



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case Number: 34/2023

In the matter between: -

THE STATE

and

ZENZILE SIMON KALATA

ACCUSED

CORAM:

M.M. MATSHAYA, AJ

HEARD ON:

28 AUGUST TO 05 SEPTEMBER 2023

DELIVERED ON:

07 SEPTEMBER 2023

INTRODUCTION

- [1] The accused Mr Zenzile Simon Kalata is facing 13 charges. In respect of counts 1,2,3,7 and 12 the state alleges that he raped different women in contravention of **section 3 of the Sexual Offences and Related Matters Amendment Act¹** (SORMA). All of them were allegedly committed at Bothaville except count no.7 which was in Viljoenskroon. They were allegedly committed on 18 April 2016, 9 July 2017, 4 December 2017, 13 October 2019 and 4 April 2021, respectively.

¹ Act 32 of 2007.

The state invoked the provisions of **section 51(1) of the Criminal Law Amendment Act²** (Minimum Sentencing Act) because the respective complainants were either raped more than once or the accused allegedly inflicted grievous bodily harm on the complainant or the rape was committed in furtherance of a common purpose or conspiracy with unknown persons, so they allege.

- [2] In respect of counts 4,5,8 and 10 the state alleges that the accused raped 4 other different women and invoked the provisions of **section 51(2) of the Minimum Sentencing Act³**. Counts 4 and 8 were allegedly committed in Viljoenskroon whereas 5 and 10 at Bothaville. These offences were allegedly committed on 17 February 2018, 9 October 2019, 24 October 2019 and 7 July 2020, respectively. The remaining 4 charges are **Robbery with Aggravating circumstances** read with the provisions of **s51(2) of the Minimum Sentencing Act**. In respect of count 6 the state alleges that the accused robbed the same complainant as in count 5 of her Mobicell cellular phone. In respect of count 9 the state alleges that the accused robbed the complainant in count 8 of her handbag and its contents. In count 11 the state alleges that the accused robbed the complainant in count 10 of her R25 cash and Mobicell cellular phone and in respect of count 13 the state alleges that the accused robbed the complainant in count 12 R29 cash and a Name Tag. In all the robbery counts the state alleges that aggravating circumstances were the use of a knife before or during or after the commission of the respective offences.
- [3] Adv. Ferreira from the Director of Public Prosecutions (DPP's office) Bloemfontein appeared for the state and the accused is legally represented by Adv Mokoena from the Bloemfontein Justice Centre. He pleaded not guilty to all the charges and the basis of his defence is a bare denial on all the counts. The evidence of the state was presented in a staggered fashion and resultantly, the exhibits handed in are not in chronological order as will become apparent from the evidence.

² Act 105 of 1997.

³ Supra.

Evidence for the state

COUNT 1

- [4] The complainant Ms PMM testified that during the early hours of 18 April 2016 she was coming from a tavern at Bothaville in the company of her friend DK. An unknown male person whose face was masked appeared and grabbed DK who managed to clap the said unknown male person and ran away. The unknown man demanded money from PMM and grabbed her on her wrist. He drew out a knife and stabbed her on the chest, head and back and dragged her to nearby bushes where he undressed her tight and panties and inserted his penis into her vagina without her consent and had sexual intercourse with her without a condom. After he was done he ran away and PMM went to a nearby homestead and asked for help. This is where she met Mr LMB who called the ambulance and the police.
- [5] PMM sustained 3 open wounds as a result of the stabbing and was later examined at Bongani hospital in Welkom by Sr Ceba. Her medical report was admitted as Exh C. The nurse observed the following injuries on her: a 6cm scratch mark on the left arm, a stab wound on the anterior chest and another scratch mark at the back. Sr Ceba also took some specimens from PMM's private parts for possible DNA investigations and the document relating to the sexual assault evidence collection kit which contained the specimens bearing the unique reference number **09D1AA5452** was admitted as Exh D. The photo album that was compiled by W/O D.K. Mabitla depicting the scene of the alleged rape was admitted as Exh E.
- [6] PMM testified that she could not identify the person who raped her because his face was masked. During cross examination she confirmed that she was in a love relationship during the time of the incident. Mr LMB also testified and confirmed the evidence of PMM pertaining to her arrival that morning seeking help. During cross examination he testified that PMM was drunk as she was smelling of alcohol when she arrived at his house.

- [7] Captain Tshepo Elias Maleme (Maleme) testified that he is a police officer and used to be attached to the Welkom Family Violence, Child Protection and Sexual Offences Unit (FCS Unit) of the South African Police Service (the SAPS). On 19 April 2016 he transported PMM to Bongani hospital for medical examination. He received the medical report (J-88) that was admitted as Exh C as well as the sealed evidence collection kit with seal no. **09D1AA5452** from Sr Ceba. He kept the sealed evidence kit in his safe until it was submitted at the Forensic Science Laboratory (FSL) in Pretoria on 25 April 2016 and the acknowledgement of receipt from the FSL was admitted later as Exh JJ. During cross examination he confirmed that he made his statement pertaining to the chain of custody on 8 February 2023 after being approached by Capt Van der Merwe.
- [8] Sgt Nomthandazo Mtengwane (Mtengwane) a police officer who used to be attached to the Welkom FCS Unit testified that on 10 July 2017 she received the J-88 (ie, Exh N) of the complainant in respect of counts 5 and 6 as she was the then investigating Officer (I/O) of Bothaville CAS 94-10-2019. There were 2 suspects that were arrested in the matter of which one was the accused in this case even though the case was later withdrawn. She wrote a covering letter dated 20 November 2019 to the FSL sending through the buccal samples that were taken from the accused by one Sgt Lebone (Lebone). The covering letter was later marked Exh KK and the accused's DNA reference sample was earlier admitted as Exh P. When these were sent to the laboratory the accused's buccal sample was sealed as per seal no. **18DBAA1929** of which it was contained in an evidence bag with seal no. PA4003835543. The acknowledgement of receipt from the laboratory was admitted as Exh LL. During cross examination she confirmed that she was not present when the said buccal sample was taken from the accused.

COUNT 2

- [9] The complainant Ms MMP testified that she lives at Kgotsong, Bothaville. During the early hours of 9 July 2017 just before 3h00 she was going home coming from Dipiding tavern with her cousin PL. An unknown man whose face

was masked appeared and chased them. MMP tripped and fell and the man caught up with her whilst PL successfully ran away. The man put a knife on her ribs and undressed her leggings and panties and inserted his penis into her vagina without her consent and had sexual intercourse with her. When he was done, he took away her Samsung cellular phone valued at R2000 and went away with it. MMP went to a nearby house and found 2 ladies and a gentleman and asked them to help her. As they were accompanying her home they met up with PL and her other cousins who were looking for her. She narrated the rape incident to PL.

- [10] They accompanied her to the police station where she made a statement and went home afterwards and did not bath. The following day she was transported by the police to Bongani hospital where she was examined and some tests were done. She also received counselling. Her J-88 was admitted as Exh F and the document pertaining to the samples that were taken from her was admitted as Exh G. The unique reference number for the sealed specimens is **15D1AC4402**. During cross examination by Mr Mokoena she agreed that she was drunk during the rape incident even though not very much. She was also confronted about her J-88 where it is noted that she had bathed as at the time of her examination but she maintained that she had not. It was submitted by Ms Ferreira that PL is now untraceable and she proceeded to lead further evidence.
- [11] Cst Joyce Tseleng Kgosing (Kgosing) a police officer who is a member of the Welkom FCS Unit testified that on 10 July 2017 she was at Bothaville conducting investigations in her cases when she was instructed by her commander to assist in a case whose investigating officer was D/W/O Tait (Tait). She assisted by transporting MMP to Bongani hospital. This is where she handed over a Sexual Assault Evidence Collection Kit (the so called rape kit) to Sr Ceba who examined MMP. After her examination she received the J-88 from the nurse as well as the sealed rape kit with seal number **15D1AC4402** with identifying numbers PA4002680710 and PAD001786542. The following day she handed over these to Tait for further handling after she had kept them overnight in a lockable safe. This medical report and rape kit were admitted as

Exh F and G, respectively. During cross examination by Mr Mokoena she testified that she did not know what Tait did with the rape kit after she handed it over to him and further did not know what eventually happened to it.

COUNT 3

- [12] The complainant in this count Ms DM testified that she resides at Kgotsong in Bothaville. During the early hours of 4 December 2017 she was walking home from Dipiding tavern alone. As she was near Tokologo shop, 4 unknown male persons approached her of which one had his face masked. The one with the masked face threatened her not to make noise otherwise he was going to stab her. He put a knife on her ribs, pressed it and threatened her to co-operate. 2 of them grabbed her hands and the other one her feet. The masked man tried to clap her but she blocked and sustained some bruises on her face during the course of blocking. They grabbed her and pulled her with her braids until they were next to the tennis court. This is where the masked man undressed her short pants and underwear and inserted his penis into her vagina without her consent and had sexual intercourse with her without using a condom. During the intercourse he had placed the knife on the ground.
- [13] When he was done another one wanted to have sexual intercourse but there was a man who appeared and they all ran away. The said man whose name she did not know except where he resided, helped her and waited for her to dress up and accompanied her to the police station where she reported the matter. She was subsequently transported to Bongani hospital in Welkom without bathing where she was examined. Her panties were taken for DNA tests. Due to delays in investigations she did not want to proceed with the case anymore as the matter was taking its toll on her. Her grandmother to whom she reported the rape incident was now old and mentally disturbed.
- [14] Mr JMM testified that on 4 December 2017 at about 3h00 he was coming from Lapologa tavern in Bothaville going home. When he was close to the tennis court he heard a woman screaming and crying. He went to check and as he was approaching 4 male persons ran away leaving a woman on the ground.

This turned out to be the complainant in this count. He observed that she was bleeding on the face, and blood was coming out of her mouth and her jersey had grass. She was naked on the bottom part of her body and she wore her pants and reported that she was raped by the gentleman who was wearing a red top hoody and had a mask on his face who was amongst the 4. He took her to the police station where he made a statement.

- [15] Kgosing was also involved in this count as the investigating officer. She testified that on 4 December 2017 she transported DM to Bongani hospital. This was where she gave Sr Qhathatsi a rape kit. After DM's examination she received from the said nurse the J-88 (ie, Exh H-1) as well as the sealed rape kit with serial no. **15D7AA0101** with identifying numbers PAD001343690 and PA4002450062 (ie, Exh J). She kept the rape kit in a lockable safe and on 11 January 2018 she handed it over to one Sgt Mohai who transported it to the FSL in Pretoria and few days later she received an acknowledgement of receipt from the FSL in her pigeon hole.

COUNT 4

- [16] The complainant in this count Ms MAT testified that she resides at Phahameng in Viljoenskroon. During the early hours of 18 February 2018 at about 2h00 she was coming from Lapologa tavern alone going to her boyfriend's home. On the way next to the clinic an unknown man approached her and threatened her by putting a knife on her waist and threatened to stab her if she made noise. He took her to the direction of Ntshwanatsatsi School where he pushed her down to the ground and undressed 1 side of her jean pants and inserted his penis into her vagina without her consent and had sexual intercourse with her without using a condom. When he was done he ran away and MAT dressed up and went to her boyfriend's home where she first met the boyfriend's brother one TK and narrated to him what had happened and later narrated to her boyfriend LK. ~~The said~~ TK has since passed away few months ago.
- [17] Police were called. They came and fetched her and took her to Viljoenskroon police station where she opened a case. From there she was taken to Pax clinic

where she was examined and some samples taken from her. The police took her to the scene of crime where she pointed out certain points and photos were taken. This is the photo album that was admitted as Exh M. During cross examination she conceded that she was drunk but not very much.

[18] W/O William Magadlela (Magadlela) testified that he is a member of the SAPS and attached to the FCS Unit in Kroonstad. He was the investigating officer in some of the cases which are the subject of these proceedings. In respect of this count, on 18 February 2018 he transported the complainant to Pax clinic in Viljoenskroon for the purpose of medical examination and handed over the sexual assault evidence collection kit to Sr Mingi who examined the complainant. He received the J-88 afterwards and this refers to Exh K in these proceedings. Furthermore, he received the sealed evidence collection kit with seal no. **16D1AD7659** with identifying no. PA4003337640. See Exh L. The evidence collection kit was handed over to the FSL in Pretoria by one Cst Mothebang Teboho William (William) on 30 January 2019. The acknowledgement of receipt from the laboratory was marked Exh CC. During cross examination he conceded that he did not always have the exhibits in respect of count 4 under his lock and key since somebody else handed them over to William who transported them to the LAB.

[19] He also testified that he took the statement of one TK who has since passed away who was the first person to whom MAT first reported the incident. The statement was admitted as Exh DD. During cross examination he conceded that it was not commissioned.

COUNTS 5 AND 6

[20] The complainant in these counts did not testify as she was reportedly untraceable.

COUNT 7

- [21] The complainant in this count Ms MSS testified that she is a resident of Phahameng in Viljoenskroon. On 13 October 2019 at about 2h00 she was coming from Lerureng tavern going home alone. An unknown male person approached her and joined and walked with her as it seemed they were heading to the same direction. She did not look at his face and could not identify him. As MSS was about to turn at the corner of the street the unknown person drew out a knife that was sword like and placed it on her ribs and ordered her not to scream and comply with instructions. The picture of the knife as drawn by MSS was admitted as Exh AA. They kept on walking until they were next to Thabang School on an open veld. She tried to run away but couldn't run far and he caught up with her.
- [22] His knife fell down and he took out a 2nd one that looked like an okapi and ordered her to undress. He caused her head to bend forward and he undressed her jeans and underwear to the ankles and inserted his penis into her vagina from the back without her consent and had sexual intercourse with her. He had sex with her a total of 3 times with intermittent breaks of about 3 and 5 minutes in between, respectively. He ran away when they heard movement and voices of people who were coming from the tavern. A black car approached and stopped and helped by transporting her to her boyfriend's place which was not far from the scene. She subsequently narrated the incident to her boyfriend by the name of MAM and the driver of the black car as they were on the way to the police station.
- [23] She eventually laid charges at the police station at about 8h00 and from there was taken to Pax clinic where she was examined by the nurse and some DNA samples were taken from her and her underwear. From there she took the police to the scene where they took photographs. This photo album is Exh S. During cross examination she conceded that she was drunk as she was on the way home because she had been drinking alcohol since 18h00 the previous evening. She also testified that the 2nd sexual encounter was a continuation of the first one as she lost balance and fell on her knees.

- [24] Mr MAM testified and confirmed the testimony of MSS as far as it relates to him. He added that MSS handed to him a black top which the unknown man allegedly laid on the ground where he raped her. They gave this to the police. Lastly, he added that at the scene they found MSS's other shoe that was apparently left at the scene.
- [25] Magadlela also testified pertaining to this count that on 13 October 2019 he transported MSS to Pax clinic for examination. He also handed the evidence collection kit to Sr Menqe. He received the J-88 and this was marked Exh Q. He also received the sealed evidence kit with seal no. **15D1AC7993** with identifying number PA4002695893 from the nurse which he kept in his safe until it was transported by Skynet courier service to the FSL. See Exh R. The acknowledgement of receipt from the LAB was marked Exh EE. The said exhibits that were sent to the laboratory were accompanied by a covering letter which listed the exhibits to be analysed. Refer to Exh FF.
- [26] Sgt William Olifant (Olifant) testified that he is a member of the SAPS attached to the tracing unit. On 26 October 2019 he transported a sealed evidence bag with seal no. PAD001790288 from Kroonstad office to the FSL. We now know that this evidence bag contained swabs from MSS. Upon handing over the evidence bag at the FSL he received an acknowledgement of receipt which he filed in his office.

COUNTS 8 AND 9

- [27] The complainant Ms MEG testified that she is a resident of Ramolotsi area in Viljoenskroon. On 24 October 2019 at about 16h30 she was coming from work walking alone in an open veld. An unknown male person who was wearing a 2 piece blue overall approached her from behind. This person had his face covered with a bandela to mask it. He demanded money and she denied having any and gave him some coins. Thereafter he grabbed her and said "let's go you are going to give me vagina." He pushed her with his elbow until they were at the bushes. This is where he demanded MEG's cellular phone but she threw it to the tree. The unknown man found a box and laid it on the ground and caused

her to lie on it. He undressed her pants and took out a condom and inserted it on his penis and then inserted his penis into her vagina and had sexual intercourse with her without her consent. When he was done he took out the condom from his penis and threw it to the ground.

[28] He subsequently left and disappeared and MEG went to pick up her phone from where she threw it and eventually left and went to call out one S to call a certain J who called the police. MEG and the police went to look for the unknown man but in vain. Later, they proceeded to the scene where the police from the Local Criminal Record Centre (LCRC) found the condom and also took photos of the scene. The photo album pertaining to this scene is Exh V. From there MEG was taken to the police station and from there to Pax clinic where she was examined and some swabs were taken from her private parts. During cross examination she confirmed that the condom was picked up by the police officer from LCRC in her presence.

[29] Magadlela also testified pertaining to these counts that on 24 October 2019 he transported MEG to Pax clinic for medical examination. He gave Dr Du Plessis the evidence collection kit. He later received the J-88 which was admitted as Exh T. He also received the sealed sexual assault evidence collection kit from the doctor. See Exh U in this regard. He kept the said exhibits like in the other cases until they were submitted to the FSL. He also visited the crime scene in this matter where a member of the LCRC picked up a used condom. See Exh V.

COUNTS 10 AND 11

[30] The complainant in these counts Ms MJM testified that she resides at Kgotsong area in Bothaville. On 7 July 2020 at about 19h00 she was walking on the street alone coming from the market going home. She was carrying some food and had a Mobicell cellular phone and had R25 cash in her bra. She met an unknown male person who drew out a knife and pointed it at her throat and made her to turn back to the direction where she was coming from. This man's face was covered with a mask. The man caused her to lie down and undressed

her skirt and tight pants and he inserted his penis into her vagina without her consent and had sexual intercourse with her. When he was done he wanted to take the R25 from her bra but MJM took it out herself and gave him. He also took away her cellular phone and ran away. The list of her stolen property was admitted as Exh BB.

[31] MJM dressed up and took the food and went home where she found her mother PEM. She reported what had happened to her and took her mother's cellular phone and phoned the police. She was subsequently taken by the police to Bongani hospital where she was examined. She had not bathed yet during her examination. There was no cross examination.

[32] MJM's mother PEM testified and confirmed MJM's testimony in as far as it relates to her. In addition, she testified that MJM's clothes were full of grass when she arrived and she was crying.

[33] Lebone testified that he is a member of the SAPS attached to the Welkom FCS Unit. On 8 July 2020 he transported MJM to Bongani hospital for medical examination assisting Sgt Nyofane (Nyofane) who was the I/O. After her examination he received from Sr Ceba the J-88 of MJM which was marked Exh W. He also received a sealed Sexual Assault Evidence Kit as per Exh X. He took them and locked them in his safe until Exh X was transported to the FSL in Pretoria. During cross examination he conceded that he did not know until when he kept Exh X under his care and custody and also did not know who transported it to the FSL.

COUNTS 12 AND 13

[34] The Last complainant in respect of these counts Ms SBM testified that she is also a resident of Kgotsong in Bothaville. On Sunday the 4th of April 2021 at about 6h00 she was walking to the shops. Whilst at the corner of Snymas church she met an unknown male person who had a mask on his face who dragged her with her hands to the bushes. He forced her to lie down and he undressed 1 leg of her jean pants and underwear and produced a knife and

threatened to stab and kill her with it if she screamed. She even sustained scratch marks on her neck. After that he inserted his penis into her vagina without her consent and had sexual intercourse with her without using a condom. When he was done he assaulted her on the head with fists and clapped her. She sustained bruises and scratch marks below the left eye and face as a result of the assault.

[35] She further testified that after assaulting her he took away from the ground her R25 cash and a name tag that had fallen earlier and he ran away. SBM dressed up and went back home where she reported the matter to her boyfriend, TS. They both went to the police station to report the incident. The police took her to Bongani hospital where she was examined. TS testified as well and confirmed the testimony of SBM in as far as it relates to him. In addition, he testified that SBM's jacket had mud at the back as if she had been lying on the mud.

[36] W/O Elonah Skolas (Skolas) testified that she has a National Diploma and a Bachelor of Technology Degree in Bio-Technology from Tshwane University of Technology. She is a forensic analyst in the Forensic Data Management section of the FSL of the SAPS in Pretoria. On 10 February 2023 she compiled the analysis report which was admitted as Exh HH. In summary, upon analysing the 2 reference samples that were taken from one Kalata (one of which is the subject of Exh P) pertaining to Bothaville CAS 135-7-2017 and 94-10-2019 (ie, counts 2 and 8), they matched with the reference samples that were taken in respect of the other charges in this case whose CAS numbers are listed in full on Exh HH. During cross examination she disputed the defence assertion that the DNA samples that matched the various reference samples were not those of the accused.

[37] Capt Stephanus Jacobus Van der Merwe (Van der Merwe) testified that he is a member of the SAPS stationed at Thabong FCS Unit. He was not the initial I/O of these dockets but received a DNA Lead report compiled by Skolas pertaining to all the cases at hand. This is the report that was admitted as Exh HH. In May 2022 he received the dockets involved as mentioned in the Lead report of which

some were already closed as undetected. From the report the accused was linked through DNA evidence. He started tracing him until he was arrested in Bothaville on 27 July 2022. On 29 July he obtained a buccal sample from him as per Exh H which he sealed with reference no. **21DBA0225TF**. He also handed the accused a certificate confirming that he was warned that he was linked by DNA evidence. See Exh MM. Van der Merwe personally submitted the accused's buccal sample at the FSL on 3 August 2022 and the acknowledgement of receipt was admitted as Exh NN.

- [38] Van der Merwe brought an unused Sexual Assault Evidence Collection kit and performed a demonstration with the various components of the kit how the process of taking evidence from a sexual assault victim unfolds up to the stage of sealing the bag. During cross examination he confirmed that he did not follow up on the top that was allegedly laid down by the perpetrator when raping MSS. He also conceded that the statements of Lebone and Maleme pertaining to the chain of custody should have been obtained and filed immediately.
- [39] W/O Prince-Eddie Mmushi (Mmushi) testified that he has a BSC Degree in Microbiology obtained from the University of Limpopo and is currently working at the Biology Section of the FSL as a Forensic Analyst and a Reporting Officer. The LAB received the respective sealed evidence bags relating to all the victims in this case with their respective CAS numbers and he analysed them. DNA profiles were found and stored in their database at the LAB. On 10 November 2022 during the course of his duties he obtained 2 reference samples as listed in Table 1 of Exh OO (ie, his first report) and Exh PP (his last report). We now know that these were obtained from the accused as per Exh H and P. Upon analysing them their DNA profiles matched. In turn he compared the 2 reference samples of the accused with the respective DNA profiles that were donated to the respective victims by the perpetrator and his findings were that they all matched.

The defence case

- [40] After closure of the state's case the accused Mr Kalata testified in his defence that prior to his arrest he was living at Naledi section, Bothaville with his grandmother. Prior to that he was living with his mother in a farm in Viljoenskroon until she passed away in 2015 and that is when he relocated to Bothaville. He denied any involvement in all the offences and also denied ever meeting the respective complainants. He also denied knowledge of the alleged masks, knives and blue overall. Lastly, he denied that his DNA was found on the respective complainants. During cross examination by Ms Ferreira he still petitioned his innocence.
- [41] After closure of the defence case both parties addressed the court. In essence, Ms Ferreira argued that the DNA evidence links the accused to all the counts and prayed for a conviction except counts 5 and 6 in respect of which the state did not lead evidence of the complainant because she's untraceable. To support her case, she asked the court to observe the striking similarities in the manner in which the offences were committed that there was same *modus operandi*. She conceded though that no probative value could be attached to the statement of MJK that was admitted in terms of **section 3 (1)(c) of the Law of Evidence Amendment Act**⁴ because it was not commissioned.
- [42] Mr Mokoena welcomed the latter submission by Ms Ferreira. He addressed the court at length and I do not intend to bore this judgment by regurgitating his submissions except to refer whenever necessary. In a nutshell, he submitted that the chain of evidence pertaining to the DNA evidence was not proved by the state on counts 2,3,10 and 12 and should this argument prevail counts 11 and 13 should automatically collapse as they rely on counts 10 and 12 respectively, through DNA evidence. Even though he did not say it in so many words, he somehow acknowledged that the chain of evidence pertaining to the other counts could not be faulted.

THE ISSUES

⁴ Act 45 of 1988.

- [43] The main issue for determination is whether the accused is the person who raped and robbed the respective complainants as alleged by the state. Furthermore, the reliability of the chain of evidence pertaining to the DNA evidence was vehemently challenged by the defence.

THE ONUS OF PROOF

- [44] The onus of proof in a criminal case rests upon the state to prove the guilt of the accused beyond reasonable doubt. In **Van der Meyden**⁵ it was held that:

"The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he or she is entitled to be acquitted if it is reasonably possible that he or she might be innocent."

EVALUATION

- [45] In **S v Chabalala**⁶ the court stated that:

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

⁵ S v Van Der Meyden 1999 (1) SACR 447 (W) at 448. See also S v T 2005 (2) SACR 318 (E) at para 37.

⁶ S v Chabalala 2003 (1) SACR 134 (SCA) at 140 (a)-(b).

- [46] The state did not lead evidence in respect of counts 5 and 6 by reason of non-traceability of the complainant and consequently the accused is entitled to an acquittal.
- [47] I had occasion to observe all the complainants when they testified. Even though some became emotional during the proceedings, in overall they gave a clear picture of the events that led to the respective charges. Their evidence was formal in nature in that they did not implicate the accused as they could not identify the assailant by reason of his masked face. In essence, it was not disputed that they were raped and robbed (where robbery was proved). The witnesses who testified as the so called first reports like Mr LMB in respect of count 1 and Mr JMM in respect of count 3 provided some consistency in terms of the report that was made to them. Therefore, I conclude that the respective complainants were credible witnesses.
- [48] It is apparent from the evidence that the evidence of the respective complainants was that of single witnesses as they were alone during the rape and or robbery incidents. **Section 208 of the Criminal Procedure Act⁷** (CPA) provides that a conviction may follow on the evidence of a single competent witness. It is settled law that the evidence of a single witness must be approached by the courts with caution. In **Stevens⁸** the court said:

"In terms of section 208 of the Criminal Procedure Act, an accused can be convicted of any offence on the single evidence of a competent witness. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility."

- [49] The complainants did not contradict themselves in all the material aspects of the case. Even those who were allegedly robbed did not exaggerate the events. For example, in counts 11 and 13 they were at liberty to inflate the robbed amounts but they did not. Furthermore, all the complainants did not implicate

⁷ Act 51 of 1977.

⁸ S v Stevens 2005 (1) All SA 1 (SCA) at para 15. See also R v Mokoena 1932 OPD 79 at 80.

the accused. This is indicative of their honesty and frankness to this court. Clearly, they have no axe to grind with the accused. Had that been the case, one would have seized the opportunity that he was alone in the dock and belatedly point him out as the perpetrator. Furthermore, where allegations of assault and resultant injuries were made they are confirmed by the relevant medical reports. For example, see Exh C in respect of count 1. The only slight blemish was on MJM who testified that she was raped for 30 hours. This cannot be true in view of the objective facts before this court particularly the evidence of her mother who testified that she arrived home at about 19h00. This does not affect the general veracity of her evidence on material aspects. My suspicion as single witnesses was extinguished by the DNA evidence as will be demonstrated later. In the end, I am confident to pronounce my satisfaction that the evidence of all the complainants was clear and satisfactory in all the material aspects of the case.

THE DNA EVIDENCE

[50] The state relies solely on DNA evidence to link the accused to all the offences. I deem it apposite at this stage to refer to case law and set the tone regarding the regarding the approach to be adopted when dealing with this type of evidence. In **Bokolo**⁹ the court said:

[17] *"Evidence of DNA profiling may be of great significance in a given case. It is important, however, that evidence of DNA profiling be viewed in proper perspective in each case.*

[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.

⁹ Bokolo v S (483/12) [2013] ZASCA 115 (18 September 2013).

- (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."*

[51] In *casu*, there is no direct evidence linking the accused to the commission of the offences and therefore the DNA profiles create a basis for circumstantial evidence upon which this court must apply inferential reasoning. The principles in relation to inferential reasoning are well established. The standard of proof beyond a reasonable doubt in criminal proceedings requires the application of, what the court in the oft-quoted case of **R v Blom**¹⁰ referred to, as the two "cardinal rules of logic":

"In reasoning by inference there are two cardinal orders of logic which cannot be ignored:

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

See also **R v Mthembu**¹¹.

[52] In respect of count 1, there's unrefuted evidence that Sr Ceba examined PMM and took samples which she sealed and handed over to Maleme on 19 April 2016 who kept them under his lock and key until the sealed exhibits were handed over to the FSL on 25 April 2016 (ie, 6 days later). The acknowledgement of receipt was obtained as per Exh JJ. The foreign DNA specimens obtained from PMM were later analysed by Mmushi and matched with the reference samples that were taken from the accused by Lebone and

¹⁰ 1939 AD 188.

¹¹ 1950 (1) SA 670 (A) at 679.

Van der Merwe as per Exh P and H, respectively. I am satisfied that the chain of evidence cannot be faulted. From PMM's testimony which was supported by her J-88 (Exh C), it is clear that the accused inflicted grievous bodily harm when he stabbed her with a knife during the incident. Therefore, this matter falls under the ambit of **section 51(1) of the Minimum Sentencing Act.**¹²

- [53] In respect of count 2, on 10 July 2017 Sr Ceba took some swabs from MMP and sealed them in an evidence bag which she handed over to Kgosing who locked it in her safe until the following day when she handed it over to the I/O ie, Tait. She did not know what happened to the exhibit bag afterwards. For inexplicable reasons, the state did not call the said Tait to testify. At this stage it is not even known how the said exhibit bag reached the laboratory.
- [54] In respect of count 3, Kgosing transported DM to Bongani hospital where she was examined by Sr Qhathatsi. During her examination she took DM's swabs and properly sealed them and handed over to Kgosing. She kept them in her safe until she handed them over to Sgt Mohai (Mohai) on 11 January 2018 who transported them to the FSL. Even though she testified that she received an acknowledgement of receipt from the laboratory, same was not handed in court as exhibit. Furthermore, Mohai did not come and testify that he indeed transported the exhibit to the laboratory. Again there was no explanation by the state for the non-calling of Mohai. Mr Mokoena submitted that this breaks the chain of evidence. There is merit in this argument and has to prevail.
- [55] DNA evidence is technical in nature. More often than not, it is obtained in instances where there is no direct evidence. It is not only important to have results at the tail end of the process that link the accused, but it is rather equally important to ensure that the evidence is properly obtained, safely preserved and properly traced throughout the relevant stages until final analysis. It is not difficult to find wisdom for that reasoning because the credibility and integrity of the whole process must be beyond reproach. This is so by the very nature of

¹² Supra.

the standard of proof that the state must satisfy in a criminal case. It would be difficult to find that the results are reliable especially that we are dealing with circumstantial evidence when the state case has some unaccounted gaps on the DNA chain evidence.

- [56] In respect of count 4, MAT was examined by Sr Mingi on 18 February 2018 who took swabs and sealed them with serial no. **16D1AD7659** and handed them over to Magadlela. At this stage the following extract from his cross examination by Mr Mokoena is relevant:

Q "You said you put the kit into the SAP 13 register?

A Yes.

Q This evidence, are you the person who transported it to the lab?

A No.

Q Do you know who transported it?

A I'll never remember who transported it.

Q Exh CC (ie, the acknowledgement of receipt form the lab) says it was delivered by Cst Mothebang William?

A I see.

Q Do you know who gave this to Cst William?

A I don't remember but I think it was from cluster office.

Q From what you are testifying about it was not always under your care and control?

A Correct.

Q Can you still recall to whom you handed this evidence to?

A What I know is that this evidence was taken to the cluster and then registered.

Q ...

A...

Q Can you remember when did you give this evidence to the cluster?

A I cannot remember.

Q Did you give it to the cluster the same day you received it or the following day or following week?

A Maybe after a week. I'm not certain.

Q ...

A...

Q You are not the person who transported this Exh LL?

A Yes.

Q So you won't know with certainty what this seal number on Exh CC mean?

A I won't say that with certainty. I only think that this is the bag that had the other exhibits in it."

[57] The above extract clearly demonstrates the poor handling of such crucial evidence pertaining to this count and I need not to belabor the matter any further. It has been conceded by Ms Ferreira that this court cannot attach probative value to the statement of MJK (ie, Exh DD) who has since passed away because it was not commissioned by Magadlela. This particular investigator who holds the rank of warrant officer boasts a total of 33 years of service in the SAPS. His handling of this matter leaves much to be desired. Gender based violent offences particularly against women have reached sky rocketing levels in this country and the public expect that the police as frontline fighters in defence of victims of such crimes, treat such cases with the sensitivity and care that they deserve. The conduct of Magadlela and Lebone (who did not appreciate the value of immediately filing the chain of custody statement) shows total lack of appreciation of what was expected of a diligent officer especially in a specialized unit like theirs. Even though the proper commissioning of the statement of MJK would not have advanced the state's case in this count, the failure to commission it buttresses my concerns regarding the conduct of Magadlela.

[58] Now I turn to count 7. Sr Menqe examined MSS and took 2 swabs. She sealed these into an exhibit bag with seal no. **15D1AC7993JJ**. She gave this to Magadlela who took it to his office and locked it in his safe until the 23rd of October 2019 when he wrote a covering letter to the FSL (ie, Exh FF) accompanying the exhibits. The said exhibits were delivered by Skynet courier service to the laboratory and the acknowledgement of receipt was received by Magadlela as per Exh EE in these proceedings. Mmushi analyzed the swabs and concluded that the DNA on them matched with that of the accused as per Exh H and P. This is objective evidence before this court that was not refuted. Even though Mr Mokoena did not say it in so many words, he was *ad idem* with the state that the chain of evidence was flawless on this count.

- [59] Even though that was the case, Mr Mokoena had some reservations regarding the inscription of Sr Menqe on the J-88 of MSS (ie, Exh Q) on page 3 paragraph F where it was written that 'no evidence given'. This does not accord with logic and common sense if regard is had to the following paragraph where the details of the person to whom the specimens were given were written. I am satisfied that this was a *bona fide* error on Sr Menqe's part.
- [60] Mr Mokoena argued that in the event I find that the accused is linked in this count the matter should resort under **section 51(2) of the Minimum Sentencing Act not 51(1)**¹³. In his view, this was a continuous incident of sexual intercourse as against Ms Ferreira's argument that there was a break in between the second and third sexual encounter. MSS conceded during cross examination that the second sexual encounter was a continuation of the first one since she slipped and lost balance as she was bending forward and the accused's male organ got ejected and subsequently re-inserted it. However, between the second and third encounters there was a break of about 5 minutes. This gave the accused the opportunity to re-think and review his stance on what he was doing. In my view, he formulated a separate intention to indulge in further sexual intercourse with MSS. Therefore, the argument by Mr Mokoena lacks merit in this regard and stands to be rejected. Consequently, I find that this count falls under **section 51(1) of the Minimum Sentencing Act**¹⁴ as alleged by the state.
- [61] Counts 8 and 9 are intertwined because the complainant was the same, MEG. Even though it appears *ex facie* from the J-88 of MEG that some samples bearing seal no. **15D1AC6734** were given to one Magadlela, he could not tell what he eventually did with the said evidence bag. All he could say was that it was handed to the cluster. How the exhibit made its way to the laboratory and its condition upon its arrival was beyond his knowledge. To add salt to the wound, there was a used condom that was found at the scene which was

¹³ Supra.

¹⁴ Supra.

collected by W/O Makgolotso Selina Moropodi of Kroonstad LCRC Unit. See Exh V the photo album. To my utter shock, Magadlela being the I/O of the case from inception did not know what happened to the condom. This is bizarre in the extremes if an I/O could not know the destination of such a crucial piece of evidence in a case of this nature. Magadlela ought to be grateful to Olifant who testified that he transported exhibit bag no. PAD001790288 in which the sealed specimens that were taken by Sr Ceba from MEG were contained under seal no. **19D1AC2528**. Upon analysis by Mmushi the accused's DNA matched the one which was found on MEG that was donated by the rapist. According to him the conservative occurrence for this DNA is 1 in 2.1 million trillion people. Mr Mokoena conceded that the DNA chain cannot be faulted in respect of count 8 and I concur with his submissions in that regard and I so find.

[62] There was a debate between the parties whether in respect of count 9 the state proved its case or not and if so, what charge. The state alleged that the accused robbed a handbag and its contents. MEG testified categorically that the accused did not use a weapon. However, she testified that when he demanded money he denied having any and gave him some loose coins which she did not quantify. Clearly, from her evidence the accused did not rob a handbag and its contents. Even if I were to consider the competent verdict of 'common' robbery the difficulty I have is that the said coins were not quantified. Ms Ferreira invited me to invoke **section 88 of the CPA**¹⁵ that the charge be cured by evidence. This argument cannot pass constitutional muster because the accused did not have the opportunity to answer for himself in the event of that eventuality. Therefore, the argument by the state cannot be sustained and the accused has to be acquitted on this count.

[63] Now I turn to counts 10 and 11. They were inter-twined as well. MJM was examined by Sr Ceba on 8 July 2020 who took some specimens and sealed them into an evidence kit bag with seal no. **19D1AC2528JJ**. These were received by Lebone who signed for them on Exh W (ie, the J-88 of MJM). During his evidence in chief he gave the impression that he kept the evidence bag

¹⁵ Supra.

under his lock and key at all material times until he personally transported it to the FSL. However, during cross examination it turned out that he did not know whether he personally delivered it or he dropped it at the cluster office for someone to deliver it to the laboratory. Mr Mokoena drew his attention to his statement (ie, Exh GG) regarding the chain of custody that was belatedly made on 15 March 2023 almost 3 years after the event. That was when it turned out that there are gaps in his statement regarding when he parted with the evidence bag and to whom he handed it and for how long he kept it with him. This lacking information broke the chain of custody of the DNA evidence. It follows automatically that count 11 collapses as it relied on the linkage of the accused in count 10.

[64] Lastly, I now deal with counts 12 and 13 as they were inter-twined as well. Ms Ferreira argued that the state proved the chain of evidence on these charges whereas Mr Mokoena argued to the contrary. It appears *ex facie* from the J-88 of SBM that one Mtengwane signed for the exhibit bag on 4 April 2021 that contained specimens that were taken by Sr Qhathatsi. From there Ms Ferreira did not lead further evidence regarding the safe keeping and possible transportation of the exhibits to the laboratory. What makes matters worse is that Mtengwane was called by the prosecutor and testified about other peripheral issues but was never asked pertinent questions about her role in the investigation of these 2 counts. This is regrettable. The broken chain of custody of the specimens collapses counts 12 and 13 and the accused is entitled to an acquittal.

[65] Skolas and Mmushi testified as experts in this case. Their credentials are beyond reproach. They substantiated their reasoning and findings. Of much importance is that when they conduct their analysis the samples do not have the donor's names and therefore chances of fabricating anyone are nil. I find that they were credible witnesses and their evidence was reliable and trustworthy.

THE VERSION OF THE ACCUSED

- [66] Now I turn to consider the version of the accused if it is reasonably possibly true. In **Shackell**¹⁶ the court stated that:

"...a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

- [67] His defence is a bare denial. Mmushi testified that the only conservative occurrence for the same DNA is 1 in 2.1 million trillion people or unless they are identical twins. The accused does not fall in this extreme rare category. In view of the expert testimony I find that the accused's defence is not reasonably possibly true on counts 1, 7 and 8 and consequently, is hereby rejected. In respect of the other counts he must be given the benefit of doubt.

CONCLUSION

- [68] In respect of counts 1, 7 and 8 I am satisfied that the accused is positively linked through DNA evidence. I am satisfied that the state has proved its case beyond reasonable doubt in those counts. Counts 1 and 7 fall under the ambit of section **51(1) of the Minimum Sentencing Act**¹⁷ because they involve the infliction of grievous bodily harm and the complainant was raped more than once respectively, and in respect of count 8 **section 51(2)** is applicable.
- [69] In view of the broken chain of evidence in respect of counts 2, 3, 4, 10, 11, 12 and 13, I find that the state has failed to prove its case beyond reasonable doubt. Therefore, the accused must be given the benefit of doubt and be acquitted. Further, the state has failed altogether to prove its case in respect of count 5, 6 and 9 and the accused should be acquitted.

¹⁶ Shackell v S 2001 (4) All SA 279 (SCA) at 288 (e)-(f).

¹⁷ Supra.

VERDICT

[70] COUNT 1: **Guilty of Rape read with section 51(1) Act 105 of 1997.**

COUNTS 2- 6 **Acquitted.**

COUNT 7: **Guilty of Rape read with section 51(1) Act 105 of 1997.**

COUNT 8: **Guilty of Rape read with section 51(2) of Act 105 of 1997.**

COUNTS 9-13: **Acquitted.**



M.M. MATSAHAYA, AJ

Appearances:

For the State: Adv. Ferreira

Instructed by

Director of Public Prosecutions

Bloemfontein

For the Respondents: Adv. P. Mokoena

Instructed by

Legal Aid South Africa

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