

REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

**CASE NO: CC 70/2020
DPP REF:10/2/11/1-M23/2020**

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.

In the matter between:

THE STATE

v

NICHOLAS HENDRIK JANSE VAN RENSBURG

ACCUSED

JUDGMENT ON MERITS

MOOSA J:

[1] **MR NICHOLAS HENDRIK JANSE VAN RENSBURG ('accused')** is arraigned on the following charges:

[1.1] **COUNT 1:**

**MURDER READ WITH THE PROVISIONS OF SECTION 51(1)(a)
AND PART 1 OF SCHEDULE 2 OF THE CRIMINAL LAW
AMENDMENT ACT 105 OF 1997**

IN THAT on or about 13 October 2019 and at or near Mjejane RDP next to Walala Wasala Tuck-shop in the district of Komatipoort the accused did unlawfully and intentionally assault **Z[....] A[....] N[....]**, an adult female by beating her causing serious injuries as a result whereof the said **Z[....] A[....] N[....]** died on 15 October 2019 in the Tonga Hospital.

[1.2] COUNT 2:

**RAPE IN CONTRAVENTION OF THE PROVISIONS OF SECTION 3,
READ WITH SECTIONS 1, 55, 56(1), 57, 58, 59, 60 AND 61 OF THE
CRIMINAL LAW AMENDEMENT ACT (SEXUAL OFFENCES AND
RELATED MATTERS) 32 OF 2007 READ WITH THE PROVISIONS
OF SECTION 51(1) OF ACT 105 OF 1997**

IN THAT on or about the date and at or near the place mentioned in count 1, the accused did unlawfully commit an act of sexual penetration with **Z[....] A[....] N[....]**, a female person, by inserting a wooden spoon into her vagina, more than once, without her consent.

[2] The accused pleaded not guilty to the charges, which he faced in the indictment. Mr Manzini, ('Mr Manzini') on behalf of the accused confirmed that the plea of the accused was in accordance with his instructions, and that the accused's defence was that of an alibi; in that he was in Malelane at the time of the commission of the offence, and further that he did not know the deceased. The accused accordingly confirmed the plea explanation made on his behalf.

[3] The accused was duly explained the provisions, application and implications of the Criminal Law Amendment Act No. 105 of 1997 ('Minimum Sentences Act'), as well as the seriousness thereof. The accused confirmed that he accordingly understood the provisions of the aforementioned Act.

ADMISSIONS

[4] The accused made the following admissions on 15 November 2021, in terms of section 220 of the CPA and which was handed in as Exhibit “A”, briefly:

[a] Admitting that he made the admissions freely, voluntarily and without any undue influence, and that the admissions sought were duly explained to him.

[b] Admitting that the deceased is the person mentioned in the indictment, and that she died on 15 October 2019 at Tonga Hospital, in the district of Nkomazi, as a result of injuries sustained consequent to the assault on her that took place between the night of 12th including the early hours of 13 October 2019.

[b] Admitting that on 17 October 2019 Dr Jan G Maree (‘Maree’) performed a medico-legal post-mortem examination on the body of the deceased person, and recorded his findings on the form GW7/15, with Death Register Number DR 219/2019, herewith handed in by consent as Exhibit “B”.

[c] Admitting that the cause of death of the deceased as being correctly recorded in Exhibit “B” to wit: **“STOMP TRAUMA”**.

[d] Admitting that the facts and findings of the medico-legal post-mortem examination recorded by Dr Maree in the post-mortem report, Exhibit “B”, are true and correct.

[e] Admitting that the body of the deceased did not sustain any further injuries from the time that she was transported from Mjejane RDP, to Tonga Hospital for treatment until her death on 15 October 2019.

[f] Admitting that in furtherance of the assault upon the deceased, a wooden spoon was inserted into her vagina, which resulted in severe bleeding from her private parts.

[g] Admitting that the deceased was still alive but severely injured when she was discovered in the house of Bheki Vuma, and that a few days later she succumbed to her injuries.

[5] To discharge the onus upon it to prove that the accused committed the crimes charged, the prosecution called the following five viva voce witnesses:

[5.1] **Nelisiwe Happy Maboso** ('Maboso'), the deceased's neighbour testified, inter alia, as follows:

[a] She knows the deceased as one 'Skoni' for a period of approximately 2 (two) years prior to her death.

[b] During the early hours of 13 October 2019, she was requested by Bheki Vuma ('Vuma') to attend at his residence in order to render assistance to him. Upon her arrival at Vuma's residence, she observed the deceased lying on the sofa in Vuma's bedroom. She observed the deceased's eyes were swollen and she was bleeding from her eyes. She further observed a bloodied wooden spoon lying on the floor, and noted that there was blood on the deceased's legs. In addition thereto, she observed that the deceased was bleeding from an injury on her neck.

[c] She then enquired from the deceased as to what had transpired and what had caused her injuries. The deceased informed her that she was beaten by Vuma's friend, who is a White man ('Mlungu'). The deceased said that 'Mlungu' had assaulted her and penetrated her with the wooden spoon. One Thuli Khoza was subsequently summoned, and she communicated further with the deceased.

That in essence concluded the evidence of the 1st witness, Maboso.

[5.2] **Bheki Vuma** ('Vuma'), the deceased's friend testified, inter alia, as follows:

[a] He knew the deceased as one 'Skoni' for a period of approximately 2 (two) years, as she used to visit him at his place of employment.

[b] He does not know where the accused resided at the time of the commission of the offence, but got to know the accused over a period of time as he used to frequent the tavern where Vuma worked.

[c] On 13 October 2019 at approximately 16h00, the accused attended at the tavern. He informed Vuma that he wanted to bath, and requested this witness to assist him in this regard. Vuma duly took him to his residence for this purpose, however, the accused did not take a bath. Instead Vuma ended up having a bath.

[d] They then returned to the tavern. The accused then suggested that he will sleep the night at Vuma's residence. Vuma then informed him that he will be working that evening and handed his house keys to the accused, and further advising him that he could go and sleep whenever he felt tired. Vuma gave the accused the only set of keys that he had for his house.

[e] The accused subsequently left the tavern, and Vuma was under the impression that the accused had proceeded to his residence in order to sleep, as he was in possession of the keys.

[f] During the early hours of the morning, Vuma returned to his residence. Upon entering therein, he observed that the bedroom door was open and that his keys were hanging on the door. He assumed that the accused was in the bedroom, and expected to see him therein.

[g] Due to the fact that it was dark, Vuma used matches for purposes of illumination. He thereafter observed blood on the floor, as well as a bloodied wooden spoon. After striking the second match, he saw a naked person on the sofa in his bedroom, and identified this person as 'Skoni'. He expected to see the accused in his bedroom. He became scared as a result of what he observed and ran out of his house, in order to seek assistance.

[h] He proceeded to Maboso, and requested her to accompany him to his residence in order to render assistance. Upon their return, he further observed that the deceased was bleeding from her private parts, and that she had a stab wound on her neck and which was bleeding. He was afraid to approach the deceased as she was naked.

[i] They were also joined by one Thuli Khoza, who also conversed with the deceased. He learnt from Maboso that the deceased had implicated the accused as the person who was responsible for her injuries.

[j] He positively identified the accused as the person who was with him on the day in question, and further confirmed that at all material times he referred to the accused as 'Mlungu'. Vuma further attended an identification parade, whereat he positively identified the accused.

[k] During cross-examination, he was adamant that it was the accused who was the one who accompanied him to his house that day. Further, stating that even the neighbours had seen the accused in his company, when they went to his house.

[l] He was further adamant that he had given his keys to no one else but the accused on 13 October 2019. He denied the alibi of the accused, when it was put to him that the accused was working with one Oom Piet on the Saturday, 12 October 2019 in Malelane, and that

he was in Malelane until 21h30. He was adamant that the accused was with him at the tavern, and at the time when it is alleged that he was at Malelane.

That in essence concluded the evidence of the 2nd witness, Vuma.

[5.3] **Thuli Precious Khoza** ('Khoza'), testified, inter alia, as follows:

[a] The deceased is known to her as 'Skoni'. During the early hours of 13 October 2019, at approximately 03h00 – 04h00, she was called by Maboso to render assistance.

[b] She proceeded to Vuma's residence and upon entering his bedroom observed the deceased to be lying on the floor. She removed the blanket from the deceased's body and observed that the floor was full of blood, and that the deceased was also covered in blood. She further observed a bloodied wooden spoon. In addition thereto, she noted that the deceased's face was swollen and that she had a wound on her neck, which was bleeding.

[e] The deceased then informed her that it was 'Mlungu', Vuma's friend who did this to her, in that he assaulted her, penetrated her with a wooden spoon and then stabbed her with a knife, and left her for dead. The deceased was later taken to hospital by ambulance for treatment.

[f] She was clear that she saw the accused in Vuma's company, at the time when they were at Vuma's house, during the afternoon of 12 October 2019. At the time when she had observed the accused in Vuma's company, her children were asking the accused for money.

[g] She stated that after this incident she was involved with others in searching for the accused, but they could not locate him.

[h] During cross-examination, she confirmed that the deceased had informed her that it was 'Mlungu', Vuma's friend who raped her and penetrated her with a wooden spoon.

[i] During a clarifying question from the court, Khoza clarified that the deceased had informed her that 'Mlungu', Vuma's friend had raped her, penetrated her with a wooden spoon and assaulted her. She further clarified that the spoon was approximately 30 (thirty) centimetres long, and a spoon that is used to make "pap".

That in essence concluded the evidence of the 3rd witness, Khoza.

[5.4] **Linah Promise Khoza** ('Linah'), testified, inter alia, as follows:

[a] She had been residing at Mjejane until April 2020, and had previously worked with Vuma.

[b] On 22 October 2019, she attended an identification parade. She duly pointed out the accused at the parade, and subsequently pointed him out once again in court, as the person who used to frequent the tavern. She was clear that at no stage, did she ever see Vuma prior to, or at the police station, at the time of her attendance at the identification parade.

[c] She stated that on 12 October 2019, the accused attended at the tavern, they hugged each other and chatted for a while. She continued with her work and subsequently observed Vuma and the accused walking out of the tavern together. She did not know as to where they were headed to. Vuma later returned to the tavern.

[d] At approximately, 02h00, the deceased came to the counter and purchased an energy drink. She thereafter left and a short while later and returned with the accused. They were chatting at the counter and the accused purchased a beer. Whilst at the counter an unknown

male attempted to make conversation with the deceased. The accused moved closer and reprimanded this person. The accused and deceased then left the tavern in each other's company.

[e] During cross examination, she was adamant that she had initially seen the accused in the company of Vuma, earlier that afternoon. She later saw the accused again, in the company of the deceased at the counter at 02h00, just before the tavern closed at approximately 02h30.

That in essence concluded the evidence of the 4th witness, Linah.

[5.5] **Pieter Johannes Jacobs** ('Jacobs'), testified, inter alia, as follows:

[a] He stated that the accused assisted him occasionally as a mechanic, and commenced assisting him on 08 October 2019. He was clear that he finishes work at 16h00, and does not work at night.

[b] On 12 October 2019, the accused arrived at his residence at 07h00, and left at 10h30, stating that his new employer wanted to see him. He never saw the accused again that day. He denied the version that the accused was repairing a motor vehicle on the evening of 12 October 2019.

[c] On 13 October 2019 at approximately 06h00, he was informed by his wife that the accused was at the gate. However, he did not find the accused at the gate, when he went outside.

[d] During cross examination, he denied the proposition that the accused had worked late on 12 October 2019, and that he had dropped off the accused at his place of residence between 20h30 – 21h30.

[e] He further denied the proposition that the accused was repairing a vehicle on 13 October 2019, whilst he was asleep.

That in essence concluded the evidence of the 5th witness, Jacobs.

[6] The State at this stage of the proceedings informed the Court that it intended handing in the Identification Parade form, which contained the proceedings of the parade, and the outcome thereof. Mr Manzini, objected to the handing in thereof, submitting that the accused alleged that he was not informed of his right to legal representation, at the time when the identification parade was held. Having carefully considered the arguments raised in this regard, I accordingly ruled that a trial within a trial be held, so as to determine the admissibility of the identification parade.

[7] I do not intend to deal in detail with the evidence that was led during the trial within a trial, for the sake of brevity and to avoid unnecessary prolix. Save to note that the State called the evidence of two witnesses and the accused was the only witness who testified in these interlocutory proceedings.

[a] Briefly, D/Captain Mkwatshwa ('Mkwatsha') testified that he is a Captain in the South African Police Services ('SAPS') with 26 (twenty six) years of service. He was tasked with the holding of an identification parade on 22 October 2019, with the witness Linah. He duly explained the procedure to the accused and all the other participants. He thereafter, approached the accused and engaged with him directly, whereby he explained his rights to him. The accused indicated that he understood his rights and that he chose to proceed with the identification parade, without the assistance of a legal representative. His response was noted on the form, and the parade duly proceeded. He was clear that had the accused informed him that he required the services of a legal representative, he would have suspended the proceedings, and would have provided the accused the opportunity to exercise his right to legal representation.

[b] Sgt Oral Ngobeni ('Ngobeni') testified that he is a Sergeant in the SAPS and that he was responsible for the holding of the identification parade

on 28 October 2019, with the witness Vuma. His evidence mirrored that of Mkwatshwa, and I do not deem it necessary to repeat his evidence during this judgment. Of importance is the fact that he, *inter alia*, explained the right to legal representation to the accused. The accused informed him that he understood his rights in this regard and chose to proceed on his own, without legal representation. Ngobeni duly noted the accused's response and preference on the form, and the identification parade duly proceeded.

That in essence concluded the evidence and the State closed its case.

[c] The accused testified that during the identification parade held on 22 October 2019, he was not informed of any of his rights. Further alleging that at no stage were his rights to legal representation explained to him by Mkwatshwa. Further alleging that he was informed that it was not necessary for him to have legal representation at the identification parade. He testified that the similar *modus operandi* was followed at the subsequent identification parade, held on 28 October 2019. He further alleged that had he been duly informed of his right to legal representation, he would have surely asked for same. That in essence concluded the evidence of the accused, and his case was closed in the trial within a trial.

[8] Having carefully considered the viva voce and documentary evidence before me, I was satisfied that the evidence presented by the State was satisfactory in all material respects, and that the accused's evidence was false beyond reasonable doubt. I accordingly accepted the evidence of the State and rejected that of the accused. It is for this reason that I ruled that the State had laid a proper basis and complied with the provisions of section 37(1)(b) and (d) of the Criminal Procedure Act 51 of 1977.

Consequently, the proceedings of the identification parade were duly accepted onto the record as evidence, and the State closed its case.

[9] The **Accused** testified in his defence, *inter alia*, as follows:

[a] On 11 October 2019, he was at the tavern in order to buy food and at this stage saw Vuma thereat.

[b] On 12 October 2019, he went to Jacobs, after this witness had telephoned him, and assisted him with repairing a motor vehicle that day. He commenced at 07h30 and worked until late that evening. Jacobs and his wife dropped him off that evening at his residence. He remained at home that evening with his wife and child, and did not go out anywhere.

[b] On 13 October 2019, Jacob's son telephoned him and he proceeded to Jacobs place, in order to repair a vehicle. He worked on the vehicle and upon completing the task, proceeded home.

[c] He denied the evidence of the State witnesses and stated that his wife would confirm that he was at home on the evening of 12 October 2019 from 20h15 until 06h00, the next morning. He further informed the court that he would make the necessary arrangements for her attendance at court, in order for her to testify on his behalf.

[d] He denied any knowledge regarding the assault and rape of the deceased, and stated that he was at home at the time of the commission of the crime.

That in essence concluded the evidence of the accused.

[10] At this stage, Mr Manzini informed the court that he required a postponement of the matter, in order to secure the attendance of two defence witnesses, who would be called on behalf of the accused. He advised that he intended to call Mr Jaco Jacobs, the son of Jacobs, as well as the accused's wife who was in Phalaborwa. The matter was accordingly postponed from 17 November 2021 to 25 November 2021, in order to give the defence a fair opportunity to secure the attendance of their witnesses.

[11] Upon resumption on 25 November 2021 at Graskop, Mr Manzini duly consulted with the witness Jaco Jacobs, and pursuant thereto informed the Court that he did not intend calling this witness any longer. Further advising that further attempts would be made in order to secure the attendance of the accused's wife's.

[12] The defence then called **Sgt Sifiso Donald Zwane** ('Zwane') the investigating officer, stationed at Komatipoort SAPS who testified, *inter alia*, as follows:

[a] During his investigations, he duly took a buccal sample from the accused, as well as submitted his clothes for forensic analysis. He did so, in the event that he did not have any eye witnesses in this case.

[b] Despite numerous enquiries, he was informed that the results were unavailable due to the backlog at the Forensic Sciences Laboratory in Pretoria.

That in essence concluded the evidence of this witness.

[13] The matter was once again postponed to 02 December 2021, at the request of the defence, in order to secure the attendance of the accused's wife. On 02 December 2021, the matter was once again postponed to 03 December 2021 for this purpose. The State duly gave notice to the accused in terms of section 342A of the CPA. After hearing argument and having considered it important to the fair trial rights of the accused, I deemed it appropriate in the circumstances to grant the accused a further opportunity to secure the attendance of his alibi witness. The matter was postponed to 10 January 2022, for this purpose.

[14] It is noteworthy to mention that the State duly handed in the Biology report on 02 December 2021, and which contained the DNA Analysis system, as Exhibit "N". Briefly indicating that the accused was excluded as the donor of the DNA, which was obtained from the floor swabs, bra and bed cover. Not enough male DNA was obtained from the vaginal swabs; and that no DNA was obtained from the sanitary pad and blanket, as well as the T-shirts. Further, that a female DNA was obtained from the swabs of the wooden spoon.

[15] On 10 January 2022, the accused requested that he be allowed to consult with his son. I allowed this opportunity despite the fact that Mr Manzini had informed the court that the defence intended closing its case. Upon consultation with his son, the accused informed the Court that his wife would definitely be attending Court and he pleaded for a further opportunity to secure the attendance of his alibi witness. I accordingly acceded to this request, in the interests of justice, despite protestations from counsel for the State. The matter was postponed to 28 March 2022, for this purpose.

[16] Upon resumption of the proceedings on 28 March 2022, Mr Manzini informed the Court that the defence would not be calling any further witnesses, including the alibi witness, and the case for the defence was accordingly closed.

EVALUATION OF EVIDENCE

[17] It is trite that in order to succeed with the prosecution, the State has to discharge the onus to establish the guilt of the accused beyond reasonable doubt, and on the other hand the accused bears no onus but will be entitled to a discharge if he presents an explanation of innocence which is reasonably possibly true. This trite legal test is more succinctly and elegantly stated by Nugent JA in **S v Mbuli**¹ as follows:

‘It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent. In whichever form the test is applied it must be satisfied upon a consideration of all the evidence’.

‘An accused version can only be rejected if the court is satisfied that it is false beyond reasonable doubt. An accused is entitled to an acquittal if there is a reasonable possibility that his or her version may be true. A court is entitled to test

¹ 2003 (1) SACR 97 (SCA); See also *S v Trickett* 1973 (3) SA 526 (T)

an accused's version against the improbabilities. However, an accused's version cannot be rejected merely because it is improbable'.²

[18] In **S v Shackell 2001(2) SACR 185 SCA** it was held that " it is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally enough is the observance that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of the 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. It is indeed permissible to test the accused's version against the inherent probabilities. 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."

[19] In assessing the evidence, a court must in the ultimate analysis look at the evidence holistically in order to determine whether the guilt of the accused is proved beyond reasonable doubt. This does not mean that the breaking down of the evidence in its component parts is not a useful aid to a proper evaluation and understanding thereof. In **S v Shilakwe**³ at page 20, para [11], the Supreme Court of Appeal approved of the following *dictum* :

"But in doing so, (breaking down the evidence in its component parts) one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in the 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 from the trees."

See **S v Hadebe and others**⁴ and **S v Mbuli**⁵.

² Susha v S 2011 JOL 27877 (SCA)

³ 2012 (1) SACR 16 (SCA)

⁴ 1998 (1) SACR 422 (SCA) at 426 F – H

[20] The same principles apply when an alibi defence is relied upon by an accused. The acceptance of the evidence on behalf of the State cannot by itself be a sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating the accused is true which can only be done if there is at the same time no reasonable possibility that the evidence exculpating him is not true. See **S v Van Aswegen**⁶ and **S v Liebenberg**⁷.

The effect hereof is that once the trial court accepts the evidence in support of an accused's alibi as reasonably possibly true, it follows that the court should find that there is a reasonable possibility that the evidence led on behalf of the State is mistaken or false.

[21] Bearing in mind the above, the correct approach is to consider the alibi in the light of the totality of the evidence in the case and the court's impression of the witnesses. See **R v Hlongwane**⁸. In doing so, the trial court should remind itself that no onus rests on an accused and that the State must prove that the accused committed the crime and it must therefore disprove the alibi.

[22] It is acceptable in evaluating the evidence in its totality to consider the inherent probabilities. Heher AJA (as he then was) dealt with this aspect as follows:

"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."

See **S v Chabalala**⁹.

⁵ 2003 (1) SACR 97 (SCA) at 110, para [57]

⁶ 2001 (2) SACR 97 (SCA) at paras [7] & [8], 100f - 101e

⁷ 2005 (2) SACR 355 (SCA) at 358H – 359E, paras [14] and [15]

⁸ 1959 (3) SA 337 (A) at 341A

⁹ 2003 (1) SACR 134 (SCA) paragraph [15]

[23] I am mindful of the basic principles to be applied when evaluating evidence. In this regard, it is trite that evidence must be weighed in its totality and that probabilities and inferences must be distinguished from speculation and conjecture.

Navsa JA in **S v Trainor**¹⁰ stated as follows: “A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety”

[24] The quote from the judgment of Malan JA in *R v Mlambo*¹¹ at 738 A and B is apposite:

‘In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused. An accused’s claim to the benefit of doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable inference which are not in conflict with, or outweighed by, the proved facts of the case. Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts; a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so’.

¹⁰ 2003 (1) SACR 35 (SCA) at 9

¹¹ 1957 (4) 727 (AD)

[25] I pause to mention that there are no eye-witnesses who actually saw the assault of the deceased by the accused. Hence, the State has relied to a certain extent on circumstantial evidence, the testimony and version of the accused, as well as the objective medico legal evidence; in order to prove the allegations against the accused, and in an attempt to prove it's case against the accused. I am therefore required to objectively and in an impartial and balanced manner, consider all the evidential material in coming to a decision.¹²

[26] It is trite that once a court is faced with circumstantial evidence it naturally flows that it is duly called upon to draw inferences from the evidence thus presented.

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

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

(2) The proved facts should be such, that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.”¹³

[27] The value of circumstantial evidence is often found in a whole range of independent circumstances, all giving rise to the same conclusion. It is imperative for the court to consider all these circumstances as a whole and not to assess each in isolation.

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

¹² S v Ntsele 1998 (2) SACR 178 (SCA)

¹³ S v Blom 1939 AD 188 at 202; See also S v Mtsweni 1985 (1) SA 590 (A) at 593

the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.”¹⁴

[28] In *De Villiers supra* at 508 it is said: “...even two particles of circumstantial evidence-though taken by itself weigh but as a feather – join them together, you will find them pressing on the delinquent with the weight of a millstone....”

[29] Circumstantial evidence is indirect proof from which a court is required to draw inferences which, when weighed with all other evidence, may contribute towards proving a fact in issue. The inference must comply with certain rules of logic.¹⁵ The reasonable inference has to be drawn only from proved facts and not from facts based on suspicion.¹⁶

Circumstantial evidence has on occasion been described as a chain, the links of which consist of pieces of evidence. This is not correct as it implies that the chain will be broken once one piece of evidence is rejected. It is better to compare it with a braided rope: as the strands break, the rope weakens and conversely, as strands are added, the stronger it gets. The gist of the matter is that one piece of circumstantial evidence may be inconclusive, but once other evidence is added, it gains probative force.

[30] The principles that are to be applied in assessing circumstantial evidence were re-stated as follows in **S v Reddy & others 1996 (2) SACR 1 (A) 8 at c-h**: “In assessing circumstantial evidence, one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in *R v Blom* 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such ‘that they exclude every reasonable inference from them save the one sought to be drawn’.”

¹⁴ *S v De Villiers* 1944 AD 493 at 508-509

¹⁵ *S v Burger* 2010 (2) SACR 1 (SCA)

¹⁶ *S v Mseleku* 2006 (2) SACR 574 (D)

[31] The *ratio* of Hendricks J in **S v Nkuna 2012 (1) SACR 167 (B)** sets out the approach to circumstantial evidence, at paragraph 121 as follows:

“The evaluation of circumstantial evidence must be guided by a test of reasonableness. The onus on the State is not that it must prove its case with absolute certainty or beyond a shadow of a doubt. All that is required is such evidence as to satisfy the court and prove its case beyond a reasonable doubt. It is trite law that the accused is under no legal obligation to prove his innocence. The State must prove the guilt of the accused beyond a reasonable doubt”.

[32] Having carefully considered the totality of the evidence and the mosaic of proof before me, as well as the admissions that have been made by the accused in terms of section 220 of the CPA, I do not deem it necessary to individually traverse the evidence of all the witnesses that testified during the trial, for the sake of brevity and to avoid unnecessary prolix.

[33] I pause to mention that upon a conspectus of all the evidence before me, the following can be regarded, *inter alia*, as common cause between the parties, as there is no evidence to the contrary:

[a] That the deceased died on 15 October 2019 at Tonga Hospital, as a result of injuries she sustained during the early hours of 13 October 2019.

[b] That the deceased was assaulted and in furtherance of such assault upon the deceased, a wooden spoon was inserted into her vagina, which resulted in severe bleeding from her private parts.

[c] That the deceased was still alive, but severely injured, when she was discovered in Vuma’s house; and that a few days later she succumbed to her injuries.

[34] The following facts are in dispute:

[a] Whether the accused committed the offences as alleged in the indictment?

[b] Whether the accused was at the scene of the crime?

[35] Essentially, having distilled all the common cause facts between the parties, the only dispute to be adjudicated upon is the determination of whether the accused was involved in the commission of the crimes as charged.

[36] I have carefully listened to the evidence of the State witnesses, and taken cognisance of their conduct and behaviour when they testified, and it is clear in my mind that their evidence clearly has a ring of truth. I did not gain the impression at any stage that the witnesses had come to falsely implicate the accused in the commission of the crimes. All the State witnesses gave their evidence in a clear, concise and uncontradicted manner, and in my view were impressive witnesses.

The accused on the other hand did not convince this Court regarding the veracity of his denial in respect of the allegations against him. In addition, he was unable to produce his wife as an alibi witness. I have further noted that the other State witness, Jacobs, who could be construed as an alibi witness, simply did not support the accused's version at all. It was clear to this Court that the accused tried his level best to continually spin a yarn, by changing his version, so as to facilitate the means to extricate himself.

[37] It is clear from the viva voce testimony of the State witnesses that they had positively identified the accused as the one who was at the tavern during the afternoon of 12 October 2019, as well as being in the company of the deceased in the tavern during the early hours of 13 October 2019. Having carefully analysed their evidence, I am satisfied that their identification is both credible and reliable, having due regard to the fact that they were able to provide sufficient detail regarding their individual observations of the accused, time and the situation at hand. Their individual observations are further strengthened by their subsequent identification of the accused, at the respective identification parades.

[38] I now turn to the circumstantial evidence of Vuma, when he testified that he had given his house keys to only the accused and no one else, and who was going to later sleep in his house. Further, I have noted Vuma's evidence that he had observed the keys hanging on the open bedroom door, at the time when he entered the house and discovered the deceased. He was clear that it was only the accused who had the keys to his bedroom, and who could have opened that door.

In addition, I have taken cognisance of the declaration by the deceased who stated that it was 'Mlungu', Vuma's friend who was responsible for the vicious assault upon herself. It is clear in my mind that there was no other White person who was Vuma's friend, and who was present at the tavern that day, and in the deceased's company, except for the accused. I have absolutely no reason to doubt the veracity of the information provided by the deceased, to the State witnesses, regarding the identity of her assailant.

[39] I have carefully analysed the evidence before me and applied the necessary caution where required, and accordingly am unable to find any reason to doubt the *ipsissima verba* of the State witnesses. They gave their evidence in a clear and concise manner without any material contradictions. On the other hand the accused made a very poor impression on this Court during his testimony. His version/s seemed to be very far fetched on the available evidence, and on any analysis of his evidence it simply cannot be believed.

[40] After careful consideration of the evidence of all the State witnesses, and the totality of the circumstantial evidence in support of the charges, I am satisfied that the evidence of the State is satisfactory in all material respects to sustain a conviction on the charges. The State witnesses made a good impression on this court, whilst the accused was unimpressive and an unsatisfactory witness.

[41] I have weighed all the elements that points towards the guilt of the accused against those which are indicative of his innocence, taking proper account of the inherent strength and weaknesses, probabilities and improbabilities on both sides, and having done so, I find that the balance weighs so heavily in favour of the State, so as to exclude any reasonable doubt of the accused's guilt.

[42] In conclusion, I find that on a consideration of the totality of the evidence the prosecution has discharged the onus to prove beyond reasonable doubt that the accused has committed the crimes as charged. On the other hand the accused has failed to give an explanation of innocence which is reasonably possibly true. and his version is accordingly rejected as beyond false.

[43] I am of the firm view, after a careful analysis of all the viva voce and objective documentary evidence, that the only reasonable and inescapable conclusion is that the accused is the person who viciously assaulted the deceased during the early hours of 13 October 2019. Nothing more! Nothing less!

[44] In the result, the accused is found guilty as follows:

[a] **COUNT 1:**

**MURDER READ WITH THE PROVISIONS OF SECTION 51(1)(a) AND
PART 1 OF SCHEDULE 2 OF ACT 105 OF 1997**

[b] **COUNT 2:**

**RAPE READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105
OF 1997**

**C I MOOSA
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION
MBOMBELA
FRIDAY, 01 APRIL 2022**

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Dates of hearing: 15 November 2021
16 November 2021
17 November 2021
25 November 2021
02 December 2021
03 December 2021
10 January 2022
28 March 2022
29 March 2022
01 April 2022

Heads to be filed on: 29 March 2022
Date of judgment: 01 April 2022