

In the High Court of South Africa
KwaZulu-Natal Local Division, Durban

Case No. CCD35/19

In the matter between:

The State

and

Simiso Sibusiso Chonco

Accused

Judgment

Lopes J

[1] The accused in this matter, Simiso Sibusiso Chonco was charged with three counts:

- (a) Rape, in that upon or about the 9th December, 2018 and at or near the Lindelani Cemetary in Ntuzuma he vaginally and anally raped Sinethemba Ngubo.
- (b) Murder, in that on the same date and at the same place he wrongfully and intentionally killed Sinethemba Ngubo in circumstances where the murder was planned or premeditated and that her death was caused by Mr Chonco in committing or after having committed rape and robbery with aggravating circumstances.

- (c) Robbery with aggravating circumstances, in that in or about the same day and place he used force and violence to induce Ms Ngubo to submit to his taking of a motor vehicle, a Kia picanto bearing registration mark NJ4665, together with other personal belongings of Ms Ngubo.

[2] Mr Chonco pleaded not guilty to the count of rape, guilty to what he described as the unintentional murder of Ms Ngubo, and theft of her motor vehicle. Mr *Mlotshwa*, who appeared for Mr Chonco recorded that the plea on count one was in accordance with his instructions, but that the pleas on counts two and three were not. Mr Chonco intervened at that stage to say that he intended pleading guilty to both counts two and three.

[3] Thereafter, and in terms of s 112(2) of the Criminal Procedure Act, 1977, Mr *Mlotshwa* submitted a statement made by Mr Chonco setting out the basis upon which he pleaded guilty to counts two and three. Ms *Dube*, who appeared for the State, recorded that the State did not accept the factual matrix set out in the s 112 statement. Accordingly, in terms of s 113 of the Act, I entered a plea of not guilty on behalf of Mr Chonco for counts two and three.

[4] Ms *Dube* then applied to have the s 112 (2) statement admitted in terms of s 220 of the Act. Mr *Mlotshwa* confirmed that the defence had no objection to such an order. This was confirmed by Mr Chonco himself. I accordingly made an order in terms of s 220 that the s 112 (2) statement was to be recorded as admissions of Mr Chonco.

[5] The State witnesses then testified, the first of which was Ms Nondumiso Nzama, whose evidence may be summarised as follows:

- (a) By the 9th December 2018 she had been in a six-year relationship with Mr Chonco, who was the father of her minor child.
- (b) On that night she and Mr Chonco were in a room at his home when Ms Ngubo arrived and knocked at the door. They kept quiet and did not respond, but Ms Ngubo continued knocking and eventually kicked-in a window.
- (c) At that stage Mr Chonco got up, opened the door, and chased after Ms Ngubo. He returned with her, and entered the room with her. At that stage Mr Chonco got dressed and left again with Ms Ngubo, telling Ms Nzama that he would be back.
- (d) Mr Chonco and Ms Ngubo walked out of the yard and stood on the road. Ms Nzama, who was by then standing outside the room holding her baby, could see them both. She could see they were quarrelling, but could not hear what they were saying. She walked back into the room because the weather was inclement, and she went out again after putting a jacket on her child. Mr Chonco and Ms Ngubo were no longer there.
- (e) She then went back into the room and phoned Mr Chonco who answered, spoke quickly, and said he would be back soon. He then hung up.
- (f) As Ms Nzama was afraid, she took her child and repaired to the main house on the property. Twenty minutes later she again called Mr Chonco and he said that he was on his way back. Some 20 minutes later he arrived and called her. They went back into the outside room where he asked her for water to wash his hands. She asked where he had been, and he said that he had been with Ms Ngubo and he had killed her.
- (g) Ms Nzama did not believe him because she did not think he was capable of doing such a thing. He offered to show her that he had

done so, and she agreed to go with him, and they travelled for a short distance in Ms Ngubo's motor vehicle, Mr Chonco having returned with the car keys to that vehicle when he returned.

- (h) They drove to some nearby houses where Mr Chonco showed Ms Nzama the body of Ms Ngubo. She was not wearing anything on the lower half of her body. Ms Nzama was afraid and requested that they leave immediately. When they returned to the room Ms Nzama collected her belongings and those of her child, and they were taken back to her home in Ms Ngubo's motor vehicle.
- (i) Ms Nzama then retired for the evening, but was in a state of shock. She was later phoned by Mr Chonco who said he wanted to dispose of Ms Ngubo's body. He later phoned Ms Nzama again and confirmed that he had done so, and had left the body of Ms Ngubo at the cemetery near the Ntapo School.
- (j) The next morning Mr Chonco phoned her and said that he was at Folweni trying to find someone who could remove the tracker from the motor vehicle, so that he could sell it. Later on that day he again phoned Ms Nzama and said that he had been unable to find someone to remove the tracker, and he had been unable to sell the motor vehicle. He arrived back at the home of Ms Nzama between 6:00 and 7:00pm that evening.
- (k) Mr Chonco then asked Ms Nzama whether she knew anyone who could remove the tracker and buy the motor vehicle. She said she did not, but because she was afraid of him she communicated with Ms Menzi Ndlovu, who is also known as Panstula, via Whatsapp. She thought that Ms Ndlovu might be of assistance.
- (l) Ms Ndlovu said that she knew someone who could assist her and Ms Nzama and Mr Chonco then travelled in Ms Ngubo's car to see her.

- (m) They met Ms Ndlovu at Ntuzuma, and she then travelled with them to attempt to see a person who could deal with the tracker and who was known to Ms Ndlovu. She was unable to get hold of that person telephonically, and they proceeded to what Ms Ndlovu described as his parental home. Eventually they reached the parents' home of the person who was supposed to assist them, one Ngosh. He was not at his parent's home and Ms Ndlovu spoke to his brother, Jojo, who came out of the house and sat in the car and spoke to the other three.
- (n) At first Mr Chonco would not disclose to Jojo why he wished to sell the motor vehicle. He then said he had had a quarrel with the owner of the motor vehicle and killed her. In response to further questioning by Jojo, Mr Chonco stated that he had throttled Ms Ngubo until she died. Mr Chonco said that he wished to dispose of the body of Ms Ngubo but Jojo was adamant that Mr Chonco must hand himself over to the South African Police Services.
- (o) At some stage Ms Ndlovu was able to get hold of Ngosh and they bid Jojo goodbye and left to see Ngosh. They eventually met him, and at approximately midnight at the graveyard, at or next to the Ntapo School, the tracker was removed.
- (p) At that stage Ms Nzama confirmed that she had asked Mr Chonco why Ms Ngubo had no clothes on the lower half of her body. She said that he had told her that Ms Ngubo's clothes had come off when they were fighting.
- (q) During cross-examination, Ms Nzama confirmed that she had not seen any physical exchange between Mr Chonco and Ms Ngubo, and had not been able to hear what they were saying, but that she was aware that they were arguing. She did not see any injuries on Mr Chonco when he returned to her after killing Ms Ngubo. She

confirmed that Ms Ngubo had entered the room whilst Mr Chonco was getting dressed, but she had not said anything. She accepted that Ms Ngubo would have been angered by her presence in the room. She also confirmed that when Ms Ngubo had kicked in the window, Mr Chonco had chased after her.

- (r) Ms Nzama disputed the suggestion put to her by Mr *Mlotshwa* that it was Jojo's idea to put the body of Ms Ngubo inside her house and then set it alight. This was suggested as a plan to cover-up the murder. Ms Nzama said that Jojo had not said that, and, instead, had insisted that Mr Chonco report the matter and surrender to the police. When it was suggested to her that she had differed from what she had said in her written statement, she conceded that it was possible, but said she had been in shock at that time.
- (s) In further cross-examination by Mr *Mlotshwa*, Ms Nzama stated that she had also been able to see the top which Ms Ngubo had been wearing when she first saw her. This was at the stage when Ms Nzama had witnessed her body lying near Mr Chonco's home.

[9] The second witness for the State was Xolani Ngema, also known as Jojo:

- (a) He confirmed that he had been at home in E Section, Ntuzuma between 10:00 and 11:00pm on the 10th December 2018. Ms Ndlovu arrived at their doorstep looking for his brother Ngosh. He had enquired as to why Ms Ndlovu wanted to speak to Ngosh and she said that they were selling a car. Mr Ngema was interested because he was looking a car to purchase. He then went outside and

got into a Kia picanto in which were sitting Mr Chonco and Ms Nzama. Ms Ndlovu had climbed into the backseat as well.

- (b) He tried to discuss the purchase price, but the driver, Mr Chonco, was evasive. Mr Ngema realised that there was a problem and asked Mr Chonco to be honest with him and tell him what was going on. Eventually Mr Chonco admitted that the owner of the motor vehicle was his girlfriend and he had killed her. (Mr Chonco previously told Mr Ngema that the vehicle belonged to someone who had died in Johannesburg and he had returned with the car and wished to sell it).
- (c) Mr Ngema was extremely shocked by this revelation and afraid that he could be implicated in the murder, because he was sitting in the deceased person's car. Mr Chonco had told Mr Ngema that he had left the body of Ms Ngubo at a place where no one would ever find her. This alarmed Mr Ngema who then tried to get more information in order to ensure that someone would in fact find the body of Ms Ngubo.
- (d) He asked why they wanted to use the services of his brother Ngosh, and Mr Chonco said he wanted the tracker in the motor vehicle removed. When Mr Chonco explained that he had travelled to Folweni in the car and had gone to petrol stations, Mr Ngema explained to Mr Chonco that a tracker would have already recorded where he had been, and that that it is likely that surveillance cameras at the petrol stations would have done the same. Mr Chonco then made a suggestion that he put the body of Ms Ngubo back into her house and make it look like a robbery, and leave the

car in her yard. There was also a suggestion by Mr Chonco that they could set the house alight.

- (e) Mr Ngema listened to what Mr Chonco said and raised the various problems which Mr Chonco would experience if he tried to do what he had suggested. Mr Ngema then suggested that the best avenue was for Mr Chonco to surrender himself to the South African Police authorities. Mr Ngema then became afraid that he would be linked to the stolen car and began to erase any possible fingerprints he may have left in the car using the long sleeve of a t-shirt he was wearing.
- (f) He then alighted from the car, which was driven away.
- (g) Mr Ngema then went back to his house but was unable to fall asleep. Eventually he phoned a friend, one Sizwe Manzini who operated a security company in Ntuzuma, and told him what had transpired. Mr Manzini came to fetch him, and at about 06:00am Mr Ngema phoned his brother Ngosh and established where Mr Chonco had been sleeping. They proceeded to that place and Mr Chonco was arrested by the security guards. Mr Chonco had then pointed out the place where he had left the body of Ms Ngubo. Mr Manzini then phoned the South African Police Services who eventually arrived with numerous other personnel.

[10] After the above witnesses had testified Mr *Mlotshwa* indicated that he needed to take certain instructions from Mr Chonco, because Ms Dube had handed to him the results of DNA tests performed by the State. These related to count one (rape). Mr *Mlotshwa* then sought leave to withdraw as the legal representative for Mr Chonco. He told the court that Mr Chonco had lost

confidence in his ability to represent him. Mr Chonco also insisted that there had been a conspiracy between the police officials who had taken the buccal samples from him, and the officials who had prepared the laboratory results. Mr Chonco stated that he wished to brief his own DNA expert to testify on his behalf. Mr Chonco stated that he and his family had sufficient resources to brief both a private legal representative and a DNA expert.

[11] Mr Chonco then indicated to the court that he had in fact briefed his own private legal representative who would have appeared on the 2nd December 2019, when the trial was scheduled to be heard. However, as the trial had been brought forward, Mr Chonco had used the legal-aid services of Mr *Mlotshwa*. Mr *Mlotshwa* recorded that although he had, on the instructions of Mr Chonco, prepared the s 112 (2) statement after lengthy consultations, Mr Chonco had not mentioned the existence of a private legal practitioner who was to appear for him.

[12] I accordingly granted an order adjourning the trial to the 2nd December 2019, and directed Mr Chonco to have his private legal representative present on that day, together with the name of his DNA expert, and a time-line for the preparation of any DNA tests or reports. As there appeared some doubt about the ability of Mr Chonco to finance these aspects, I directed that the Investigating Officer contact the family of Mr Chonco in order to apprise them of Mr Chonco's predicament, and to ascertain whether they were willing and able to assist him. Mr Chonco undertook to provide the names and addresses of his family members to the Investigating Officer.

[13] On the 2nd December 2019 Ms *Dube* informed the Court that the Investigating Officer had visited the paternal uncle of Mr Chonco, Mr Thulani Chonco. He was unwilling and unable to assist Mr Chonco. Ms *Dube* confirmed that she had spoken to Thulani Chonco telephonically, and he had confirmed what the Investigating Officer had told me. The Investigating Officer also stated that he had spoken to other members of Mr Chonco's family (not names given to him by Mr Chonco). They apparently indicated that Mr Chonco's father, who was on military deployment in the Democratic Republic of Congo, had stated that the family was not to assist Mr Chonco.

[14] Mr Chonco told the Court that the Investigating Officer had told his family members not to assist him because he would not be acquitted. He then clarified that this had happened when he still imprisoned at the police station. Mr Chonco also said that his uncle had visited him in Westville Prison on the 27th November 2019, and had said that he would visit Mr Chonco 'when he gets time'. Mr Chonco also conceded that he would no longer be able to employ his own attorney or DNA expert. The trial continued the next day with Mr *Mbili* who was appointed by Legal Aid South Africa (Judicare), representing Mr Chonco.

[15] The next State witness was Warrant Officer Motjile Oduetse Chriswell Makapan, who told the Court that:

- (a) He is a forensic analyst in the South African Police Forensic Science Laboratory in Pretoria. He set out his qualifications and training, including twelve years' in the Biological Health Sciences.

- (b) He had analysed the DNA results from tests conducted by technicians working under him in the laboratory. He explained that the results of all the samples taken from Ms Ngubo and submitted for analyses had perfectly matched the two separate buccal ‘Reference Samples’ taken from Mr Chonco. He stated that no two persons would have the same results, and that Mr Chonco’s DNA had been found in samples taken from both the vagina and anus of Ms Ngubo.

[17] In cross-examination by Mr *Mbili* it was put to the witness that Mr Chonco had had consensual sexual intercourse with Ms Ngubo at approximately 3.00pm on the day of her murder. Warrant Officer Makapan confirmed that he had not been involved in the investigation of the matter, and, prior to appearing in Court in this matter, had not met the Investigating Officer.

[18] Doctor Lesego Ipeleng Tsikwe testified that:

- (a) She was a registered medical practitioner, employed by the State as a forensic pathologist, and had been working in the Tugela District as Senior Registrar in the Nkosi Albert Luthuli Hospital mortuary in December 2018.
- (b) She had conducted a post-mortem examination report on the body of Ms Ngubo. Her principal findings were:
 - (i) The cause of Ms Ngubo’s death was strangulation, with blunt force trauma and constriction of the upper neck structures.

- (ii) Ms Ngubo sustained numerous, significant and extensive injuries to her genitalia and perianal areas, but they were not fatal.
- (c) She had taken vaginal and anal swabs which were properly sealed in the Sexual Assault Kits with which she had been provided.
- (d) She found that the internal injuries which Ms Ngubo sustained in her vaginal and anal areas were the result of the use of tremendous force. This was most unlikely to have occurred pursuant to consensual intercourse. She testified in detail why this was so. The injuries were so severe that they would not even have been sustained in what she referred to as 'rough, but consensual sex', or under intoxication. Significantly, she doubted whether Ms Ngubo would have been able to walk unaided after the intercourse, describing the idea as 'fantastical'. Driving a motor vehicle and kicking-in windows would have been 'unheard of in my profession' after the assault. She described the probability that the intercourse was not consensual as '99%'.
- (e) She also testified to the existence of bite marks to the inner cheeks and lips of Ms Ngubo, which were consistent with someone clamping a hand over her mouth, and a considerable struggle. This was also evidenced by scratch marks on her face. Dr Tsikwe discounted entirely the suggestion put to her in cross-examination the Ms Ngubo had undergone an asthmatic attack, and without her medication, had passed away. She stated that this was contradicted by the fact that Ms Ngubo's hyoid bone had been fractured, she had deep and extensive bruising of her neck structures, and she showed no signs of chronic asthma. In addition, asthma was not

indicated because there were no crystals in her airways, and no bronchial constriction.

[19] The next witness was Xoliswa Fortunate Ndlovu. She confirmed that on the 10th December, 2018, Ms Nzama had contacted her and related to her a series of events. She was thereafter fetched by Ms Nzama and Mr Chonco (who was then unknown to her), and they drove to Ntuzuma to find a mechanic who could remove the tracker from the white Pia picanto. Eventually they had reached the home of Jojo, to whom Mr Chonco related the events of the previous evening. She confirmed the discussion which had taken place in the motor vehicle between Mr Chonco and Jojo as had been testified to by Ms Nzama. She also explained how the tracker had been found and removed at the Lindelani Cemetery. At the graveyard Mr Chonco received a phone call when he told the caller where they were. The tracker was destroyed, and Ms Nzama, Ms Ndlovu and two males left on foot. As they did so the security services and the police arrived.

[20] Ms Ndlovu emphatically denied the suggestion in cross-examination that Mr Chonco merely wished to speak to Jojo and obtain advice from him regarding what he should do. She reiterated that Mr Chonco had wanted to have the tracker removed from the vehicle so that he could sell the car. She also reacted strongly to the suggestion that she had been primed as to what to say by the Investigating Officer.

[21] Ms Nomalungelo Sanelesiwe Pearl Ngubo then testified that she was the sister of Ms Ngubo. She had known that her sister had been in a relationship

with Mr Chonco. She also knew that he was aware that her sister was pregnant, because he had told her so himself. She had been fetched from her home by members of the South African Police when they were searching for Ms Ngubo. They eventually went to the Lindelani Cemetery where she had identified the body of her sister. It was obvious to her that her sister was injured and the lower half of her body was naked.

[22] Sergeant Emmanuel Nkosinathi Madonsela told the Court that he proceeded to the Lindelani Cemetery on the 11th December 2018 pursuant to a report he had received. There he was shown the body of Ms Ngubo, and it was identified to him as such by her sister. He handed over the body to Dudu Nxumalo, the driver of the Phoenix Mortuary van in which Ms Ngubo's body was removed. He also confirmed the contents of a photograph album (Exhibit 'C') which showed the body of Ms Ngubo, as well as photographs of the white Kia picanto.

[23] Mr *Mbili* confirmed that the defence had no issue with the removal of the body of Ms Ngubo until the post-mortem examination report was completed. Ms *Dube* then closed the case for the State. The links in the DNA chain, are by virtue of the admissions by Mr Chonco and the other evidence not necessary to deal with. The DNA results had been adduced because of the initial denial of intercourse implied in the plea and s 112 statement, because no admissions of intercourse had been made at that stage. Only at the stage of the DNA results being forthcoming was the consensual intercourse raised by the defence.

[24] Mr Chonco then testified. He was a very, very poor witness. He was completely unable to deal with the contradictions between his s 112 statement and what his legal representatives put to the various witnesses, the presence of his DNA in the vaginal and anal samples, and the horrific injuries suffered by Ms Ngubo as testified to by Dr Tsikwe. His was deliberately vague when he could not answer questions, and this Court could not safely rely on anything he said unless it was confirmed by other witnesses. His evidence is a matter of record, and it would serve no purpose for me to troll through his evidence highlighting every dishonest contradiction and gross improbability. Mr *Mbili* closed the defence case at the end of Mr Chonco's evidence.

[25] The State witnesses all gave their evidence in a forthright and honest manner. Such contradictions as occurred between their various versions were only as to be expected of people testifying about events which occurred over time and during a continuous sequence. The State witnesses were not in any way discredited in cross-examination – their evidence was left unshaken. The evidence of Dr Tshikwe was detailed and demonstrated clearly why the defence of consensual intercourse was a hopeless attempt at deception.

[26] There is no doubt that Ms Ngubo went to the home of Mr Chonco determined to confront him. She did so in a most insistent manner, breaking two windows when he would not respond to her. Her confrontational behaviour was almost certain to create a row. Clearly she and Mr Chonco walked away from the house in order to be able to debate their problem in privacy, and out of the earshot of Ms Nzama. What followed, however, was tragic. It is difficult to know which one of the two started the physical confrontation. What is clear is

the brutal reaction of Mr Chonco which followed, both in raping Ms Ngubo twice, and in strangling her to death.

[27] That Ms Ngubo was raped twice by Mr Chonco, admits of no doubt because of the combined evidential weight of:

- (a) The DNA evidence.
- (b) The inability of the defence of consensual intercourse to stand up to the scrutiny of the post-mortem examination report, and the evidence of Dr Tshikwe of the extent to which the injuries sustained by Ms Ngubo would have disabled her.
- (c) The state in which the body of Ms Ngubo was seen by Ms Nzama, and the state it was in when recovered at the Lindelani Cemetery, as confirmed in the photographs.
- (d) The clothing of Ms Ngubo which was recovered at the place where she was murdered.

[28] Ms *Dube*, correctly in my view, conceded that the murder was not premeditated. She submitted that it does, however, fall into the category of a murder committed after raping the victim – thus falling into the category of those included in Part I of Schedule 2 to the Criminal Law Amendment Act, 1997.

[29] Ms *Dube* also conceded, again correctly in my view, that the robbery charge could not succeed, and Mr Chonco was guilty, at best, of the theft of Ms Ngubo's Kia picanto, cell phone and other belongings. There is no doubt that he

intended to sell the vehicle, and to that end, had the tracker device removed from the vehicle.

[30] In all the circumstances, I make the following order:

- (a) Mr Chonco is guilty of Count 1 – the rape of Ms Ngubo on two occasions.
- (b) Mr Chonco is guilty of Count 2 - the murder of Ms Ngubo in terms of Part I of Schedule 2, subparagraph (c) of the Criminal Law Amendment Act, 1997.
- (c) Mr Chonco is guilty of the competent verdict of theft on Count 3, in relation to the Kia picanto motor vehicle belonging to Ms Ngubo, and her two cell phones.

Lopes, J

Date of judgment:	11 th December 2019.
Dates of hearing:	19 th and 20 th November, 2019, and the 2 nd , 3 rd , 4 th , 5 th , 6 th and 11 th December, 2019.
For the State:	Ms Dube.
For Mr Chonco:	Mr Mlotshwa instructed by Legal Aid, South Africa, and Mr Mbili, instructed by Judicare.