

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION: MTHATHA]**

CASE NO. CC19/2017

In the matter between:

THE STATE

VS

HEADMAN DYOSI

JUDGMENT

JOLWANA J

Introduction

[1] The accused stands arraigned on multiple counts being six counts of rape, four counts of murder and one count of attempted murder. These offences were committed over a period of about three years from April 2012 to May 2015 at certain locations in Lady Frere. All the victims were women who were all raped and four of them were also murdered. The other two were lucky not to have been killed. There

were no eye witnesses to any of these crimes and the two victims who were not killed could not identify the person who attacked and raped them.

[2] The accused pleaded not guilty to all the charges and declined to disclose the basis of his defence.

Summary of substantial facts

[3] The indictment also contained the following summary of substantial facts:

- “1. On 7 April 2012 the complainant in count 1 and count 2 was raped and severely assaulted by an unknown male.
2. On 7 December 2012 the body of the deceased in Count 3 and Count 4 was found lying on the ground, hands also tied up and the deceased was raped.
3. The deceased died of “*HEAD INJURIES*”
4. On 21 July 2014 the complainant in count 5 was near the Lady Frere Day Care Centre when at about 19h00 an unknown male grabbed the complainant from behind, dragged her to a dark place and raped her.
5. On 15 May 2015 the deceased in count 6 and 7 left her home never to return, the family phoned and looked for the deceased but to no avail, on 21 May 2015 the deceased’s body was found.
6. The deceased was raped and died of “*HEAD INJURY*”
7. The accused was arrested on 5 June 2015, as cell phone records linked him; the accused was found also in possession of the deceased’s cell phone and is also linked with positive DNA results.
8. The deceased in Count 8 and 9 was raped and murdered cause of death, “*MANUAL STRANGULATION AND HEAD INJURY*”. Accused is linked with positive DNA results.
9. The deceased in count 10 and 11 was raped and murdered cause of death, “*HEAD INJURY AND STAB NECK*”. Accused is linked with positive DNA results.”

Case for the state

[4] The state called Ms A[...] N[...] F[...], the complainant in counts 1 and 2 who resides at P[...] M[...] I[...] in Lady Frere. She stayed at home with her brother and her child. On the 07 April 2012 she had knocked off from a part time job and returned home with some basic groceries. The family's electric stove had broken down and she therefore used a three legged pot to cook a meal for her family outside in a fireplace. The sun had already set when she made the fire and her brother was in the house. At some point she called on her brother to bring her a spoon. However, he did not come out of the house. She later noticed that there was someone next to her whom she assumed was her brother. When she looked at this person she realized that it was not her brother. It was an unknown man who had covered his head with a hood. She did not know this person.

[5] He hit her on the face with a clenched fist and she fell down next to the pot. She was hit again on the left cheek with a sharp object and she bled. She struggled with this person who continued hitting her and dragged her away from the fireplace. He tied her hands with some shoemaker strings. He pressed her down with his knee and forcibly pulled off her panty. He unbelted himself and lowered down his trousers and raped her. When he finished raping her he pulled up his trousers and went away. With great difficulty she slowly walked into the house where she found her brother sitting on a sofa next to a radio. She was thereafter assisted by her brother to lie down on a sponge on the floor. She slept and police came the following morning and she told them what happened. She was taken to Glen Grey Hospital in an ambulance where she received treatment. She was discharged from hospital about three weeks later.

[6] Constable Yamkela Maliwa testified that in the morning on 08 April 2012 her commander told her that there was a rape victim who had been admitted at hospital.

She went to see the complainant A[...] F[...] at Glen Grey hospital to open a rape case. She had taken with her a rape kit which she handed it to Dr Mlindwa who examined and took DNA samples from the complainant. She thereafter received the sealed rape kit from the said doctor. She took it back to the police station and made SAP13 entries.

[7] Dr Bulelani Christopher Mlindwa, testified that on 8 April 2012 he attended to and examined Ms AF who had been beaten up and sexually assaulted. She had sustained an occipital fracture with ragged laceration. This means that the back of her head was fractured. Her skull was cracked and had a penetrating injury. She had a 4cm laceration on her forehead. She also had bilateral and orbital haematoma with bilateral subconjunctival haemorrhage. He described this to mean that she had blood outside the blood vessels, meaning the blood vessels had ruptured and the blood oozed inside the skin. She also had a red eye. There was also a 3cm laceration on the chin. He testified that a skull is an extremely hard bone. That it was fractured meant that maximum force was used with a sharp or blunt object.

[8] The vaginal examination revealed a semen like discharge at cervical level with blood stains which was a sign of forceful penetration. The perineum also had a semen like discharge. He collected swabs with a sexual assault kit which he had received from a police officer. After taking all the swabs and sealing them individually, he placed all of them in an evidence collection kit bag which was then sealed and given to the police officer, constable Maliwa.

[9] The complainant in count 5, AOT testified that she is a resident of K[...] I[...] in Lady Frere. On 21 July 2014 at about 19:00 she walked from work place on her way to see her boyfriend at Veza location in Lady Frere. Her boyfriend was going to meet

her halfway. When she had just spoken on the phone with her boyfriend she heard some footsteps after which she was grabbed with her clothes. It was dark but the streetlights were on. Her assailant was wearing a balaclava with only his eyes being visible. He demanded her phone and money and pulled her to a shrubby area away from the road. He forced her to undress and assaulted her with a stick. He also undressed himself and raped her. When he finished raping her both vaginally and anally he told her to go away.

[10] She proceeded to her boyfriend's homestead where she reported the incident. An ambulance was called and she was taken to Queenstown Private Hospital. She was later taken to Thembeni Care Crisis Centre where swabs were taken from her.

[11] Nokufika Eunice Qoba testified that she is a professional nurse trained in general nursing, community, physical and midwifery and had specialized in forensic nursing. On 21 July 2014 she was on duty at Komani Thuthuzela Care Crisis Centre where she completed a J88 pertaining to AT after examining her. She concluded that there were injuries that were consistent with sexual assault. On an anal examination she concluded that there was forceful anal penetration. She collected DNA specimens which she placed in a adult sexual assault evidence collection kit, sealed it and gave it to a police officer who had brought the kit.

[12] Mfusi Magobotiti testified that he resides at Ngcuka locality in Lady Frere. He is the paternal uncle of N[...] Q[...], the deceased in counts 6 and 7. He had last seen the deceased on 15 May 2015 saying she was going to attend a night vigil. The deceased had a little baby whom she left with her wheelchair bound elder sister. The following morning she had not returned home and her phone was off. When he called her again on Monday the phone was answered by a male person. He

assumed that it was her boyfriend and told him that they must fetch the baby. When he phoned again later that day the phone was again picked up but the person who answered the phone did not talk.

[13] The following Thursday he received a call informing him that a body had been found near Mthwakazi River and that he should come and identify the body. He proceeded there and found police officers at the crime scene. He identified the deceased as N[...] Q[...]. The skin from her forehead and face had been peeled off. Her lower body up to the waist was covered with soil. Her breasts were cut. In short her body had been mutilated.

[14] Nande Raphael Keswa, testified that on 12 April 2014 he had been with B[...] V[...], the deceased in count 8. They were neighbours and they met in town when he was on the way to Spar Supermarket. He later left for his rural home at Zingqolweni with his other friend Zingiswa leaving the deceased at Tullz Barber shop. The following day he was informed by his mother that she had been found dead.

[15] Thandiswa Alicia Mpatheni, a professional nurse at Thembeni Care Crisis Centre testified that she holds a diploma in nursing, midwifery, psychiatry and community. She also did forensic training. On 05 June 2015 she was at work when Mr Nzube, a police officer arrived with the accused. Mr Nzube gave her a crime kit and asked her to take buccal samples from the accused. After introducing herself to the accused she told him that she was going to take saliva samples from him. She asked him if he agreed to the taking of the saliva samples and he agreed.

[16] She took the crime kit and showed him that it was sealed. She took three samples from the accused. She placed the sealed samples in the evidence collection kit which she also sealed, completed all the necessary details and asked

the accused to sign for the samples. She handed all the DNA collection kits to Mr Nzube.

[17] Dr Fuzani testified that he worked at Queenstown Forensic Laboratory. He was at work on the 15 April 2014 and conducted a post-mortem examination and compiled a report in respect of Buyelwa Veyi. His chief post-mortem findings were:

1. Degloving Injury of Sculp frontally and occipital area with heamatoma
2. Cerebral Oedema
3. Petechia in heart, lungs, trachea and thymus
4. Strangulation abrasion around neck above thyroid cartilage
5. Bruising of introitus at 6 o'clock position.

[18] He then concluded that the cause of death was manual strangulation and head injury.

[19] He also took some specimens which he handed over to the investigating officers.

[20] He also testified about the post mortem examination and his report thereon in respect of N[...] S[...] J[...], the deceased in counts 10 and 11 which he conducted on the 16 January 2015. Her body was recovered at Phumla Mqeshi locality in Lady Frere. His chief post mortem findings were:

1. Extensive scalp haematoma with massive subdural and subarachnoid haemorrhage.
2. Multiple stab wounds in neck severing major vessels and penetrating chest.

3. Bilateral haemothorax.

4. Subendocardial haemorrhages left ventricle

5. All organs pale.

[21] He then concluded that the cause of death was head injury and stab neck. He also took specimens for DNA analysis which he sealed and gave to constable Qwanya.

[22] Luvuyo Nzube testified that he is a member of the SAPS and that at one stage he was the investigating officer of in respect of the death of N[...] Q[...]. Her body was found near a river at Ngcuka locality in Lady Frere. As part of his investigation he attended a post mortem examination conducted by Dr Mbotya in Queenstown. He received collection kits from Dr Mbotya and entered them in their exhibit register SAP13 at Lady Frere police station.

[23] He also consulted with the father of the deceased who told him that he had bought a cellphone for the deceased before her death. He gave him a box for the phone which had the details of the phone. He then contacted their local intelligence unit in Queenstown to establish if the phone was being used. He received a report from them which showed that the phone was being used as well as a list of numbers that were being called by that phone.

[24] The analysis of the said phone records revealed that there was one number that was being called regularly using that phone. The lady who was being called with N[...]’s cell phone told him that the person who had been calling her was the accused. Further investigations revealed that the accused was working at a certain home in Lady Frere. They proceeded to that home and found him there. They

searched him and found the cell phone in question in his possession. He discovered that the IMEI number of the cell phone matched the one written in the box that he got from the deceased's father.

[25] The accused told them that he bought that cell phone from one Bhabhu who had a shop in town. They proceeded to Bhabhu's shop with the accused. Bhabhu told them that he did not sell any cell phones and only repaired cell phones and that the accused was lying in saying he bought a cell phone from him. It became clear to him that the accused was lying in saying he bought the cell phone from Bhabhu. He then concluded that the accused could be a suspect in the murder of N[...].

[26] He then arrested the accused for the murder of N[...] Q[...]. He took the accused to Thembeni Care Crisis Centre in Queenstown for DNA samples to be taken from him. The reason he asked for three DNA samples to be taken was that there were also other undetected cases similar to the one of N[...] Q[...]. He was with sergeant Prusent and sergeant Qwanya when the samples were taken.

[27] The forensic nurse who took the buccal samples sealed them and gave the sealed kits to him. He and his colleagues played no role in sealing the kits and did not assist the nurse in doing so. He took the kits and entered them in the SAP13/169 register at Lady Frere police station.

[28] Under cross examination he testified that they were shown phones for repairs by Bhabhu and that there were no cell phones that were for sale in the shop. He confirmed that Bhabhu told them that he did not sell any cell phones, there was no display for phones for sale in Bhabhu's shop and he said he was only repairing the cell phones.

[29] He denied that he or any of his two other colleagues assisted the nurse in the process of taking buccal samples. The nurse did everything on her own and after she had finished she handed the buccal samples to them having sealed them herself. He took the sealed buccal samples to Lady Frere Police Station where he entered them in the SAP13 register.

[30] The state called Thoko Qaliwe who testified that he is the father of the deceased N[...] Q[...]. He bought a cell phone from Jet Stores for his daughter N[...]. He gave the box and proof of purchase of the said cell phone to sergeant Nzube for further investigations.

[31] The state called Nosipho Ncanywa–Mvula who testified that she stayed at Makome Street in Lady Frere. She knew the accused as he worked as a gardener in the premises in which she stayed as a tenant. She met with Mr Nzube on a Friday morning. He was asked by Mr Nzube about a cell phone number he had on a certain cell phone. Because she did not know if she knew that number, Mr Nzube suggested to her that she must dial that number from her phone. She dialled the number it showed up on her cell phone as a number that belonged to the accused. Nzube asked him where he could locate the accused and she told him the address which is Makoma Street in Lady Frere.

[32] Muhammed Shafique testified that he works in town in Lady Frere. He is generally called Bhabhu. He did not know the accused. He did not sell cell phones and he only repaired them. Under cross examination he confirmed that police did come to his shop with the accused and he told them that he did not sell any cell phones. He testified that he never put any phone on display for sale in his display

counter since the time he opened the shop eight years ago until now. He denied that he sold a phone to the accused for R300.00 as he did not sell any phones.

[33] The state called sergeant Sizwe Gaika, a member of the SAPS stationed at the provincial office of the Family Violence Child Protection and Sexual Offences (the FCS). He testified that he is a serial and electronic crime investigator which is under the FCS unit. On 25 May 2016 he was on duty and was present when buccal samples were taken from the accused by sergeant Dlomo using a DNA reference sample collection kit.

[34] The state called sergeant Sonwabile Dlomo a member of the SAPS stationed at King Williamstown FCS. He testified that at some stage he was the investigating officer in respect of the cases before this court. He was a member of a task team that dealt with serial rapes and killings. He received a DNA lead from their DNA data base in Pretoria in terms of which some cases were linked to the case of N[...] Q[...]. Five cases were linked with this case making a total of six cases with the DNA profile of the accused. When he received the link he collected all the relevant dockets and visited the accused who was in prison at the time. The other five cases were unsolved cases when the link was made and they had no suspect for them at that stage.

[35] The accused was in prison in respect of the case of N[...] Q[...]. He asked the accused for a confirmation DNA sample. The accused refused to give him a confirmation sample and became rude, stood up and left him sitting there. He then decided to requisition the accused to be brought to court. However, it turned out that he was due to appear in court in respect of the case of N[...] Q[...]. He approached

the accused on the date of his court appearance and asked him for a buccal confirmation sample and on this occasion he agreed.

[36] He took buccal samples from the accused using a sealed kit which he opened in front of the accused and sealed them and placed them in a sealed bag. He then took the DNA sample reference collection kit bag to Lady Frere police station and registered it in the SAP13 register. He thereafter took the said kit bag with him to his King Williamstown Office. He kept it and the following day he personally took the samples to a laboratory in Port Elizabeth.

[37] When all of this was happening swabs from the victims and complainants had already been taken and testing done in the other five cases from Lady Frere. It is the arrest of the accused and the taking of the sample from him that created a link with the DNA that had been found in the other five undetected cases. Having submitted the samples he had taken from the accused he waited for a report of the DNA results from all the cases. He received the said report and found that all the other cases were linked with the accused's DNA. This resulted in the accused being charged also in respect of the other unsolved cases which had his DNA profile.

[38] The state called lieutenant colonel Sharlene Otto, a chief forensic analyst based at the Forensic Science Laboratory in Platteklouf, Cape Town. Her qualifications and experience are fully detailed in her report and are not in dispute. She testified that on 28 August 2017 she received case files in respect of two Lady Frere cases being that of N[...] S[...] J[...] and N[...] Q[...]. This followed an investigative hit led report issued by the National Forensic DNA database in Pretoria linking four cases that had already been analysed and reported on. The case of J[...] is peculiar in that of the six cases it is the only one in which the crime sample also had one allele

which did not belong to the accused. For this reason it is to it that specific focus will be given when I later analyse the evidence.

[39] Colonel Otto testified that the National Forensics DNA database worked independently on their database and looked at cases that had a link with one another. Such cases are then flagged and an investigative hit led report is issued. This happens for instance when different cases which had been dealt with independently and at different times reflected the same DNA profile.

[40] She testified that at locus D19S433 there were three alleles being 13.2, 14:14.2 and 14:14.2. This means that it is a mixture in respect of vestibule swab DNA which is the case whenever there are more than two alleles at a locus. This means that at that locus there is a DNA of another person other than the accused. The mixture result was in respect of the DNA obtained from the vaginal swab of the victim. She went on to say that it may very well be that 13.2 was from the victim herself for the simple reason that the vestibule swab or sample was taken from an intimate part.

[41] The DNA extraction process at the laboratory which is a DNA analysis on the vaginal swabs includes trying to remove all the female DNA. This is not always successful resulting in the result being a mixture but sometimes they do end up with a single male profile. If the DNA from the swab is a mixture they then check to see if in all of the alleles, all of the DNA from the suspect is represented in that mixture. It is only when the complete DNA from the suspect is represented in all the loci that the suspect is included in respect of the swab from the victim.

[42] Her conclusion therefore was that the DNA result of the reference sample H. Dyosi 15DBAJ4875 can be read into the mixture DNA result on the swab vestibule PA4000987435. The most conservative occurrence for the mixture DNA result on

the swab vestibule PA4000987435 for all the possible contributors is one person in every 1 104 trillion people.

[43] Under cross examination she conceded that it is possible that 13.2 can be a male allele. However, she went on to say that it being only one allele she would expect it to be from the victim's intimate part. She added that in any event the suspect's DNA is also present even in that marker with an unknown allele.

[44] A number of other state witnesses testified in respect of each of the charges. Documentary evidence and certain admissions were handed up by agreement. It would, therefore, serve no purpose to summarise all of this evidence as it was never disputed or challenged. Most of it related to crime scene visits by police officers and the collection of exhibits and the taking of samples which were later analysed at the forensic laboratory. The state thereafter closed its case and the accused testified in his defence.

The defence case

[45] The accused started his evidence with a bold assertion that he never committed any of the offences for which he was charged. He knew only two of the victims being N[...] Q[...] and N[...] N[...] being the deceased in counts 3 and 4 and counts 6 and 7. He testified that he and N[...] stayed in the same locality. He had a love relationship with N[...] and that relationship never stopped until she died.

[46] On 05 June 2015 he was at work at N[...]’s place when three police officers arrived. They asked him for his cell phone and he told them that it was being charged. Mr Nzube took it and said that was the cell phone they had been looking for. They thereafter took him to Lady Frere police station. On their arrival there at

the police station they assaulted him asking him why he killed N[...]. He told them that he did not kill N[...]. They asked him where he got his cell phone from and he told them that he got it from Bhabhu. He was taken to Bhabhu where Mr Nzube asked Bhabhu if he knew him and Bhabhu said he did not know him. He then said to Bhabhu that he was the one he had sold a cell phone to. Bhabhu said he did not sell cell phones, he was merely fixing them. He then asked Bhabhu about the cell phones which had price tags in the glass counter. Bhabhu then said he did not sell fake cell phones.

[47] He testified that he had seen the cell phone that the police were interested in from that glass counter and had bought it for R300.00 from Bhabhu. However, he never got a receipt. Bhabhu had lied when he testified that he was not selling any cell phones. He was arrested on 5 June 2015 and he had had that cell phone for about a month at the time of his arrest. When he bought that cell phone he did not check its IMEI number as all he wanted was to buy a cell phone as his other phone had a problem. He could not dispute that the cell phone which he said he bought from Bhabhu belonged to N[...].

[48] They left Bhabhu's shop and returned to the police station. He was thereafter taken to a hospital in Queenstown. When they arrived at the hospital they were attended to by a nurse, Miss Mpatheni who took buccal samples from him. The nurse was assisted by the police officers in sealing the buccal samples who then showed him that they were sealed. He disputed Miss Mpatheni's evidence, the nurse and the police's evidence that police did not assist her in sealing the buccal samples.

[49] He also disputed Ms Mpatheni's evidence that she only took three buccal samples from him. After the samples were taken he was taken back to the police

station. He testified that he did not know how his DNA got to be linked to the rape and murder victims and complainants. He did not rape any of them and he did not go to Phumla Mqeshi locality.

[50] On the date on which N[...] was raped and killed, he did not go to Ngcuka Mountain where she was found dead. On 21 July 2014, the date on which A[...] O[...] T[...] was raped near Lady Frere Day Care Centre he was not there. On 15 May 2015, the date on which N[...] was raped and killed at Ngcuka locality he never went there. He only heard that N[...] was found there. On 12 April 2014 the date on which Buyelwa Veyi was raped and killed at Ngcuka locality he was not there. However, he was present when her body was removed as he stayed in that locality. On 9 January 2015 the date on which N[...] S[...] J[...] was raped and killed at Phumla Mqeshi locality he never went there.

[51] Under cross examination he confirmed that before his arrest he resided at Ngcuka locality and he was born there. He knows Phumla Mqeshi locality and it is about 10km from Ngcuka locality. On 7 April 2012 the date on which Ms Angelina Fose was attacked and raped he did not remember where he was but normally would be at home. He saw A[...] F[...] for the first time when she testified in court. He never had sexual intercourse with her. He did not know how his DNA was found from a swab that had been taken from her cervix. He, however, could not deny that his DNA was found from that swab.

[52] He confirmed that he knew N[...] N[...] as they had a love relationship. They had that relationship for about a year or a little bit longer than a year from 2013 to 2014. They were in a sexual relationship until she died. When it was put to him that N[...] died or her body was found on 7 December 2012 at Ngcuka Mountain in Lady

Frere he testified that he was not sure about the period in which they were in a relationship. The last time he saw her was on the day she was killed and he had sex with her. He was still wondering how his DNA was found on the cervical and vaginal swab of A[...] O[...] T[...] who was raped on 21 July 2014 near the Lady Frere Day Care Centre as he did not rape her.

[53] He had known N[...] Q[...] for a long time. He had no relationship with her. He could not dispute that his DNA was found on her pants.

[54] He did not know B[...] V[...] and he was not in town on the day she was last seen alive. He heard when the evidence was given that his DNA was also found on her genitalia. He also did not know N[...] S[...] J[...] whose body was found on 9 January 2015 at Phumla Mqeshi locality. He never met her as he did not even know her. He did not know how it is that his DNA was found on her vestibule swab.

[55] He testified that he did not know N[...]’s cell phone and therefore could not dispute that it is the one that was traced to him through the IMEI number. He heard from sergeant Nzube that the phone which he said he bought it from Bhabhu was N[...]’s cell phone. He confirmed that before his arrest he had had that cell phone for about a month. It was put to him that N[...] went missing on the 15 May 2015 and he was found in possession of the cell phone on 5 June 2015 which is about three weeks. He said he did not know when he brought the cell phone and the time line that he gave was just an estimation. He also confirmed that he was not given a receipt when he bought the cell phone from Bhabhu. He was surprised that his DNA profile was also found in her and she had also been killed. He said he was also confused about the fact that six different women who had been raped on different days were found with his DNA.

[56] After the evidence of the accused the defence closed its case without calling further witnesses.

The analysis of the evidence

[57] The evidence against the accused is circumstantial. The state had no direct evidence of anyone having seen the accused person committing any of the crimes for which he was charged. Most victims in this case were raped and killed. Even the victims who did not die, A[.] F[...] and A[...] O[...] T[...] did not see the person who assaulted and raped them. Therefore there was no direct evidence.

[58] In respect of each rape and murder victim swabs were taken from their private parts and certain items of clothing found at crime scenes for DNA analysis. Initially when the five victims, A[...] F[...], A[...] O[...] T[...], who were raped but were not killed, N[...] N[...], B[...] V[...] and N[...] S[...] J[...] who were raped and killed there was no suspect and therefore the DNA collected could not be compared with any suspect's DNA.

[59] It was the rape and the murder of N[...] Q[...] that linked all the other five cases through the DNA. The evidence of the state is that N[...]’s father had bought her a cell phone from Jet Stores. He had kept the box which came with that cell phone at home. When he came back from Gauteng where he worked he told the police that he had bought N[...] a cell phone which was never found with her when her body was found at Ngcuka Mountain. The police used the IMEI number found on the box of that phone to trace that phone’s activity. They established that that phone was being used with a different sim card.

[60] Further investigations led to the accused and that phone was found in possession of the accused person. He claimed to have bought it from Mohammed Shafique (Bhabhu). However, Bhabhu denied that he ever sold the said phone to the accused. His evidence was that he had a cell phone repair business in town in Lady Frere. He, however, did not sell any of the cell phones that he repaired and did not sell any cell phones at all.

[61] That led to the arrest of the accused from whom a buccal sample was taken. That buccal sample was compared to the male DNA found in the swabs taken from N[...] and it was a positive match. The accused's DNA also had a hit with other male DNA found in other victims of crimes being rapes and murders in this case. This necessitated a confirmation sample to be taken from the accused and the evidence of the state is that the DNA of the accused was found in the swabs taken from all the victims of rape and murder in this case.

[62] The evidence of the accused amounted to nothing more than his denial that he is the person who raped and killed the deceased and raped and assaulted two other victims in respect of the rape and murderous crime spree. He claimed to have had consensual sexual intercourse at his homestead with N[...] N[...] whom he said was his girlfriend, during the day, on the very day of her rape and murder. He also testified that having been in a relationship with her for more than a year, nobody, at least not from his side knew about their relationship. There were two reasons for this, the first one was that it was a secret love affair as he had a love relationship with one Kholeka. Secondly he had no close friends who knew about this relationship. He basically was the only one other than the deceased herself who knew about their relationship.

[63] My assessment of the evidence is that the accused lied about a love relationship with N[...] which never existed. He also lied about the consensual sexual intercourse which he claimed happened during the day on the day in which N[...] was killed. He was very strangely unable to give details about their love affair which he conveniently said nobody knew about it. I accept the evidence of the state that N[...] N[...], like all the other victims was raped. In respect of all the other victims of rape and some were subsequently murdered he made no attempt to challenge the DNA evidence which linked him to all those victims, all of whom had been raped and some of whom were also murdered after being raped. His evidence was so improbable as to be false and an afterthought. The same applies to his evidence about how he got to be in possession of the phone belonging to N[...] which was found by the police in his possession three weeks after she was raped and killed. I must emphasize that his DNA was also inexplicably found in the case of N[...].

[64] I must point out that all the chain evidence led by state witnesses from all the crime scenes and from all the victims was not questioned or called into doubt. A number of state witnesses were called who gave evidence about the collection of DNA samples from all the victims of these crimes and various crime scenes. The chain evidence from each victim and crime scene was accounted for through proper procedures that were painstakingly and vigorously observed until that evidence was scientifically analysed by appropriately qualified and experienced DNA analysts. All that process having been observed the results of the DNA analysts about the DNA samples taken from all the victims all came to the same conclusion implicating the accused. Having listened to all the witnesses of the state about the collection and preservation and transportation of the evidence to the final DNA forensic laboratory in Cape Town where it was analysed, was handled with great care and integrity.

This explains why the accused did not and I add could not challenge that evidence on any cogent basis.

[65] Mr Gxaba, counsel for the accused conceded, correctly so, during argument that there was no challenge mounted by the accused against the manner in which the chain evidence in this case was handled. There was also no challenge to the DNA forensic analysis evidence of the DNA analysts who analysed the DNA samples collected from the accused and the victims.

[66] In *Bokolo v S*¹ the court pronounced decisively on how DNA evidence should be assessed and dealt with in our courts. 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 a 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 there, is circumstantial evidence. The weight therefore depends on a number of factors. These include:

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

[19] Paragraphs (i) and (ii) speak for themselves. Analysts provide interpretations of electropherograms referred to in paragraph (iii). The weight of such expert opinion (and of conflicting opinions) depends on the extent to which the opinions are founded on logical and cogent reasoning.

[20] If the STR profile of an accused person in fact differs from the profile retrieved from the sample taken at the scene, even in respect of only one allele, the accused person must

¹ *Bokolo v S* 2014 (1) SACR 66 (SCA)

be excluded as a source of the crime scene DNA. However, the converse is not true. Because only a limited number of STR loci are analysed, an STR profile cannot identify a person. Therefore the weight to be attached to evidence of an STR profile match or inclusion in the first place depends on the probability of such a match or inclusion occurring in a particular population. Without such evidence the STR profile match or inclusion means no more than that the accused person cannot be excluded as a source of the crime scene DNA.

[21] If the profile in question may be found in many individuals, a match between the profile of the accused person and the crime scene DNA will have little or no probative value. This is of particular importance where the crime scene DNA is a mixture, which increases the likelihood that the profiles of other members of the population can be read into the mixture. On the other hand an extremely rare profile will strongly point to the involvement of the accused. This essential component of DNA evidence is usually presented in the form of statistical analyses of a population database. This is the complex topic that does not in this case require further elaboration than the following general remarks.

[22] First the more loci are included in the profile the less chance there is of another person adventitiously fitting the profile. Second, statistical calculations of this nature generally make use of the product rule. This rule postulates that the probability of several things occurring together is the product of their separate probabilities. It calculates the numerical probability that a particular profile may occur in a population or, in its alternative form, the numerical probability that a person randomly chosen from that population will possess the same genetic profile. The important point is that the results of these calculations are not absolute.

[23] This brings into play the other evidence in a case. I cannot conceive of a criminal case where there is absolutely no other relevant evidence or evidentiary material. This may range from direct eye witness evidence implicating the accused, to circumstantial evidence as mundane as the proximity of the home of the accused to the scene of the crime. This may of course also include evidence pointing to the innocence of the accused. In the final analysis this evidence determines whether the guilt of the accused has been proven beyond reasonable doubt or not."

[67] The evidence of the state that the deceased were raped and killed and the two complainants who were not killed were assaulted and raped was never disputed. All that the accused was saying was that he was not the person who committed those

offences. In his evidence he made no serious attempt to dispute or put into doubt the evidence of the state.

[68] All the places in which the offences more committed were well known to the accused which were all within close proximity of his homestead. All he said was that he was never in any of those places on those days during which the crimes were committed. It is true that there is in fact no evidence by the state that he was there on those days or at any time during which those crimes might have been committed.

[69] Our law requires that all the evidence must be accounted for and considered together. In *S v Van der Meyden*² the court stated the legal position in this regard as follows:

“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 is entitled to be acquitted if it is reasonably possible that he might be innocent. These are not separate and independent tests but the expression of the same test viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward, might be true. The two are inseparable, each being the logical corollary of the other. In which ever form the test is expressed, it must be satisfied upon consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt and so too does it look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.”

Conclusion

[70] On the conspectus of all the evidence in this case. I have come to the conclusion that the state has proved the guilt of the accused beyond reasonable doubt. The evidence of the state against the accused was overwhelming. I am

² *S v Van der Meyden* 1999 (2) SA 79 (WLD)

satisfied that it is the accused who assaulted, raped and in many cases killed the victims of those crimes. The evidence of the state that his DNA profile was found in the swabs obtained in respect of the different crimes in this matter corroborated each other. That evidence by the state could not be gainsaid by the accused in any meaningful way.

[71] In the result the accused is found guilty of all the charges preferred against him in the indictment.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the State: A. GOVENDER

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Instructed by: LEGAL AID SOUTH AFRICA

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Heard on: 15 July 2019

Delivered on: 17 July 2019

