

IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION: MTHATHA]

CASE NO. CC 06/2018

In the matter between:

THE STATE

VS

XOLISA SIYEKA

ACCUSED NO. 1

MNCEDISI VUBA

ACCUSED NO. 2

JUDGMENT

JOLWANA J

Introduction

[1] The accused were charged with the offence of rape in contravention of section 3 read with section 1, 56 (1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. It is alleged that upon or about the 02 September 2017 the accused did unlawfully and intentionally have sexual intercourse with a female person, to wit, S Q (S) without her consent.

[2] The prosecution did not make an outline of its case. However, in its summary of substantial facts in terms of Section 144(3) (a) of Act 51 of 1977 annexed to the indictment the state's case is summarised as follows:

Summary of substantial facts

- "1. On the 2nd of September 2017 the victim and her friends were enjoying themselves with alcohol.
2. At about 01:30 the victim's friends left the home where they were to another home to continue enjoying themselves.

3. The victim was left alone with accused 1 and accused 2 and Z S, as she was sleeping due to the fact that she was under the influence of alcohol.
4. The complainant was then raped by accused 1, accused 2 and Z S.
5. Her friend witnessed the incident and reported it to the victim's mother.
6. The victim's mother came to the room where the victim was sleeping and witnessed accused 2 having sexual intercourse with the victim.
7. Z S, accused 2 and accused 1 respectively, advanced towards the victim's mother to assault her and they were subsequently stabbed by her.
8. The victim was then taken away by her mother and the police were then summoned.
9. Accused 1 and accused 2 were taken for medical treatment and were then placed under arrest, on 2nd of September 2017.
10. At all material times in committing this offence, the accused acted in furtherance of a common purpose."

Plea explanation

[3] Both accused pleaded not guilty to the charge. The plea explanation in respect of accused no.1 was that he denied raping S. On that day he drank liquor and on feeling drunk he went to sleep in the room in which the incident took place. He was awoken from his sleep by being stabbed by the victim's mother and tried to run.

[4] Accused no. 2 also denied raping Siphokazi. His plea explanation was that he was called to the scene by N who said he was being called by the deceased, Z S. Whilst waiting to talk to Z, N borrowed his phone to call S's mother. Whilst still waiting S's mother arrived, lit him with a torch and stabbed him once. He managed to run to his home.

[5] It was submitted on behalf of both accused that blood and buccal samples were taken from them for purposes of DNA analysis. The results excluded both of them.

Evidence for the prosecution

[6] The state called N N J (N) to testify. Her evidence was that she currently stays at Uniford in Queenstown but before that she stayed for about a year before the incident at Zwartwater in Lady Frere, the same locality in which both accused, Z and S stayed. Therefore she knew all of them very well.

[7] N testified that on the 01 September 2017 Siphokazi was at her home, the M homestead with N, Z, Z (accused no.1's father) F (Z's mother), M, accused no.1 and

accused no.2. They were drinking autumn harvest crackling and viceroy brandy. However, between 20:00 and 21:00 S who is F's daughter chased them away as she wanted to sleep. They then moved to Zamide's bedroom which is in a four roomed house adjacent to the M homestead. M did not go to Zamide's bedroom, he went to sleep instead. That evening N drank only one tot of brandy.

[8] N left the others in Zamide's bedroom to see her boyfriend who was waiting for her at a corner near the four roomed house. She returned after about 30 minutes or so later and found accused no.1 quarrelling with his father Z as a result of which accused no.1 stabbed Z who then left. N also left.

[9] Siphokazi went to sleep in a mattress that was in the kitchen in the same four roomed house. N left S sleeping there to take F to the M homestead where she stayed which is near to the four roomed house.

[10] When N returned she found accused no.2 "fingering" S who was sound asleep in the mattress in the kitchen. S's trousers were open, accused no. 2's hand was under her trousers and his fingers were in S's vagina. When she left earlier S had her jeans, tights and panty on and properly zipped and buttoned. N told accused no.2 to stop what he was doing and he stopped. During all of this S was fast asleep and was not aware of what accused no.2 was doing as she was drunk.

[11] Thereafter, N took a bottle of the autumn harvest crackling to F in the M homestead. She returned to Z's bedroom and she and Z moved S from the kitchen and put her on a base bed in Z's bedroom. At this stage everybody had gone except herself, S, accused no.1 and accused no.2. She covered S with a blanket and left to see her boyfriend again outside. At this stage S was alone in the bedroom, accused no.1 and accused no.2 were in the kitchen although she could not recall what they were doing.

[12] After spending about an hour with her boyfriend N went to the M homestead where she stayed to sleep. However, before going to sleep she went to check on S in Z's bedroom where she had left her sleeping on a base bed. She found accused no.1 having sexual intercourse with S on the bed. Accused no.1 was on top of S and was undressed. S's eyes were closed and she was crying. Her pants had been pulled down to her knees together with her tight and panties. Accused no.1's

trousers were also on his knees. He was making an up and down movement on top of S who was lying on her stomach.

[13] N pulled accused no.1 away from Siphokazi and as he moved away she could see his penis. Accused no.2 and Z were watching and did stop accused no.1. The house had electric lights but only Z's bedroom where S was sleeping had lights on. She tried to wake her up and even poured water on her. Her eyes were open but could not stand on her own. She wanted to take her to the M homestead. However, S was too drunk and she therefore put her on the bed again as she did not know what else to do.

[14] Z and accused no.1 were in the bedroom and accused no.2 was at the door. N pulled up S's panties, tight and trousers, zipped and buttoned her trousers and covered her with a blanket. N left for the M homestead to sleep leaving S with accused no.1, accused no.2 as well as Z.

[15] However, she could not fall asleep and decided to return to Z's bedroom. She found Z having sexual intercourse with S who was lying on her back with Z on top and making an up and down movement with his penis in her vagina. Accused no.1 and accused no.2 were watching and did nothing to try to stop Z. When she intervened telling them that what they were doing was wrong, accused no.1 wanted to hit her and she took a stick from accused no.2 to hit him. She and accused no.2 hit accused no.1 and they were stopped by Z. N tried to wake S up but she did not wake up.

[16] She fastened Siphokazi's trousers again. She was assured by Z that they would not do anything to her. She went to the M homestead to ask for help in taking S home. She reported what had happened but no one was paying any attention.

[17] N returned to Z's bedroom and when she arrived accused no.1 closed the door before she entered. She peeped through the holes on the door and saw accused no.1 having sexual intercourse with S. Accused no.1 stood up from the bed and cut off the electric wires to cut off electricity. As a result she could no longer see what was happening inside.

[18] N then left to call her cousin L from the M homestead and they both came to Zamide's bedroom. They tried to open the door. She thought a sofa must have been

pushed to the door so that it could not open. She could feel that something was blocking the door. L suggested that they should go to call S's mother to come and fetch her. They went to S's grandmother's homestead. S's grandmother took them to M so that M could call Siphokazi's mother as they all did not have airtime.

[19] M phoned S's mother who said she was coming. L left to look after her baby. S's mother arrived with the sub-headman and other people. Before they reached the four roomed house they had left S in with Z, accused no.1 and accused no.2 they could hear S screaming. S's mother asked her to show her Z's bedroom. The other people were outside while others were in the kitchen.

[20] S's mother pushed Z's bedroom door and entered. She entered as well. They both used their cell phone torches to light. S was lying on her back while accused no.1 and Z were holding her legs. S was crying. When they became aware of their presence they jumped off the bed and started running while S's mother was stabbing them.

[21] N was pushed away by accused no.2 who got out of the room and jumped out of the window of the other room. N saw accused no.1 on the door way of the other room and she hit him and pulled him on to the bed in the other room. N returned to Z's bedroom and found him lying behind the door bleeding and there was blood on the floor.

[22] They went to P's homestead to wait for the police. The police and ambulance arrived and she made a statement to the police. She denied that accused no.1 was sleeping and was woken up from his sleep being stabbed by S's mother. She denied that she had called accused no.2 saying Z wanted him-she said accused no.2 went to that house to drink. She denied that accused no.2 was just stabbed by S's mother's while waiting for Z in the kitchen.

[23] Under cross examination she testified that the M homestead in which she stayed is her paternal aunt, F's homestead. She confirmed that at some stage other people left and only Z, accused no.1 and accused no.2 remained with S and herself. She denied that she ever told accused no.2 that he was needed by Z. She denied that she was drunk and said she had come back from school. She disputed both

accuseds' versions. She testified that she could not remember how many times she went away and came back to find the accused raping S.

[24] When she went to report what was happening in the M homestead she found her grandfather, F's husband drunk and he is an old man. Her boyfriend did not want to get involved. She testified that when S's mother got to Z's bedroom and saw what the accused and Z were doing she asked them what they were doing. They jumped off the bed and were stabbed by S's mother when they tried to run.

[25] When certain inconsistencies between her evidence and the statement made by S's mother were pointed out to her she insisted on her version and remained unfazed. She testified that she disagreed with the police sketch of the four roomed house because in the police's drawing the house has one door inside whereas it actually has three doors inside excluding the outside kitchen door. She proceeded to make her own drawing. When her drawing was shown to the accused they confirmed the correctness thereof as against that of the police.

[26] The next state witness was N T Q, (S's mother). She testified that Siphokazi is her daughter but stays with her mother in the same locality of Zwartwater. On 02 September 2017 she was at her homestead asleep when she was woken up by a phone call at 01:13 in the morning. It was her mother at the other end of the phone who told her that N and L were at her homestead to tell her that S was being raped by some young men.

[27] She called a member of the Police Forum, one T B to ask him to call the police. However, he was on voice mail. Because it is dangerous in the area with some naughty young men making it unsafe to walk at night, she armed herself with a knife which she put in her pinafore. She went to the sub-headman, Mr Malibongwe Ntshetshe (sub-headman) who stays near her home. He said he was coming with her.

[28] As they continued walking now having been joined by L and S M, she received a call from N telling them to hurry up. When they got close to the homestead in which N had been waiting for her, N came out with T F. The sub-headman suggested that they should wait for the police. She refused after being told by N that S had been crying since about 22:00.

[29] From about 100m away she could hear S screaming from the four roomed house. When they eventually arrived she asked S, L and T to monitor the windows. The sub-headman had not yet arrived as he had turned away to buy airtime. She asked N to show her the room where S was. With her phone torch on she proceeded to the room from which S's scream came. N had opened the kitchen door for her. The bedroom door was not closed.

[30] When she entered the bedroom with her cellphone providing light she could see Z, S, accused no.1 and accused no.2 all on the bed. Accused no.2 had lifted S's buttocks with his penis inside her buttocks raping her. She asked them what they were doing. Accused no.2 moved away from S and she saw his penis. When she entered accused no.1 was not doing anything at that stage but his trousers and underwear were on his knees and he was kneeling behind accused no.2.

[31] Accused no.2 jumped off the bed first and came straight at her. She drew her knife and stabbed him once as he passed her. Z came and tried to hold her and they struggled and she fell on her knees and he also fell. As Z was standing up she stabbed him while still on her knees. In the meantime accused no.1 was dressing up. As accused no.1 came she met him halfway and stabbed him several times. He ran into another room and fell on his face on the bed. She was not sure where N was when all of this was happening as she was very emotional. She got out of the house leaving S on the bed.

[32] S was non responsive when she called her name. She would repeat her own name after it was called. Only her upper body clothes were on her with the lower body being naked. She reported to the members of the community who were there what was happening. They went into the house to fetch S who could not even walk. T lent S her dress and they carried her out of the house. They went to wait for the police at a nearby homestead. Police arrived and took her and S to Glen Grey Hospital where S was treated and discharged. They were both taken to Dubeni Police Station from which she was taken to Komani police cells. S was to be taken home by the police. S did not know what had happened to her and at that time she did not tell her. It was only when she appeared in court on Monday that she told her what had happened. She knew both accused as well as Z who died that day. She

knew accused no.1 as a very troublesome young man and had encounters with him before.

[33] She disputed accused no.1's version that he was sleeping in that room and was awoken from his sleep being stabbed by her. She also disputed accused no.2's version that he was waiting in the kitchen for N who had gone to call S's grandmother when she entered and stabbed him. She disputed the version presented by both accused as being untrue. Her version did not change during cross examination.

[34] The state then called the complainant, S to the witness stand. She testified that on the 01 September 2017 she was in town with her friend N where they were drinking savannah. They returned from town at about 13:00. They later went to the M homestead at about 19:00 where they found Z, S, N, Z, Z's mother F, N, accused no.1 and accused no.2. They were drinking viceroy brandy and wines. S and N did not drink.

[35] The viceroy was being taken neat. After S chased everybody away from the M homestead they proceeded to Z's place to continue drinking. She was sitting on the bed as the drinking continued. She was also drinking and at some point she fell asleep. She was wearing pink panties and a pink brassiere, a brownish tight, blue jeans, a mohair jersey and beige pump shoes. She fell asleep with these clothes on.

[36] She was later woken up by N who wanted her to sleep at her home while she wanted to go and sleep at her own home. She woke up and left. She was followed by accused no.2 who assaulted her with a stick and forced her to return to Z's bedroom where drinking was taking place. She did not know what happened thereafter until she woke up in hospital. She did not know how she got to hospital. Police later took her from hospital to the police station. When her mother returned from prison she told her what had happened. She did not give her consent to Z, accused no.1 and accused no.2 to have sexual intercourse with her.

[37] Under cross examination she denied that she had a love relationship with Z. She testified that she could not possibly have a love relationship with Z as he was her cousin. When it was put to her that accused no.1 and accused no.2 denied raping

her she said she did not know as she woke up in hospital. She did not recall everything that happened that night because she had consumed alcohol.

[38] The state called Dr Tyhala who testified that she was on duty on 02 September 2017 and examined Siphokazi. Exhibit "C", the J88 medico-legal examination report was completed by her. Her clinical findings were that S had been sexually assaulted, had no memory of the event, was crying and anxious, had slight swelling on the left periorbital area and reddened eyes. Her conclusions were that S had been sexually assaulted although there were no vaginal or cervical injuries. She had abrasions on the posterior fourchette, she had a skin tag at 8:00 of the perineum.

[39] The other state witness, Captain Makhosandile Mkula's evidence did not take the matter any further. The state read into the record exhibit "E" being an affidavit in terms of section 212 of the Criminal Procedure Act 51 of 1977. It is a Biology Report compiled by a Forensic Analyst and Reporting Officer, Warrant Officer Luthando Lukhanyo Tiya. The results excluded both accused. The state thereafter closed its case.

Evidence for the defence

Accused no.1

[40] Accused no.1 testified in his defence. He testified that on the 01 September 2017 he spent the whole day at his home and at about 16:00 he went to the M homestead. On his arrival there he found F, S, Z, N, S and Z. They were consuming alcohol which was autumn haverst crackling and brandy except Si who was not drinking. He joined them in consuming alcohol and he got drunk. He denied that N only drank one tot of brandy and said she was also partaking of every available alcohol.

[41] When he felt drunk he took a bottle of brandy which had a small amount of liquor and went to Zamilé's bedroom. He finished off the little brandy and fell asleep. He woke up being stabbed, for no reason, by N, S's mother. She stabbed him so much that he had several stab wounds and his intestines were exposed as a result of the stabbing. He tried to run but fell inside the house although he was not sure in which

room he fell. He lost consciousness and regained it in hospital. He spent about a month at Frontier and Glen Grey Hospitals.

[42] He denied raping S or assisting anybody to rape her. He confirmed that indeed he may have been found in Z's bed as he went there to sleep after feeling drowsy but denied taking part in raping S.

[43] Under cross examination he testified that Z and accused no.2 were friends and he had been invited to the M homestead by Z. He went there to drink as Z had been in town and had said he was going to buy liquor from town. He confirmed that indeed N was there at the M homestead. He testified that he must have consumed about 10 glasses of autumn harvest crackling and 7-8 tots of viceroy brandy.

[44] He went to Z's room to sleep because that is what he did when he went to drink at the M homestead. Z's bedroom was the only room with lights on. He slept on a bed which was a base and a mattress that was covered with blankets. He slept on top of the blankets. When he went to sleep the lights were on and when he woke up being stabbed by S's mother the lights were off. She lit him with a torch asking them what they were doing. He did not see any other person on the bed or in the room as he was trying to escape. He confirmed that photo 6 of exhibit "B" depicted Z's bedroom and that it has no mattress.

[45] He testified that when he slept there the mattress was there with a blanket covering it. He confirmed that photo 30 depicted a kitchen with the mattress and he did not know when the mattress was taken there. When he slept in Z's bedroom before he was woken up by being stabbed by S's mother it had a base with mattress and covered with a blanket. He did not know who removed the mattress.

[46] He testified that S's mother just arrived and stabbed everyone who was in that room. When asked who was everyone he said it was accused no.2 and Z who were said to have also been stabbed by S's mother.

Accused no.2

[47] Accused no.2 also testified in his defence. He testified that at about 21:30 on the 01 September 2017 he went to a shop at Z's homestead (the M homestead) to buy airtime. He met N there at the shop and she asked him if he had met Z as he was

looking for him. She then said they should go together to Z's place – the four roomed house. They entered at the kitchen and N said she was going to call Z from his bedroom. She came back saying that Z said he was coming. He did not want to stay so he reminded N to call him again. She went back to Z's bedroom and again returned saying Z said he was coming and that he must wait.

[48] He waited for a while and he again told N to tell Z that he was leaving. She then said these people are kissing and that he must go and tell him himself that he was leaving. He then told her that he does not enter another homestead's bedroom. She went back to Z's bedroom and came back telling him that Z and S were kissing and that accused no.1 was also in that bedroom. N also said that they had switched the light off and that S was starting her things.

[49] At that stage N asked him to lend her his phone so that she could call S's mother to come and fetch her. He gave his phone to N. She asked him for S's mother's phone number which he did not have. She then said she would ask for it from the people on the shop side. She came back with L saying she did not get the phone number.

[50] N and L left saying they were going to call S's mother themselves. He told her to take his phone with her so that if they met anyone who knew S's mother's phone number they could get it and phone her. She came back without L but with S's mother. He was still in the kitchen which had no lights on.

[51] He was in the kitchen next to the door when they arrived. S's mother lit him with a phone torch and stabbed him on the back. He asked her why she was stabbing him. She reversed and tripped on a chair that was in the kitchen. He exited through the kitchen door after being stabbed by her and went home. He told his younger brother that he had been stabbed and his younger brother said he was going to call an ambulance.

[52] The ambulance arrived with accused no.1 and they were both taken to Frontier Hospital where he was admitted for six days. He testified that N was drunk but not so drunk that she would not know what was happening. He disputed most of N's testimony and said he never entered Z's bedroom as he does not enter another homestead's bedroom. He also disputed all of S's evidence and denied "fingering"

her or having sexual intercourse with her. He denied having sexual intercourse with S anally as her mother had testified or at all.

[53] Under cross examination he testified that when he arrived at the four roomed house in which Z stayed, he found N's brother T there with T, M, M's friend and N in the kitchen. He testified that Z and S had had a love relationship for six months when the incident happened. Before that S had a love relationship with Z's younger brother. This resulted in Z's mother assaulting S. It is important to note that this version was never put to any of the state witnesses nor did the accused mention it in his evidence in chief. The only issue that was put to S relates to her alleged love relationship with Z.

[54] He also testified that when N returned with S's mother he was still waiting in the kitchen with T, T, M, M's friend and N. This was also never put to N or S's mother. He also testified that the reason S's mother came there and stabbed him for no apparent reason is because they were not in good terms. This was also never put to N, S's mother and S when they testified.

The assessment of the evidence.

[55] There were five witnesses for the state. I will start with the last witness, captain Mkula and end with N, the first witness. Captain Mkula did not seem to have played a major role in the investigation of the case. His evidence largely related to placing the accused under arrest at Glen Grey Hospital. His evidence was more of a formal nature and as such was not relevant for purposes of proving the involvement of the accused in the offence.

[56] The evidence of Dr Tyhala who examined S established as a fact, that she was sexually assaulted. However, her evidence did not give any information as to who was involved in the commission of the offence. It also corroborates the evidence of S herself to the effect that she was drunk and did not know what had happened to her. In the J88 medico-legal examination report that Dr Tyhala completed, she, among other things, reports that S's mental health and emotional status was anxious, crying and unable to remember what had happened.

[57] On clinical evidence of drugs or alcohol, Dr Tyhala reported of "*alcohol ingestion yesterday 2017/9/1*". This also corroborates S's evidence that she had been drinking

and was drunk on the night in question. S did not try to pretend that she personally knew what had happened to her beyond what her mother told her. She did not try to implicate any of the accused.

[58] It is not in dispute that S was raped as N testified. It is not in dispute that Dr Tyhala made the findings that she did nor are her conclusions as contained in the J88 medico-legal report being challenged. All that the accused are saying is that they did not rape S and were not involved in the commission of the offence in any way whatsoever. Their version is that they never had sexual intercourse at all with S that night and they did not assist anyone to rape her.

[59] This brings me to the two witnesses whose evidence is that they saw S being raped by the accused and Z. One of the two witnesses is N Q, S's mother. Her evidence is that it was at 01:13 in the morning of the 02 September 2017 when she received a call from her mother that her child S was being raped by some young men.

[60] When she arrived at Z's bedroom to which she was shown by N, she saw accused no.2 raping the complainant anally. She also described what the position of each of the people in that room was and what was happening. However, her evidence is that only accused no.2 was raping S when she arrived. She stabbed accused no.1, accused no.2 and Z. Z succumbed to the stab wounds. That all three of them were stabbed by S's mother is common cause.

[61] The only dispute relates to why they were stabbed and in respect of accused no.2 whether he was stabbed in the kitchen or in Z's bedroom. Accused no.1's evidence is that he was asleep when he woke up being stabbed by S's mother. He has no real theory as to why she stabbed him nor does he know how she got there as he claims to have woken up being stabbed. However, he corroborated S's mother's evidence on being stabbed in Z's bedroom. This is the very same bedroom in which S's mother testified to having found him kneeling behind accused no.2 while the latter was anally raping S.

[62] Accused no.2 gave evidence of being aware how S's mother got there. His version is that he gave his own cell phone to N who together with L, were going to call S's mother to come and fetch S. According to accused no.2 S's mother found

him in the kitchen in the four roomed house in which Z stayed. She entered and stabbed him for no reason. He, however, corroborates N and S's mother's evidence that N went to call S's mother and she in fact came. N corroborates S's mother that she found the three, Z, accused no.1 and accused no.2 in Z's bedroom and at that time accused no.2 was raping S.

[63] This brings me to N's evidence. Put briefly her evidence is that on different occasions she saw each of the accused and Z raping S and this started with accused no.2 "*fingering*" her. She described the "*fingering*" as accused no.2 having inserted his fingers in S's vagina. It was never suggested that N could not have seen this happening for whatever reason. Accused no.2's case is simply that he could not have done this "*fingering*" and could not have raped S as he never even saw her that day. N did not know how many times she went away and returned to find one of the accused or Z in the act of raping S who was heavily inebriated and was not aware of what was happening.

[64] Mr Gxaba, counsel for both accused pointed out that N was a single witness in so far as the "*fingering*" and some of the alleged rape incidents which only she witnessed. I understood this to exclude the last incident which was allegedly witnessed by both N and S's mother. On this occasion it was N's and S's mother's evidence that they saw accused no.2 having inserted his penis in S's anus thus raping her in the presence of accused no.1 and Z.

[65] In my view, N's evidence was very clear, consistent and credible in her description of what she saw. She never deviated from her evidence in describing what she saw when she found either of the accused and Z raping S on those different occasions while others were not only in the room but were watching. On the last occasion her evidence is corroborated by that of S's mother. S's mother also gave very clear evidence about all of the accused, Z and S being on the bed with accused no.2 raping her. In N's evidence which is credible and remains unchallenged in any cogent way, she saw each of the accused raping S who was heavily drunk and crying and could not even stand or walk.

[66] Mr Gxaba pointed out the following five discrepancies in the state's evidence:

1. N had testified that she drank one tot of brandy which was poured out for her by accused no.2. On the other hand S had testified that N took one tot of brandy which she poured out for herself.

2. N said she covered S with a blanket on the bed and left her whereas S said N wanted her to sleep at her (N's) house while she wanted to go home, left going home and was followed by accused no.2 who beat her all over her body and drove her back to Z's place. N did not talk about S leaving and being beaten up by accused no.2 outside.

3. N said she went to call S's mother, they entered Z's bedroom and S's mother closed the door. She and S's mother had thier cellphone torches on. She observed Z and accused no.1 each holding S's legs while accused no.2 was raping S. In this regard S's mother's evidence was that when she entered the room she found accused no.2 having sexual intercourse with S anally while lifting her buttocks with accused no.1 kneeling behind accused no.2 next to the wall.

4. N was asked how many times did she go out and when she came back she found S being raped and she said she did not remember.

5. DNA evidence excludes both accused and this contradicted N's evidence of having seen S being raped by accused no.1 and accused no. 2.

[67] About the first point I am not sure why it is significant that N said her one tot was poured out for her by accused no.2 when S said N poured herself one tot. They both agree that she drank only one tot of brandy. The same applies to S's evidence of having tried to leave and was beaten up all over her body by accused no.2 who drove her back to Z's place. This is alleged to have happened outside. It may very well be that if it happened N did not see it as it happened outside at night.

[68] The third point is about accused no.1 and Z allegedly holding S's legs while accused no.2 was raping S as N described. N and S's mother agree that accused no.2 was having sexual intercourse with S when they arrived. This is also corroborated by Dr Tyhala who completed the J88 form and found peri anal abrasions and a skin tag at 8:00 position.

[69] The fact that N did not give the number of times the rape incidents occurred that night does not, in my view, derogate from her evidence of having seen both accused and Z having sexual intercourse with S on several occasions in the presence of others.

[70] Despite the criticism based on these four discrepancies I remain extremely satisfied with N's evidence and that of S's mother. I will deal with the DNA results later. I was similarly impressed by S owning up to having been drunk and not knowing what had happened to her beyond being told by others instead of trying to implicate the accused. Their evidence, in many ways corroborated each other in most material respects. There is also the independent evidence of Dr Tyhala that S was sexually assaulted. She testified that she might not have had vaginal injuries if her muscle were relaxed and was drunk and therefore not offering any resistance. I understood her evidence as being that the lack of physical vaginal injuries is not necessarily inconsistent with being raped.

[71] It is not without significance that most discrepancies that were pointed out by counsel for the accused did not relate to the rape incidents themselves. They related to peripheral issues like who poured brandy, the fact that N did not talk about S leaving or trying to leave and being turned back. The fact that S's mother talked about accused no.1 kneeling behind accused no.2 who was raping S from behind. Of significance is that they both said S was at that moment being anally penetrated between the buttocks by accused no.2.

[72] Also the fact that N could not remember the number of times she went away and came back to find either one of the accused or Z having sexual intercourse with S in the presence of others cannot and does not, in my view, derogate from her principal evidence of having seen each one of the three men having sexual intercourse with the heavily inebriated S who did not know what was taking place.

[73] None of these issues, inconsistencies or discrepancies affect in a material way the credibility of N as a witness. I remain convinced that she told the truth as did S's mother. If one has regards to the fact that the room was dark where all of this was taking place when S's mother arrived, the only source of light being the torches that N and S's mother said they were using, the number of people in that room which was Z, the two co-accused and S, honest mistakes are not unimaginable. Counsel for the

State Ms Govender referred to the case of *S v Mkohle* (unreported judgment (639/88) [1989] ZASCA 98 (7 September 1989)). In that case Nesdat JA had this to say:

“13. Contradictions per se do not lead to the rejection of a witness’s evidence. As Nicholas J, as he then was, observed in *S v Oosthuizen* 1982 (3) SA 571 (T) at 576 B-C, they may simply be indicative of an error. And (at 576 G-H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions their number and importance and their bearing on other facts of the witness’s evidence.”

The DNA report

[74] It was argued on behalf of the accused that their version that they did not rape S finds support or corroboration from the state’s own DNA report which excluded them. The report reads as follows:

“
BIOLOGY REPORT: DNA
LAB 531453/17; LAB 482648/17 & LAB 477207/17
GLEN GREY CAS 02/09/2017

AFFIDAVIT IN TERMS OF SECTION 212 OF THE CRIMINAL PROCEDURE ACT, 1977 (ACT 51 OF 1977) (as amended):

I, **LUTHANDO LUKHANYO TIYA**, declare under oath, in accordance with Section 212 subsections (4)(a), (6)(b) and (8)(a) of the Criminal Procedure Act, Act 51 of 1977, (as amended) as follows:

1.

I, number **5388843-0** am a **Warrant Officer** in the South African Police Services, at the Biology Section of the Forensic Science Laboratory, 47 Silwerboom Avenue, Platteklouf with telephone number 021 929 0071. I am a **Forensic analyst** and a **Reporting Officer**, and I am in the service of the State.

2.

2(a) I am in possession of a Bachelor of Science Degree majoring in Genetics and a Bachelor of Science Honour’s Degree majoring in Forensic Genetics, both obtained at the University of the Free State. Included as part of the above-mentioned course is molecular and cellular biology, which is relevant to DNA.

2(b) As of 29 March 2011, I have been attached to the biology Section of the Forensic Science Laboratory. Since that time I have undergone in-house training with reference to body fluid identification and DNA techniques, which has afforded me the knowledge and skills needed for forensic biological analyses.

2(c) In total I have approximately **twelve years’** experience in the biological sciences.

3.

During the course of my official duties on 2018-02-16, I received the case file pertaining to **GLEN GREY CAS 02/09/2017** from the access control location E1-30_WR locator at the Biology Section of the Forensic Science Laboratory.

4.

During the course of my official duties, I established the following from the samples that were subjected to DNA analysis system, by a process requiring skill in biology. The relevant results obtained via the DNA processing system, are given below:

4.1 No DNA result was obtained from the Condom, PA5001443683.

4.2 Not enough male DNA was obtained from the Cervix Swab 13D1AD5994.

4.3 The donors of the reference samples 13DBAC3640 and 16DBBZ8689 were excluded as the donors of the DNA on the Vaginal Vault Swab 13D1AD5994 and the Perineum/Perianal Swab 13D1AD5994.

5.

The case files and contents were in safekeeping for the duration of the investigation from date of receipt until completion.”

[75] I have a number of difficulties with this submission. DNA reports are not in and of themselves conclusive without more. It depends on a number of factors whether reliance can be placed on a DNA report such as the chain evidence which would show that a possibility of contamination is excluded and the conditions in which the evidence of the DNA was kept from the time it was procured to the time of testing. It cannot be that because the accused are excluded they therefore did not commit the offence. By the same token even in cases where the results are positive and implicate the accused, if the chain evidence is suspect and the integrity of its handling has not been proved to be of an acceptable standard such evidence cannot be used against the accused.

[76] I am fortified in this view by the sentiments expressed by Van der Merwe AJA in *S v SB 2014 (1) SACR 66 (SCA)* in which the learned Acting Judge of Appeal he had this to say:

“[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 therein, 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 this case”

[19] ...

[20]

[22] ...

[23] ...

[24] 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 proved beyond reasonable doubt or not."

[77] In this case both accused came with so improbable a version that it is false. Accused no.1 testified that he was sleeping in Z's bedroom when he was woken up from his sleep by S's mother stabbing him for no apparent reason. Accused no.2's evidence under cross examination is that he was in the kitchen with six other people when S's mother entered and stabbed him. He did not call anyone of these persons to support his version. This in circumstances in which his version agrees with that of N, namely she went to call S's mother to come and fetch S. It is N's version that when she returned with S's mother she found all three, Z, accused no.1 and accused no.2 with S in Z's bedroom with accused no.2 having sexual intercourse with S who was crying. S's mother entered and stabbed all three of them in Z's bedroom with Z being fatally stabbed. Even if N's evidence was, in some respects that of a single witness, especially as it relates to earlier incidents of S being sexually violated, I still find it extremely reliable and credible.

[78] In *Pistorius v S* 2014 (2) SACR 314 (SCA) the Supreme Court of Appeal cited with approval the case of *S v Sauls and Another* 1981 (3) SA 172 (A) at p180 C-H where Diemont JA said:

"In *R v T* 1958 (2) SA 676 (A) at 678 Ogilvie Thompson AJA said that the cautionary remarks made in the 1932 case were equally applicable to s 256 of the 1955 Criminal Procedure Code, but that the remarks must not be elevated to an absolute rule of law. Section 256 has now been replaced by section 208 of the Criminal Procedure Act 51 of 1977. This section no longer refers to "the single evidence of any competent and credible witness": it provides merely that

"an accused may be convicted on the single evidence of any competent witness".

The absence of the word credible is of no significance; the single witness must still be credible, but there are, as *Wigmore* points out, "indefinite degrees in this character we call credibility" (*Wigmore on Evidence* vol 111 para 2034 at 262). There is no rule of thumb, test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 758). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are short comings or defects or

contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean

“that the appeal must succeed if any criticism, however slender of the witnesses’ evidence were well founded”

(per Schreiner JA in *R v Nhlapho* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 546 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the existence of common sense.

The question then is not whether there were flaws in Lenox’s evidence- it would be remarkable if there were not in a witness of this kind. The question is what weight, if any, must be given to the many criticism that were voiced by counsel in argument.”

[79] As indicated above I am satisfied with the evidence of N, the eye witness to the commission of this offence. Even if one were to accept as being well founded, the criticism made by counsel for the accused regarding her evidence such imperfections do not change my assessment of her as a credible and reliable witness. In any event, as I understand the criticism, it is not that she contradicted herself in anyway whatsoever, either in a statement she made to the police against the evidence in chief as well as when she testified under cross examination. The criticism is that when her evidence is compared with that of S and her mother there are some discrepancies. Even that considered I am satisfied that her eye witness account of what happened that night is extremely credible and reliable.

[80] This brings me to the elements of this offence for which the accused are charged. Even on this point I can do no better than refer to the decision of the Supreme Court of Appeal in *Otto v The State* (988/2016) [2017] ZASCA 114 (21 September 2017) in which Plasket AJA said:

“[13] Rape is no longer a common law crime. It is now an offence defined by statute, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Section 3 of the Act provides:

‘Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”) without the consent of B, is guilty of the offence of rape.’

[14] The term sexual penetration is defined by s 1(1) to include any act which causes penetration to any extent whatsoever by ... (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person.

[15] In terms of s 1(2), consent, for purposes inter alia, of the offence created by s 3 means ‘voluntary or uncoerced agreement’. Section 1(3) provides that the circumstances in respect of which a complainant does not voluntarily or without coercion agree to an act of sexual penetration ... include, but are not limited to the situation ‘where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act’.

[16] The onus rests on the State to prove all of the elements of the offence of rape including the absence of consent and intention. This is so even where, as in this case, the version put to the complainant by the appellant's legal representative was a denial of any sexual contact with her. That false version makes the State's task a great deal easier, as does the fact that the appellant decided not to testify."

[81] It is common cause in this matter that S was so drunk that she did not even know what was happening to her. She testified to having woken up in hospital and had to be told what had happened to her. Clearly S could not have consented to sexual intercourse in that condition. In any event it was never contended that she did consent or that she could have consented. I can find no basis for the accused to have believed that she did consent even tacitly and it was never contended that she could have been able to give a tacit consent to sexual penetration.

[82] This brings me to the issue of sexual penetration. The accused did not dispute that S was sexually penetrated. The J88 form and its findings were not contested. I cannot see why an accused person whose defence is that he never had sexual intercourse with the complainant cannot contend that in any event the complainant was not penetrated based on the available evidence tendered by the state. Dr Tyhala's findings were not challenged and therefore her conclusions stand. These conclusions corroborate the observation of N who testified to having witnessed S being raped by both accused and Z. S's mother also testified to having seen accused no.2 having put his penis in S's anus.

[83] That the complainant was sexually penetrated is, as it must be, common cause on the facts of this case. The only issue for determination is who committed this offence. The answer to this question must be found in the evidence before the court taking into account the accounts of all witnesses for the state and the accused persons. Having considered all the evidence the court must determine whether the state has discharged its onus of proving the guilt of the accused beyond reasonable doubt as it is obliged to do.

[84] In restating this legal position I can do no better than refer to the salutary and authoritative sentiments eloquently expressed with precision by Nugent J, as he then was, in *S v Van der Meyden 1999 (2) SA 79 (WCD)*. He said:

"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 he might be innocent. (See, for example, *R v Difford 1937 AD 370* especially 373, 383. These are not separate and

independent tests but the expression of the same test when 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.”

[85] On the conspectus of all the evidence in this matter I have come to the conclusion that the state has proved the guilt of the accused beyond reasonable doubt. The evidence of the state considered together with that of the accused shows a misguided attempt by the accused to concoct a version that seeks to absolve them from taking responsibility for their actions by giving a false version of events. It is clear that they, at some point, must have agreed to sexually violate S’s dignity as a woman by striping her naked and taking turns to rape her while she was so drunk that she could not defend herself from the abuse

[86] Accordingly accused no.1 and accused no.2 are found guilty of raping S Q as charged.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the State: C. GOVENDER

Instructed by: NPA

MTHATHA

Counsel for the accused: K.M. GXABA

Instructed by: LEGAL AID BOARD

MTHATHA

Heard on: 05 December 2018

Delivered on: 11 December 2018