

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, EASTERN CIRCUIT, ERMELO)**

CASE NUMBER: CC 94/14

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

05/08/2015

A handwritten signature in black ink, appearing to read "Lamprecht", is written over a horizontal line.

In the matter between:

THE STATE

versus

BHEKIBUTHO VINCENT NXUMALO

JUDGMENT

LAMPRECHT, AJ (05/08/2015)

Introduction

[1] On 15 October 2008, between midnight and 01h00 in the morning, an unknown man whose face was covered with a balaclava and a scarf, by unknown means¹ entered the house of Ms J. C. D.² at [.....], Wesselton, Ermelo, while she and her two children were asleep. She and her [....] old baby was sleeping in one room while her [.....] old daughter KL D³ slept in another room. Ms D. woke up when the man shone a torchlight into her face, and after he had already taken her R46.00 in cash and a cellular phone that she had on her bedside table. He told her that he had a fire arm in his possession but she only saw a knife. He told her to follow him to the dining room and undress because he wanted to have sexual intercourse with her. She begged him not to do that to her as she had a very young baby with her. She begged him not to harm them and invited him to take anything he wanted from the house but to leave them alone. The man then left her room and closed the door. He went into the room of KL D and instructed her to follow him to the dining room and to undress so that he could have sex with her. She abided his instructions, also not to scream for help, because he threatened to kill her. In the dining room he raped her before he left. KL D then went to her mother's room and reported that there was a man in the house. Ms D. then told her to lie down and hope that they are not harmed. After some time, Ms D. went to look for help at the neighbours, who offered them place to sleep. KL D then reported to her that her private parts were painful and that she had

¹ After the incident no evidence was found of forceful entry to the house that was otherwise locked and the complainant thought that the only means of entry could have been through a duplicate or master key. She later found out that the key that she used, with serial number Y11, was a key that was quite commonly used by many persons. Instances of lock-picking are also not uncommon and, since there was no other signs of forced entry, the only way in which the man could have entered the premises was by the use of a master key or a duplicate key or by picking the lock.

² The first state witness.

³ The second state witness – now 16 years old.

been raped. The police were called and KL D was taken for medical examination and treatment at the hospital. The DNA of the accused was found on a swab taken from KL D's genitals during the examination and the examination revealed that her hymen had two fresh tears at the 5 o'clock and 7 o'clock positions with slight bleeding, which was consistent with forceful penetration of the vagina. KL D was severely traumatised by the incident and the ARV medicines that were administered to her to prevent HIV AIDS infection had a very negative effect on her physique. She no longer trusts any man, including her uncle and father and she does not even want to enter into any relationship with a boyfriend, although she is already sixteen years old today. She has trouble sleeping and coping with the incident and still needs to receive counseling.

[2] All of this became clear from the evidence available to the state, which was also tendered at the trial and which saw the accused charged with counts 4 (rape of KL D), 6 (housebreaking with the intent to commit a crime unknown to the state) and 7 (robbery with aggravating circumstances). At the commencement of the trial and after plea proceedings, the accused formally admitted in terms of section 220 of the Criminal Procedure Act 51 of 1977 (the CPA) that the contents of the J88 completed in respect of the Medico-Legal Examination of KL D⁴ were correct and also that the DNA reports were correct, namely, that it was his DNA that was found on the swab taken from the genital area of KL D during the examination. His plea explanation in terms of section 115 of the CPA is to the effect that he denied having committed any of the mentioned

⁴ Exhibit "E".

crimes and explained the presence of his DNA in the genitals of KL D on the following basis: He had a love affair with Ms D. and had consensual sexual intercourse with her, using a condom. Afterwards, so he averred during plea and cross examination of Ms D., Ms D. took the used condom and 'implanted' the semen therein into the vagina of KL D so that he could falsely be implicated with the offence.

[3] During the night of 7 April 2013, an unknown person entered the room of the deceased mentioned in count 1, T. M., an elderly lady who had been living there in the same house as Ms E. M.⁵ in Wesselton, Ermelo for the past [...] years. Ms M. heard a noise during the night as if something was being chopped. She woke up and went to the door to listen for any further noises. She could not hear anything further, especially from the room of the deceased, and she went back to sleep. The next morning she was awoken by a tenant at the back of the premises, informing her that the window to the deceased's room was open and that it appeared suspicious, because the single burglar bar in the window had been knocked out. She went to investigate. The window was indeed open and the room's door was locked from the inside. Due to the height of the window, she had to get onto a 20 litre drum standing there to peek into the room. She saw the deceased lying on the floor, naked, writhing and groaning sounds that sounded like 'He ! He !' . She could also see that the keys were hanging on the inside of the door, meaning that the door had been locked from the inside. The police were summoned and they entered the room through the window and unlocked

⁵ The third state witness.

the door so that Ms M. and others could dress the deceased for her to be taken away to hospital by ambulance.

[4] According to the J88 report in respect of the deceased,⁶ the contents of which were also formally admitted by the accused to be correct, the deceased presented with a swollen face and neck with scratch marks on the shoulders. The medical examination also revealed fresh bruises and tears to her genital area, which indicated that her vagina had been forcefully penetrated. There was also a whitish discharge from her vagina, a sample of which was taken for DNA analysis.

[5] A day or so later, the deceased died – Ms M. learned of her demise after three days. According to the post mortem report, which was also formally admitted in terms of section 220 of the CPA, the cause of death was ‘subdural bleeding right hyoid bone fractured’. The pathologist that did the post-mortem was called by the court at the closure of the state’s case in terms of section 186 of the CPA to clarify the exact mechanism of the cause of death as I deemed his evidence to be necessary for a just decision of the matter.⁷ Dr Anthonie Marthinus Krafft testified that the deceased had bruises on the right forehead with sub-cutaneous bleeding and also subdural bleeding in the same area. The hyoid bone is a horseshoe-shaped bone in the throat between the chin and the

⁶ Exhibit “D”.

⁷ In *Director of Public Prosecutions, Transvaal v Mtshweni* [2007] 1 All SA 531 (SCA) at paras [20]-[26] it was held that a trial court has a duty to call for such evidence to be presented if the court is not altogether sure what the expert evidence means in a particular case for a just decision of the matter. A failure to do so may, in appropriate circumstances, such as the current, even be regarded as an irregularity justifying a setting aside of the proceedings on appeal.

thyroid cartilage ('Adam's apple') and is not easily fractured. In a suspected case of murder, a fractured hyoid is strongly indicative of throttling or strangulation. In this case, however, the fractured hyoid, although indicative thereof that the deceased was throttled during an assault, did not cause the death. The death probably ensued as a result of the subdural bleeding that became too much for the brain to handle; and, although the breathing of the deceased would have been affected by the throttling and the fractured hyoid, that did not cause death in this case. The bruises on the forehead with resultant subdural bleeding was probably caused by blunt-force trauma and it would appear as if the deceased was throttled and, when she did not die as a result, the assailant caused some or other blunt force trauma to the head of the deceased that eventually led to her death. It is possible that she died two to three days after the incident, although the Doctor could not determine an exact time of death.

[6] DNA material was isolated from a swab that was taken from the genital area of the deceased and the DNA report, which was formally admitted to be correct, indicated that it was the accused's DNA that was found on the swab. It was further formally admitted that a cellular phone was taken from the deceased's house during the incident and that, during his arrest, the accused was found in possession of the missing cellular phone with serial number 35765501644919 mentioned in count 3.

[7] This evidence led to the accused being charged with counts 1 (murder), 2 (rape), 3 (Robbery with aggravating circumstances) and 5 (housebreaking with intent to commit an offence unknown to the state). Besides formally admitting the cause of death and the post-mortem report, the accused formally admitted that it was his DNA that was found in the vaginal swab that was taken from the deceased's body, and also admitted the J88 Report to be correct in every detail. As in the case of the incident of 15 October 2008, however, the accused sought to explain the presence of his DNA in the vagina of the deceased on an exculpatory basis, averring that he and the deceased had a love affair and consensual sexual intercourse at an undisclosed time before she died. He did however not try to explain his admitted possession of the stolen cellular phone at the time of his arrest.

The trial

[8] In relation to counts 4, 6 and 7, Mr Jacobs for the state presented the evidence of two state witnesses, to wit Ms D. and KL D. In relation to counts 1, 2, 3, 4 and 5, the evidence of only one witness, Ms M., was led. The state obviously relied on the formal admissions made directly after plea, together with the evidence of these witnesses, to prove its case against the accused. As indicated above, I ordered that the evidence of the pathologist that conducted the post-mortem be placed before court for clarification.

[9] A stark feature of the trial is that, although Counsel for the accused, Mr Mnisi, regularly consulted with the accused in court and during adjournments

requested for that purpose, the evidence of KL D and Ms M. was never contested during cross-examination. Mr Mnisi did however put the accused's, almost hilarious version of planted DNA to Ms D., the mother of KL D, who vehemently denied the averments. Same was not put to KL D who clearly and tearfully related in her evidence that she had been raped by an unknown male person. Although it was put to Ms D. that she and the accused had a love relationship and that he was surprised to hear that the witness had a 19-day old child at the time, she vehemently denied that she knew the accused or that she ever saw him before. When KL D testified that she did not know the accused and that she never saw him before in her life and that he definitely did not have any love relationship with her mother that she knew of, her evidence was left uncontested at the specific instruction of the accused. It need be said that, when KL D was asked to look at the accused to see whether she knows him, she burst out in tears before saying that she did not know him at all. During her testimony the accused also burst out in tears and was crying so much that his Counsel had difficulty consulting with him. After an adjournment Counsel for accused put on record that he had received firm instructions from the accused not to contest the evidence of KL D. After the witness was excused, Mr Mnisi put on record that the accused was not emotionally fit to continue with the trial, but, when I asked the accused, he indicated that he was ready to continue. The evidence of Ms M. then followed and, although she testified that she had been living with the deceased in the same house for [...] years; that she knew the deceased's boyfriend whom she last saw visiting the deceased approximately two to three months before the incident; that the accused was unknown to her and that he was definitely not a

boyfriend to the deceased; and, that the room had undoubtedly been broken into before the deceased was found, her evidence was, again on the specific instruction of the accused left uncontested during cross-examination. The evidence of the pathologist was also not contested.

[10] Surprisingly, after the state's case had been closed and the pathologist was excused as a witness, Mr Mnisi requested an adjournment until the next day so that he could consult with his client probably with a view to bring an application for the discharge of the accused in terms of section 174 of the CPA. An adjournment was refused as, to my mind, no further consultation was required to enable Counsel to bring the application. He knew what the evidence was and what the chances were that an argument could be formulated that there is no evidence upon which a reasonable court, acting carefully could convict the accused. I further dissuaded him from bringing an application of the sort, indicating that it would amount to a waste of time since I am of the opinion that there existed enough evidence at that stage on which I would be able to convict the accused should there be no further evidence forthcoming; and, I further challenged Mr Mnisi that, if he had the guts to with confidence argue that there is no evidence that could result in a conviction, he should put his money where his mouth is and simply close the case for the defence after which he can present his arguments for an acquittal – and not waste time with an application that is almost doomed to fail. Mr Mnisi then consulted with the accused in court and clearly explained to him that an application for his discharge will not be successful and advised him of his rights to present evidence or remain silent.

Thereafter Mr Mnisi closed the case for the accused without any evidence in favour of the accused.

[11] The prosecutor immediately argued that the accused should therefore be convicted as charged on all counts except count 6, which he left in the hands of the court. As far as count 7 is concerned, he conceded that the crime of robbery has probably not been proven and that the accused can only be convicted of theft as the cash and cellular phone were taken before the relevant witness even became aware of the thief's presence in her room and of him being armed and before he threatened her with violence. Mr Mnisi however requested an adjournment until the following morning to prepare his closing argument. At that stage already, however, when pushed for a speedy finalization of closing arguments so that the court can properly prepare judgment for the following day, Mr Mnisi told court that in such a case he would rather leave judgment in the hands of the court and not address the court at all. I therefore decided reluctantly to grant an adjournment until today to avoid the impression that Defence Counsel was not allowed proper opportunity to prepare closing argument and to address the court before judgment.

[12] Upon resumption, and after initial confusion in Counsel's mind about which stage of the trial we are in, another adjournment for further consultation with the accused was occasioned. After some time, on resumption, Mr Mnisi informed court that he has now consulted with the accused and that they have

decided not to address court on the merits but to leave the judgment entirely in the hands of the court.

The facts and the law

[13] It is trite law that the onus in a criminal matter rests solidly on the state to prove its case beyond reasonable doubt, and that there is no onus on an accused person to rebut the state's case or to convince the court of the truth of any explanation he gives in response to the state's case. If, in the court's mind there is a reasonable possibility of the state's version of the events being false or mistaken, and the accused's version being true, then the accused is entitled to the benefit of the doubt and his acquittal.

[14] The linking of the accused to both these occasions through DNA evidence suggests an inference that he is the person who committed these crimes. His attempt at explaining the presence of his DNA in the vaginas of the two victims of rape on an exculpatory basis, especially in the case of KL D, came across as fairy-tale-like, which even a fifth-grader would never believe in the circumstances. There is clear evidence that none of these victims knew the accused from before and, therefore, that they had not on their own laid the charges against him that led to his arrest and trial. The only way in which he was implicated was through the DNA evidence. Had any of the victims of 15 October 2008 known the accused, and, had the mother of KL D been so callously wicked to plant semen from a used condom in the vagina of her young child, one would have expected them to say to the police that they knew the culprit so that he could be arrested

as soon as possible. The exculpatory explanation for the presence of his DNA in the vagina of the deceased mentioned in count 1 is discredited by the clear and uncontested evidence that the room of the deceased was broken into, and that she was seriously and lethally injured by her assailant before she was found naked on the floor, barely able to breathe or speak. In the face of all this, the accused exercised his right to silence and did not testify, which is a clear indication that he had tailored his defence after he became aware of the fact that he was tied to both incidents through DNA evidence.

[15] Whilst on the topic of DNA evidence linking an accused person on a rape charge being disclosed before trial, some remarks need be made. In *Shabalala and Others v Attorney-General Transvaal and Another*,⁸ Mahomed DP⁹ held¹⁰ that the possibility of an accused being able to tailor his defence should he be allowed access to the evidence before his trial so that he can properly prepare his plea and defence should never be a bar to witness statements being divulged to the defence if requested. As a regional magistrate with more than 30 years' experience, who is currently only acting as Judge in the High Court, I have extensive experience at trying rape cases where the accused person is linked by means of DNA evidence. In all cases¹¹ where the existence of DNA evidence surfaced for the first time during the trial, the defence was invariably changed from an alibi to sexual intercourse with consent. In many cases¹² where the existence of DNA evidence was disclosed before the trial, there were clear

⁸ 1996 (1) SA b725 (CC).

⁹ As he then was.

¹⁰ At para [46] of the judgment.

¹¹ More than 20.

¹² More than 50.

indications during the trial that the relevant accused persons, as in this matter, tailored a defence of consent while the circumstances sketched by the evidence clearly militated against consent. In some cases,¹³ I have encountered defence lawyers overtly or covertly refusing to arrange trial dates before DNA results were known and, almost invariably in such cases the defence could be foretold by the prosecutor depending on whether the accused is linked through DNA evidence or not. In case of the former, the defence would always be consent, whilst in the latter, the defence would always be an alibi or a bare denial of sexual intercourse. A variety on the theme would often be that the accused would admit that his DNA was found in the vagina of the victim because he had sexual intercourse with consent with the victim, not on the day of the incident but some days before, necessitating the state to lead medical evidence to rebut this version where it is possible for the medical science to say how long male DNA can remain in the vagina of a victim after deposit thereof.

[16] I do not think that the existence or not of DNA evidence linking an accused person with the crime of rape is a prerequisite for him to prepare his plea or defence. I am of the opinion that a new rule of privilege against disclosure can be developed by the courts (on proper application) or by the legislature to curb the disclosure of DNA evidence before plea and to avoid unnecessarily lengthy trials where the evidence against the accused is overwhelming.

¹³ More than 50.

[15] I do not think that a reasonable possibility exists of the accused's version during plea could be the truth and that the state's case could be false. To the contrary, there are clear indications that the accused's version is false in every respect and it is rejected. He remained silent in the face of credible evidence.

[16] On the evidence and all the formal admissions only one inference is possible as far as both instances are concerned. The accused is the person that broke into D.'s house on 15 October 2008 by using a duplicate or master key or by picking the lock with a clear intention to rob and rape someone inside the house; that he stole the cash and the cellular phone belonging to Ms D.; and that he raped KL D before leaving the house. The accused is the person that broke into the room of the deceased on 7 April 2013 after which he brutally assaulted and raped her and took possession of her cellular phone that was found in his possession during his arrest. There can be no other reasonable inference that can be drawn from the facts and, therefore, the well-known requirements of *R v Blom*¹⁴ have clearly been met.

[17] As far as the two charges¹⁵ of housebreaking with intent to commit offences unknown to the state are concerned, the evidence clearly proved that the intention of the accused at both occasions where he entered the relevant houses without consent or justification was to rob and rape someone inside the

¹⁴ 1939 AD 188 at 202-3. See also *S v Sesetse* 1981 (3) SA 353 (A) at 369-70; and *S v Mtsweni* 1985 (1) SA 590 (A) at 593-4, which are all to the same effect, namely that: an inference of guilt can be drawn on circumstantial evidence provided that the inference is consistent with all the other proven facts and that no other reasonable inference is possible save the one sought to be drawn.

¹⁵ Counts 5 and 6.

houses. In terms of section 262(2) of the CPA he may be convicted of the specific crimes proven, namely housebreaking with intent to rob and rape. As far as the robbery charge in count 7 is concerned, however, the evidence proved that no violence or threats of violence were employed to make Ms D. part with her property, but that the cash and cellular phone were taken even before she became aware of the intruder's presence inside her room. A conviction of robbery can therefore not follow.¹⁶ But, in terms of section 260 (d) of the CPA, the accused may on this charge be convicted of theft.

[18] The accused is accordingly convicted and found guilty as follows:

Count 1 – Murder;

Count 2 – Rape;

Count 3 – Robbery with aggravating circumstances;

Count 4 – Rape;

Count 5 – Housebreaking with intent to rape and rob;

Count 6 – Housebreaking with intent to rape and rob; and,

Count 7 – Theft.



A A LAMPRECHT

¹⁶ E.g., see *Ex Parte Minister of Justice: In re R v Gesa; R v De Jongh* 1959 (1) SA 234 (A); *S v Makhalanyane* 1980 (3) SA 425 (O) at 430A-D; *S v Sithole* 1981 (1) SA 1186 (N); *S v Kgoyane* 1982 (4) SA 133 (T); *S v Mofokeng* 1982 (4) SA 147 (T).

Representation for the state:

Counsel

Adv JJ Jacobs

Representation for the accused

Counsel

Adv PM Mnisi

Instructed by

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