

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: CC137/14

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

24 August 2015

.....
DATE

.....
SIGNATURE

In the matter between:

THE STATE
versus

THOBANE XOLANI FAKUDE

JUDGMENT

LAMPRECHT, AJ

[1] In terms of the amended indictment dated 26 January 2014, accused is charged with three counts of murder;¹ one of attempted murder;² three of housebreaking with intent to rape, rob and murder;³ three of rape;⁴ and, three of robbery with aggravating circumstances.⁵ The charges relate to three separate incidents in the small town of Volksrust on the border of Mpumalanga and KwaZulu-Natal, namely:

1.1 **On 11 November 2012** – the house, situated at no [...], Volksrust, of M. M. J. J. V. R., an [...] year-old female person, was allegedly broken into. She was then brutally and severely assaulted, raped and robbed of a few almost insignificant pieces of jewelry and a jar containing small change. She died on 21 November 2012 in a Clinic in Dundee as a result of her injuries sustained during the incident.

1.2 **Between 28 June and 5 July 2013** – the house, situated at [...], Volksrust, of E. M. B., a [...] year-old female person and D. M., a [...] year-old male person, was allegedly broken into. Both of them were brutally and severely assaulted. Ms B. was raped and both of them were robbed of a velvet maroon coloured bag decorated with simulated pearls and a Nissan Bakkie key. Both of them died on the scene as a result of the injuries sustained.

1.3 **On 12 August 2013** – the house, situated at [...], Volksrust, of R. C. J., an [...] year-old female person, was allegedly broken into. She was brutally and severely assaulted, raped and robbed of a number of things,

¹ Counts 1, 5 and 6.

² Count 10.

³ Counts 2, 7 and 11.

⁴ Counts 4, 9 and 13.

⁵ Counts 3, 8 and 12.

mainly jewelry and a cellular mobile phone. In the latter incident, the victim is still alive, hence the accused has been charged with only attempted murder, not murder as in the other two instances.

[2] Accused, herein represented by Counsel in private practice, Adv PM Mnisi, briefed by the Legal Aid Board of South Africa as a so-called 'Judicare Instruction', initially requested (and was granted) one day's postponement of the matter to properly consult with his Counsel. On 12 August 2015⁶ he pleaded guilty to all counts, barring the count of rape relating to Ms J.,⁷ the only surviving victim, to which he pleaded not guilty. It should be noted that, before pleading guilty to counts 5, murder of Ms B., and 10, attempted murder of Ms J., he first consulted with his Counsel in court. After he pleaded not guilty to count 13, the rape of Ms J., his Counsel consulted with him in court after which the plea of not guilty was confirmed by both the accused and his Counsel. The latter plea appeared to be a deviation from the accused's initial instructions to Counsel as can be inferred from the fact that his initial statement⁸ in terms of section 112(2) of the Criminal Procedure Act⁹ (the CPA), which was signed by the accused, included a guilty plea on that count as well.

[3] His written statement in terms of section 112(2) of the CPA was read out by Counsel, during which process the guilty plea on count 13 was deleted, and the document was handed in as Exhibit A1. Accused in open court confirmed the

⁶ Although judgment has been set down and prepared for 14 August 2015, Counsel reported sick and the matter was rolled to 24 August 2015 for judgment.

⁷ Count 13.

⁸ Exhibit "A1".

⁹ Act no 51 of 1977 as amended.

contents of the statement and his signature on the document. Both Counsel for the accused and the prosecutor, Adv J Kotzé from the Office of the Director of Public Prosecutions, thereafter informed the court that they had in addition to the written statement agreed to further formal admissions in terms of section 220 of the CPA, which were reduced into writing. The document was read out by the prosecutor and handed in as Exhibit A2 after which both Mr Mnisi and the accused, in open court, confirmed the correctness of the formal admissions and that the accused consents that they could be recorded as formal admissions. In addition to Exhibit “A2”, a number of other documentary exhibits, the contents of which have now been formally admitted through Exhibit A2, were likewise admitted into evidence, namely

3.1 **Exhibit “B”** – the Post Mortem Report in respect of the deceased in count 1, Ms J. V. R., which was compiled by Dr KM Neerahoo, indicating the cause of death as “subdural hemorrhage due to head injury”;

3.2 **Exhibit “C”** – the Post Mortem Report in respect of the deceased in count 5, Ms B., which was compiled by Dr SM Shingange, indicating the cause of death as “multiple head injuries”;

3.3 **Exhibit “D”** – The Post Mortem Report in respect of the deceased in count 6, Mr M., which was compiled by Dr SM Shingange, indicating the cause of death as “multiple head injuries”;

3.4 **Exhibit “E”** – a Sketch plan of the house and a photo album with photos of the scene of the incident of 11 November 2012 at no [...], Volksrust, compiled by W/O TA Masondo;

3.5 **Exhibit “F”** – a photo album with photos of the scene at no [...], Volksrust, as photographed on 08 July 2013, including photos of the bodies of the two deceased persons mentioned in counts 5 and 6, compiled by Capt PB Sikhosana;

3.6 **Exhibit “G”** – a Sketch plan of the house and a photo album of the scene at no [...], Volksrust, including photos of ‘blood-spatter’ on the scene and of the bodies of the two deceased persons mentioned in counts 5 and 6 which were taken during the *post mortem*, as photographed on 06 and 09 July 2013, compiled by W/O ES Mazibuko;

3.7 **Exhibit “H”** – photo album and key thereto of all three the scenes, the exhibits recovered and place of arrest of the accused; compiled by Lt Col SS Albertse;

3.8 **Exhibit “J”** – statement in terms of section 212(4)(a) and (8)(a) of the CPA by W/O Prince-Eddie Neo Mmushi (DNA analysis and comparison report linking the control blood sample of the accused to the cervical swab taken from the deceased in count 5, Ms B.);

3.9 **Exhibit “K”** – statement in terms of section 213(1) and (2)(a) of the CPA by Capt FS Moller pertaining to the cellular phones that were robbed and of their subsequent use after the incidents; and,

3.10 **Exhibit “L”** – a J88 medical report completed by Ms NI Vilakazi, a professional forensic nurse on 12 August 2013 after a medical examination of Ms J., mentioned in count 13.

[4] A perusal of the plea statement, Exhibit “A1”, and the formal admissions, Exhibit “A2”, revealed that they have merely and slavishly followed and repeated the bald statements, without elucidation, in the indictment, which falls short of what is substantively required in terms of section 112(1)(b) read with (2) of the CPA.¹⁰ This laxness by Counsel, which can never be allowed to pass muster, especially in this Division, should be deprecated in the strongest possible terms; and, in normal circumstances, a plea of not guilty would have been recorded in terms of section 113 of the CPA, unless the presiding officer, through further questioning of the accused,¹¹ could satisfy himself that the accused is in fact guilty of the offences he pleaded guilty to. It was probably in sensing this possible attitude by the Court that Counsel for the State, *ex abundanti cautela*, but without having the effect that was sought, discussed with Counsel for the defence and the accused to enter into the fray the formal admissions in Exhibit “A2”. Even after having recorded the formal admissions, there were, however, still some lacunae that have not properly been admitted by the defence in both exhibits so that the plea in itself, without any further evidence or admissions, could lead to a conviction of the accused. I queried this state of affairs by asking Counsel for the accused and the accused in person whether the intricate legal points such as the

¹⁰ E.g., see *S v Sellars and Six Other Cases* 1991 (1) SACR 491 (N); *S v B* 1991 (1) SACR 405 (N) where the substantive requirements of subsection (2) are authoritatively elucidated and where it is indicated that the statement should not be a mere repetition of the bald allegations in the charge sheet, as the procedure in section 112 of the CPA is intended to be a safeguard against a wrong conviction in the case of a plea of guilty. The provisions of section 112(1)(b) read with (2) of the CPA were intended to replace the requirement of *aliunde* evidence in addition to a plea of guilty in terms of section 258(1)(b) of the repealed 1955 CPA, Act 56 of 1955, which was also designed to minimise the risk of a wrong conviction on a plea of guilty and, therefore, decided cases on this point under the previous dispensation are still of importance – *S v Cook* 1977 (1) SA 653 (A).

¹¹ A Kruger *Hiemstra's Criminal Procedure* (Loose-leaf annotated ed) 17-11: The substantive requirements of subsection (2) are further elucidated in *S v B* 1991 (1) SACR 405 (N) where the point is stressed that the statement should not be a mere repetition of the bald allegations in the charge sheet. *In such a case the presiding officer must obtain the necessary elucidation by means of questions.* – Italics added.

criminality of the conduct, *modus operandi*, intent and effects of the plea of guilty had been properly canvassed during consultation; and, by asking Counsel for the state whether the state was prepared to accept the plea as it stands without further questioning by the Court and / or the leading of evidence after a plea of not guilty is entered. The response by both Counsel was to the effect that, during a further adjournment, an additional set of formal admissions in terms of section 220 of the CPA were drawn up by agreement between the parties, in the handwriting of Counsel for the state and signed by the accused, which was subsequent to the adjournment read into the record by the prosecutor and handed in as Exhibit “M”. These further ‘formal admissions’ were confirmed in open court by both accused and his Counsel.

[5] Formal admissions in terms of section 220 of the CPA are supposedly only possible in the case of a plea of not guilty, because such formal admissions can only be made in respect of facts originally “placed in issue at such proceedings” and the questioning in terms of section 112(1)(b) and the statement in terms of section 112(2) of the CPA are supposed to render the making of such admissions redundant and superfluous.¹² There is however nothing in section 220 of the CPA suggesting that it is totally inadmissible for the defence (or, for that matter, the state) to place on record formal admissions in terms of section 220 in respect of such issues that have not thoroughly been covered by the questioning in terms of section 212(1)(b) or the statement in terms of section

¹² See A Kruger *Hiemstra’s Criminal Procedure* (Loose-leaf annotated ed) 24-75: “**Only at plea of not guilty**—Only when there is a plea of not guilty and the accused has consequently joined issue with the state can admissions be converted into proof in this manner (*R v Fouché* 1958 (3) SA 767 (T) at 777). When there is a plea of guilty, no facts are in dispute. An admission can, according to section 220(1), only be made with regards to facts “placed in issue at such proceedings”.”

112(2). *R v Fouché*, on which Kruger in *Hiemstra's Criminal Procedure* relies¹³ for the, entirely formalistic, assertion that formal admissions in terms of section 220 are not possible when a plea of guilty is entered, has been decided before the current CPA saw the light of day and can have only persuasive value for the current judgment. I am aware thereof that the practice to make formal admissions in terms of section 220 of the CPA has become almost daily practice in the lower courts and the High Court, especially where guilty pleas do not *verbatim* refer to important facts such as the so-called causal link or 'chain' evidence in murder cases. In any event, in cases such as these, the procedure as required in terms of section 112(1)(b) read with (2) of the CPA, is often in practice being subverted by Counsel to the detriment of justice; and, it is, to an extent, cumbersome, degrading and time consuming for a presiding officer to do the work of Counsel for the defence by questioning the accused further to satisfy the statutory requirements where the statements have not properly been drawn up. It is therefore in the interests of justice and to preserve the proper *decorum* of the Court if Counsel and defendants are allowed to, in addition to 'section 112(2) statements' formally admit facts that have not been properly admitted during a plea of guilty. There can to my mind be no objection to this procedure being followed to preserve a plea of guilty, which is designed to avoid a lengthy trial where the accused exercises his right to plead guilty, provided that the accused person himself agrees to the procedure being followed and personally grants permission for the formal admissions to be made. I therefore appreciate the initiative taken by Counsel for the state to discuss the possibility of the further

¹³ *Ibid.*

formal admissions with the defence after I have voiced my misgivings in this regard. This was clearly done to avoid my further questioning of the accused or the recording of a plea of not guilty in terms of section 113 of the CPA, which could have resulted in a drawn-out and lengthy trial in a case where more than 40 witnesses for the state have been listed.

[6] Moreover, so it would appear, section 112(3) of the CPA sanctions the presentation of evidence (including formal admissions) in addition to the 'section 112(2) statement' or questioning in terms of section 112(1)(b).¹⁴ It reads:

“(3) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.”

[7] Referring to *S v Khumalo*,¹⁵ Kruger argues¹⁶ that the words “with regard to sentence” in the provision qualify all the preceding words and that section 112(3) only sanctions the leading of evidence after conviction following a plea of guilty but before sentence. I respectfully disagree. The CPA¹⁷ and the common law already allow for evidence and arguments to be presented after conviction following a plea of guilty or a plea of not guilty in order for the court to determine an appropriate sentence and, nowhere in section 112(3) is an indication to be

¹⁴ E.g., see *S v Qinta* 1979 (2) SA 326 (O) at 327H-328A; *S v Witbooi* 1978 (3) SA 590 (T) at 595A; *S v Matlabeng en 'n Ander* 1983 (4) SA 431 (O) at 434E (in which *S v Qinta* was followed without discussion).

¹⁵ 1978 (4) SA 516 (N).

¹⁶ A Kruger *Hiemstra's Criminal Procedure* (Loose-leaf annotated ed) 17-11.

¹⁷ See section 274 of the CPA.

found that the presentation of evidence in terms of that section is only admissible with regards to the determination of an appropriate sentence after conviction. Such an interpretation of section 112(3) amounts to an essentially formalistic approach to criminal procedure that can lead to the administration of justice being delayed or prejudiced. In any event, the purpose of section 112(1)(b) read with (2) of the CPA is to “question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty” so that the court may be “satisfied that the accused is guilty of the offence” he pleaded guilty to before allowing the court to convict the accused person. This purpose would be satisfied if section 112(3) of the CPA is interpreted to mean that the prosecutor and/or the defence or the court may present or call for evidence to be presented “on any aspect of the charge”, even before conviction; and, such an approach would be in service of the substantial requirement that the possibility of a wrong conviction on a mere plea of guilty should be avoided.

[8] Nevertheless, all of this could have been avoided had Counsel for the accused from the very outset drawn up a proper ‘section 112(2) statement’ as required; but, although cumbersome and time consuming, the procedure eventually followed in this matter has enabled me to come to a just decision as far as the charges on which the accused pleaded guilty are concerned.

[9] From the ‘section 112(2) statement’, Exhibit “A1”, as well as from the formal admissions contained in exhibits “A2” and “M”, I am satisfied that the

accused admits all the allegations in the charges that he pleaded guilty to and that he is in fact guilty of the crimes charged.

9.1 He admits that on 11 November 2012 he broke into the house of M. M. J. J. V. R. at no [...] Volksrust by breaking a window at the garage, after which he entered the premises through the broken window with the intention to rob, rape and murder. He found the deceased inside the house. He then assaulted her by hitting her several times with his clenched fists. After he had subdued her in this way, did he then rape her and take the belongings mentioned in count 3. He further admits that, although the deceased died only a few days later, the deceased had died as a result of the injuries that he inflicted during the assault and that he foresaw the possibility that she might die when he assaulted her. The cause of death was “subdural hemorrhage due to head injury”.

9.2 He admits that on 29 June 2013 he broke into the house of Ms B. and Mr M. at no [...], Volksrust, by breaking a glass front door. He then entered the premises through the broken door with the intention to rob, rape and murder. He attacked the two occupants of the home with a garden fork, hitting both several times with the fork. After they were subdued, he raped Ms B.. He then took the items mentioned in count 8 and left. He further admits that Ms B. and Mr M. died as a result of the injuries he inflicted on them with the garden fork and that he foresaw the possibility that they might die as a result of the assault. The cause of death was “multiple head injuries” in both cases. He further admits that his

DNA was found on the cervical swab taken from the dead body of Ms B., by implication linking him to her rape.

9.3 He admits that on 12 August 2013, he broke into the house of R. C. J. at no [...], Volksrust, by breaking a window. He gained entry and entered the house through the broken window with the intention to rob, rape and murder. He found the victim inside who came to investigate, and he overcame her by strangling (or throttling) her until she lost consciousness. He then took the items mentioned in count 12 and left. He formally admitted that the contents of the J88 "Report by Authorised Medical Practitioner on the Completion of a Medico-Legal Examination" conducted on the person of Ms J. (Exhibit "L") are correct. Therefore he admitted that the forensic nurse who conducted the clinical examination of Ms J. found a laceration and bruises around the neck of the victim suggesting strangulation; and, in addition to that, she found various bruises and tears to her genitals with slight bleeding suggestive of 'forceful penetration' of her vagina.

9.4 In addition to the above he admits that at all relevant times mentioned in his admissions, he was of sound and sober senses, he knew that what he was doing was wrong and punishable by law and that he was able to act according to this conception of illegality, but that he nevertheless proceeded with his actions regardless.

[10] I am therefore satisfied from the admissions made by the accused that he is guilty of the crimes charged in counts 1 to 12 to which he pleaded guilty. This

satisfies the substantive requirements of section 112(1)(b) read with (2) of the CPA and the accused may accordingly be convicted of the mentioned crimes without any additional evidence.

[11] As far as count 13 is concerned, rape of the surviving victim, Ms J., the accused pleaded not guilty in circumstances outlined above. As indicated, he did however formally admit the contents of the J88 Report, Exhibit "L" in which an expert opinion is expressed that she had been forcefully penetrated in her vagina. The prosecutor apparently decided to spare Ms J. the agony and shame of having to testify in open court, and closed his case without any additional evidence. The defence followed suit and did not present any evidence as far as this count is concerned. The prosecutor argued that the formally admitted injuries and expert opinion of the forensic nurse amounted to "sufficient proof of" the facts so admitted and that the accused should, in the absence of evidence to the contrary, also be convicted on this count. Adv Mnisi did not address court and left the matter in my hands to decide.

[12] In addition to what Mr Kotzé has argued for the state, it should be noted that the circumstances of the burglary, assault with intent to rob, rape and murder, and robbery to which the accused pleaded guilty (counts 10, 11 and 12) are so reminiscent of the *modus operandi* that the accused followed during the other two incidents involving the burglary, murder, robbery and rape of the other victims mentioned in the other counts to which the accused pleaded guilty; so that an inference is justified that he, in this case, also raped the victim just as he

did with the other two female victims in the earlier incidents. Something that may also not be lost sight of, is the fact, according to his own plea of guilty on count 11, Exhibit "A1", he admitted that he "unlawfully and intentionally enter[ed] the house of R. C. J. **with the intent to rob, rape and murder the said R. C. J.**".¹⁸ What we have on this count is therefore:

12.1 That the accused admitted to having broken into the house of the victim with, *inter alia*, the intention to rape her;

12.2 That the victim's genitals evidenced injuries consistent with forceful penetration of her vagina;

12.3 That the accused on two previous occasions, in similar circumstances than the current, broke into the houses of the other two female victims mentioned, assaulted them with murderous intent and raped them before robbing them of their belongings after which he left. It is therefore hard to conceive why he would not fulfill his own intention to rape in the case of Ms J. as he did in the other two cases when he had the motive, time and means to do so.

These circumstantial facts are such that they justify an inference that Ms J. had also been raped by the accused as alleged and, in the light of accused's silence, especially on why he decided to plead not guilty on this count in defiance to his earlier instructions to Counsel, this inference appears to be the only reasonable inference that can rightly be drawn in the circumstances of this case.¹⁹

¹⁸ Emphasis added.

¹⁹ The requirements as set out in *R v Blom* 1939 AD 188 at 202-3 have therefore been met in that, (1) the inference is consistent with all the other proved facts in the case and, (2) the proven circumstances are such that they exclude every reasonable inference from them save the one sought to be drawn.

[13] Thus, in terms of the provisions of section 112(1)(b) read with subsections (2), (3) and section 220 of the CPA, I am satisfied that the accused admits all the allegations in counts 1 to 12 to the extent that I am satisfied of his guilt on those counts in that no defence has been left open to him. As far as count 13 is concerned, I am on the available evidence, mainly consisting of formal admissions by the accused in terms of section 220 of the CPA, satisfied that the state has succeeded in proving, beyond reasonable doubt, that the accused on that occasion also raped the victim, Ms J., as alleged. Accordingly, the accused is convicted and found guilty of all counts 1 to 13 as charged.



**A A LAMPRECHT
ACTING JUDGE, GAUTENG
DIVISION OF THE HIGH COURT
14 August 2015**

Representation for the state:

Counsel

Adv J Kotzé

Representation for the accused

Counsel

Adv PM Mnisi

Instructed by

Legal Aid South Africa