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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PALM RIDGE)**

CASE NO: CC 59/2024

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: NO

(3) REVISED.

DATE: 2025/05/23

SIGNATURE:

In the matter between:

THE STATE

and

NKULULEKO MTSHALI

ACCUSED

JUDGEMENT

JOHNSON, AJ:

[1] The accused is an adult male and charged with two counts that were both allegedly committed on 5 January 2023 at or near Batswaneng Section, Khutsong. The allegations in the indictment are that he;

1.1 Unlawfully and intentionally killed M[...] M[...] an 8-year-old female child, the deceased mentioned in count 1, by strangling her;

1.2 Raped her by unlawfully and intentionally committing an act of sexual penetration.

[2] He is represented by Adv Myamane and pleaded not guilty to both counts. Although he wanted to remain silent, he made the following admissions in terms of section 220, of the Criminal Procedure Act 51/1977, ("CPA") during the trial:

2.1 The authenticity of Exhibits A 1-7, depicting 7 photos of the deceased when she was discovered;

2.2 The admissions contained in Exhibit B and its annexures Exhibits C, D and E;

2.3 The admissions contained in Exhibit F and its annexures Exhibits F1, G, H, J, K, L and M, which are statements, the contents of which were also admitted.

[3] E[...] N[...] testified that she was the grandmother of the deceased, and that she stayed with her. On 5 January 2023 she said that Phakiso, who is apparently deceased and stayed 3 streets away from her, called her and she left at around 16:00. She went to Phakiso's house a while later but could not find her. She went to P[...] N[...] and they eventually went back to Phakiso's house with the police, whom they met on the way. They entered the house and found her dead as depicted in Exhibit A photos 1 - 7.

[4] P[...] N[...] is the son of the first witness, and confirmed her evidence as referred to above. He summoned his colleagues and they and the police went to look for Phakiso. They found him at the Khutsong Hostel and he was arrested. They also found the accused at Mzulu's house. After the police spoke to him, he was taken away.

[5] The version of the accused was put to him quite extensively. It was put that the accused never smoked drugs until he met Phakiso. When Phakiso was high on drugs, he would have oral sex with the accused. After he had seen Phakiso earlier the afternoon of 5 January 2023, he came to fetch him between 19 and 20:00 and took him to his house. When Phakiso entered the kitchen, the accused saw blood on the floor. He stood back, and Phakiso asked what was wrong with him. They went to the dining room where he saw the body of the deceased. When he asked Phakiso what this is, Phakiso slapped him. Phakiso had a firearm on his waist. Phakiso said that he must undress and "eat this girl". The accused replied and asked how he can eat someone with blood. Phakiso assaulted him and slapped him. He then undressed because he was afraid of Phakiso. He only had his underpants on when he got on top of the deceased. He then faked sexual intercourse. He did not take out his penis from his underwear. He had no erection and was afraid. Phakiso assaulted him and said that he made a fool out of him. Phakiso said that if he was afraid of blood, he would give him a condom. He gave the accused a condom, but he still did not have an erection. Phakiso dragged him to the bedroom and blindfolded him with a cloth. Phakiso then masturbated him. The accused got an erection and ejaculated. Phakiso chased him away and said that he must never tell anybody about what happened or what he saw. He threatened to kill the accused and his family if he did. He ran out of the house and told no one. He went home and locked himself in his room. He did not want to speak to anyone as he was traumatised.

[6] Tshililo Rambau is a Warrant officer in the South African Police Services stationed at the Forensic Science Laboratory and the author of Exhibit E. He confirmed the contents of the Exhibit. His finding which was formally admitted by the accused, is that the DNA on the swabs that were collected from the body of the deceased, matched those of the accused.

[7] The evidence of Constables Bobe and Mokoena did not contribute anything towards resolving the disputes, which is whether the version of the accused is reasonable possibly true that his semen was planted on the body of the deceased, and whether he raped and killed her.

[8] Dr Julian Jacobson is a medical officer who conducted a post-mortem examination on the body of the deceased on 6 January 2023. He confirmed the contents of his report Exhibit D, which was admitted by the defence. He took a swab from her outer genitalia and marked it swab 1, one 5cm inside her vagina and marked it swab 2 and took a sample from her nails. He sealed it in a bag with seal no PW300109550. He found that there was trauma during the penetration because of the injuries he found in par 26 of his report: "GENITALIA: There is 1.5cm tear towards the rectum. There is a bruising and tear of the minor labia with bleeding around genital area." The blood and bruises are indications that she was alive during penetration. His notes in par 4 is a further indication of trauma that she endured.

[9] That was the State's case.

[10] The accused testified that he was at home on 5 January 2023. The second defence witness, as well as the domestic worker were also there. At approximately 14:00 Phakiso came to fetch him, and they went to his house to take drugs. After they used drugs, Phakiso left to fetch more. He waited for approximately 30 minutes, and when he did not return, he left and went back home.

[11] At approximately 19 to 20:00 hours Phakiso came to fetch him again. He said that there was a break-in into his house and they went there to confirm it. As they entered, Phakiso slapped him. He took him into the dining room where he saw the deceased. Phakiso threatened him and said that he must have sexual intercourse with the child. He went to lay on the child. He was scared. He initially testified that Phakiso pulled out a firearm, but immediately retracted that and said that he only exposed it to him. He said that if he did not do what he instructed him to do, he will kill him and his family.

[12] He laid on top of the child because Phakiso threatened him. He refused and Phakiso produced a condom. He did not have an erection and told Phakiso that he saw blood on the child. He slapped him. He laid on the child and made as if he was complying with his instructions. Phakiso asked why did it look as if the accused was making a fool of him. He pulled the accused from the child and took him into the

bedroom. He tied his wrists while slapping him and then blindfolded him. He then masturbated the accused. The accused got an erection and ejaculated.

[13] Phakiso chased him away and said that he never wanted to see him again. He went home and into his room, and locked himself inside. He told "Uncle," the second defence witness, about everything that happened at Phakiso's house.

[14] The police arrived during the night and arrested him. He agrees that his semen was found in the vagina of the deceased, but it is possible that Phakiso planted it there. He never had sexual intercourse and ejaculated in the deceased. He did not kill her.

[15] Samual Kwele also known as "Uncle", testified that he works for the father of the accused as a caretaker. He and the accused were at work on 5 January 2023 for the whole day. At around 13:00 the accused went out for a short while, and returned. He again left the premises at around 20:00. He was called out by the same person who came to fetch him earlier. He returned at about 21:30 and went to where he slept. When he knocked of at 02:00, he found the accused in his room. He said that he wanted to tell him something. The accused then told him what happened at Phakiso's house after he left the second time. He told the accused to tell his father, but he said he was afraid. He then reported the incident to the accused's father. They went to Phakiso's house, which was on fire. They went back to the tavern and he went home.

[16] Shadrack Mtshali testified that the accused is his grandson, although he is referred to as his father. On 5 January 2023 he visited his other taverns and came back between 16 and 17:00. Kwele approached him at around 02:00 and said that they must speak. They went to a certain house which was on fire. He told the accused that he planned take him to the police station to tell them what happened.

[17] That was the case for the defence.

[18] It is common cause and not in dispute, that the deceased was raped and killed on the day in question, that the accused was present where she was kept in

the house of Phakiso, that he climbed on top of her, and that his semen was found in her vagina. The only issue is whether he raped and killed her. His initial defence is that his semen was planted on the deceased by Phakiso. In argument however, advocate Myamane argued that Phakiso raped and killed her to take revenge on the father of the accused.

[19] At the request of the State, a trial-within-a-trial was conducted to rule on the admissibility of a pointing-out and a confession. I will deal with this matter first.

[20] As far as the trial-within-a-trial is concerned, the state called the interpreter Const. Mlangeni who interpreted for the accused during the proceedings, and Capt. Theron who conducted the pointing-out and took down the confession. It is not necessary to evaluate the evidence of Const. Mlangeni as far as the admissibility of the statement is concerned. It can be judged on the evidence of Capt. Theron alone. What was clear from the outset was that the Capt. was requested to do a pointing-out with the accused. He informed the accused of his right to remain silent and not say anything or make a pointing out, and that anything he says will be written down and used against him. He was also informed of his right to legal assistance. The rights that were explained, were done in accordance with a form Exhibit P, which was clearly a preamble in respect of a pointing out, which is an admission. The preamble in respect of a confession differs from the requirements for an admission and should be in accordance with section 217 of the CPA.

[21] In *Mudau and Another v S*¹ the court concluded as follows:

"[14] ... It is manifest therefore that implicit in the whole procedure envisaged by the section is a questioning by the magistrate of the person confessing. These questions as well as the answers must be recorded for it to be able to appear from the document that the confession was made under the required conditions of voluntariness, etc. This, of course, is also in accordance with longstanding practice. It is well known that over a period of many years departmental instructions and the decisions of the Courts have built up a

¹ Case No: 1148/2016 29 March 2017 (SCA)

series of guidelines designed to ensure that confessions are in fact freely and voluntarily made without the exercise of undue influence. ... These rights have since the advent of the Constitution been entrenched in s 35."

[22] The Appeal court at [16] expressed its apprehension to the fact that the required preamble to the confession was not fully completed. Sections where his rights to silence and to legal representation had to be explained, and whether he was in his sound and sober senses, were left blank. Although the magistrate testified that he could remember the matter and that the appellant answered the questions in the affirmative, the confession was nevertheless rejected. In this case, we do not even have a half-completed preamble - there is no pre-amble at all containing any rights that were explained to the accused, and what his answers to those questions was.

[23] In par [22], the Appeal court also expressed its apprehension to the fact that the magistrate taking down the statement, did not record his observation about whether the accused was in his sound and sober senses with specific reference to anxiety, nervousness, joviality, and demeanour.

[24] As the defence had already admitted where the incident took place and there was no issue between the parties as far as this was concerned, I ruled that the evidence about the pointing out was not relevant. The State then proceeded and attempted to lead evidence of a confession that the accused allegedly made after they returned from the pointing out. He again warned the accused of his rights as before, but made no notes of questions asked or replies given by the accused. He then made a confession. At the end of the State's case in the trial within a trial, the State conceded that the confession was not admissible. I dismissed the State's application to hand in the statement.

[25] As far as the proper approach to the evaluation of the evidence in a criminal case is concerned, the court remarked as follows in *Sithole v S*² –

² [2011] ZASCA 85 para 8,

"The State bears the onus of establishing the guilt of an accused beyond reasonable doubt and he is entitled to be acquitted if there is a reasonable doubt that he might be innocent. The onus has to be discharged upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible true, that it might be true. The correct approach is set out in the following passage from *Mosephi and others v RLAC* (1980-1984) 57 at 59 F-H:"

'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'

[26] There is no direct evidence linking the accused to the offences, only circumstantial evidence and what he said in relation to the event. The court is tasked with evaluating the evidence, and determine whether it can reason by inference, which should be the only reasonable inference to be drawn, that the accused committed the offences.

[27] According to the accused, he was present in the house of Phakiso with the deceased. He got on top of her, and his semen was found in her outer genitalia and

5cm in her vagina. According to the Doctor's finding, the semen was discharged when she was still alive. This was not disputed. *Prima facie* the evidence points to the fact that the accused raped and killed the deceased.

That is however not enough for a conviction. His evidence also needs to be evaluated. If he gives a version that might reasonably possibly be true, he is entitled to the benefit of the doubt and be acquitted.

[28] It was put to P[...] N[...] that the accused discovered the body of the deceased at Phakiso's house when Phakiso took him there. Is it reasonably possibly true that she was dead when he saw her at Phakiso's house? Not according to evidence of Dr Jacobson. The deceased was alive during sexual intercourse, which left his semen on the deceased. This evidence is undisputed.

[29] The evidence of Dr Jacobson and his findings, who conducted a post mortem on the deceased on 9 January 2023 and compiled a Medico-Legal Autopsy Report Exhibit D, was formally admitted. His undisputed finding is that she died because of a violent sexual assault and strangulation. His further evidence that he took swabs from her outer genitalia and another one 5 cm inside her vagina which he marked PW3001095500, was also not disputed. The accused admitted that the DNA contained in the swabs were his. His defence however is that, although he faked sex with the deceased on the instructions of Phakiso, his semen was planted there.

[30] The question is whether this can reasonable, possibly be true? The undisputed evidence of Dr Jacobson is that she had signs of sexual assault. There was trauma during the sexual intercourse. The fact that she was bruised and bled during the penetration, is an indication that she was alive during the penetration. His evidence that it was highly unlikely that semen was planted in her vagina, as this would need special instruments to accomplished, was also not disputed.

[31] A further fact which renders his allegation improbable, is that although he alleged that he told the second defence witness of what happened there, he never mentioned that he ejaculated when Phakiso allegedly masturbated him. If he did ejaculate at that stage, it would have been very important to mention it from the

outset as it would have been an indication that his version, that his semen was planted, was true and a pointer to his innocence. Yet he never mentioned it, which makes his allegation that there was any semen to plant, except for the semen that was discharged into her vagina during sexual intercourse, highly improbable.

[32] The accused further mentioned that he also told the second defence witness that Phakiso sodomized him. Mr Kwele never testified that the accused ever made such an allegation to him. It also appears that no-one was aware of any alleged violent behaviour of Phakiso towards the accused, despite that fact that they have known each other for 7 to 8 months, and saw each other about 4 times per week. It rather seemed that they had a healthy and good sexual relationship. If not, he would have mentioned it to "Uncle", like he allegedly did after the deceased was raped and killed. He also mentioned that Phakiso in fact raped him on several occasions as he had sexual intercourse with the accused without consent. This is also highly improbable. No-one would endure being raped for so long without reporting it to the police. Even after his arrest, this was not brought to the attention of anyone.

[33] It was argued that Phakiso raped and killed the deceased because of a grudge between him and the deceased's father. It was never put to any of the witnesses that Phakiso raped and killed the deceased. This was only mentioned in argument.

[34] The instructions of the accused to his advocate, which was put to P[...] N[...], was that he went home after the incident and locked himself in his room as he was traumatized and did not want to speak to anyone. He did not give her any instructions that he told the second defence witness what had happened, because if she had such instructions, it would have been put to the witness. In evidence however, the accused contradicted his instructions and testified that he told "Uncle" of the incident.

[35] It was put to P[...] that the accused saw a firearm on the waist of Phakiso, never that he threatened him with it. Mr Kwele testified that the accused told him that Phakiso threatened him with the firearm. The accused also contradicted himself in this regard. He was quick to retract his evidence that Phakiso pulled out the firearm,

and immediately thereafter said that Phakiso only showed him the firearm. This is also inconsistent with his instructions to his advocate, that he only "saw" it.

[36] The accused testified that he faked sexual intercourse with the deceased, but could not explain how he faked it, or how he pretended to have sex with her.

[37] He alleged that Phakiso assaulted him on numerous occasions during the incident, but this was never mentioned in the alleged conversation with the second defence witness.

[38] The explanation by Mr Kwele of why he did not tell the police of what the accused had allegedly told him about the incident, is unconvincing. If the accused did make such allegations to him, it would have exited everybody related to the accused, because it would be an indication of his innocence. Yet he never tells the police about such a conversation. He testified that he told the accused's father of it, but that is also improbable because nothing of the sort was brought to the attention of the police. What is also surprising, is that the conversation and the contents thereof was not even mentioned to the accused's advocate, because it was not put to Mr P[...] N[...].

[39] I stress the evidence of Dr Jacobson, who explained why he concluded that the deceased was alive when she was sexually assaulted and the semen discharged. This was not disputed. The evidence of the accused that she was already dead and his semen planted on her, is therefore not reasonably possibly true.

[39] The Court is satisfied beyond reasonable doubt that his evidence is false and it is rejected where it conflicts with that of the State. The evidence of the defence witnesses is rejected for the same reasons. The balance weighs so heavily in favour of the state that it excludes any reasonable doubt about the accused's guilt.

[40] In the absence of any credible evidence from his side, the prima facie evidence becomes conclusive proof, of the allegations against him. He is consequently convicted of both counts 1 and 2 as charged.

JOHNSON AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, PALM RIDGE