



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

Case No. CC33/2017

In the matter between:

THE STATE

and

THANDO MGQOBOZI

Accused

JUDGMENT

JOLWANA J

[1] The accused was arraigned in this Court on numerous charges relating to the death of two children who were aged 16 and 12 years old at the time of their tragic death. The accused was charged with kidnapping, aggravated robbery, two counts of murder and rape. In respect of the robbery charges, the State invoked the provisions of section 51(2) of the Criminal Law (Sentencing) Amendment Act 38 of 2007, read with part 2 of Schedule 2 of Act 105 of 1997 on the basis that the commission of the robbery was accompanied by the use of a sharp instrument which was used to murder the deceased. In respect of the two murder charges, the State invoked the provisions of section 51(1) of the Criminal Law (Sentencing) Amendment

Act 38 of 2007 read with Part 1 of Schedule 2 of Act 105 of 1997, in the first instance on the basis that the murders were planned or premeditated. In relation to count 4, also on the basis that the murder was committed after the accused had committed rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. In respect of the charge of rape which is count 5, Section 51(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with Part 1 of Schedule 2 of Act 105 of 1997 was invoked on the basis that the rape was accompanied by the infliction of grievous bodily harm. The accused who was, throughout, legally represented, pleaded not guilty to all the charges and elected not to disclose the basis of his defence.

[2] The State started by presenting the evidence of warrant officer Cupido from the Local Criminal Record Centre (LCRC) who took crime scene photographs and collected crime scene exhibits. However, I do not intend to deal with his evidence as all the chain evidence was admitted by the accused. The evidence of warrant officer Somdaka was that on 2 December 2015 in the morning, he received a report that some children had been found murdered at Nqadu Administrative Area. He phoned warrant officer Cupido from the LCRC in Butterworth and Mrs Lupondo from the Forensic Department in Butterworth asking them to attend to the crime scene. He, together with sergeant Zide thereafter proceeded to the crime scene. When they got there, community members were already there waiting at a short distance from actual crime scene. They found two bodies of the deceased persons. Both deceased persons had their trousers tied around their necks. Their bodies had multiple stab wounds. After some time warrant officer Cupido and Mrs Lupondo arrived. Warrant officer Cupido took crime scene photographs and collected exhibits after which he left. Thereafter Mrs Lupondo removed the bodies from the crime scene and took them to the mortuary.

[3] He and sergeant Zide were told by the members of the community that they suspected the accused person as well as Xola Gqibile (Xola) and Lwando Siguca (Lwando). They asked the community members to take them to the home of the accused for purposes of conducting a search at his home. On arrival at the home of the accused, they saw a bath tub that was outside in which there was a pair of jeans soaked in water. The pair of jeans had what looked like blood stains. They entered

the house and found the accused sleeping in his bed. The house had one outside door and inside there was a door that led to the room in which the accused was sleeping. There was also another door that led to another room. Only the police entered the house being himself, sergeant Zide and major Ndeleni who had also arrived. In the room where the accused was lying on his bed there was another bed on which no one was sleeping. Accused told them that he stayed alone. He asked the accused for permission to search his room and the accused gave them permission to do so. He and his colleagues searched the accused's room starting with the bed on which he was sleeping but did not find anything in that bed. He then searched the other bed that was in the same room. He found a vodaphone cell phone that was white at the back with a black screen under the mattress of the second bed. Accused was present in the room throughout the search. He asked accused about that phone and the accused said that he did not know anything about it. Warrant officer Somdaka testified that he asked one Nomagcaleka, a member of the community from the Royal House of Nqadu to assist him in paging through it. Nomagcaleka pressed the phone and the face of one of the deceased children appeared on the screen.

[4] Under cross-examination, it was put to warrant officer Somdaka that the accused and the other suspects were taken from the crime scene in vehicles that were driven by community members, which he denied. It was further put to him that the search at the homestead of the accused was only focused on the accused's bed and the second bed that was in the room. He testified that he was the one who found the phone under the mattress of the second bed in the room of the accused. It was put to warrant officer Somdaka that the accused was not in the room when the search was conducted. As a result, he did not see it when the phone was discovered but a phone was showed to him which was said to have been found under the mattress of another bed in his room. He was not shown the picture that was said to have appeared on the screen of that phone. Warrant officer Somdaka testified that they found accused sleeping in his room and conducted the search in his presence and found the cell phone under the matters. That phone was turned on in the room and it was showed to him depicting the picture of C[...]. In the room it was the accused, sergeant Zide and major Ndeleni and himself. His colleagues were all present when he questioned the accused about that phone. The members of the community were

outside. When the picture of the deceased appeared on the screen, the picture was identified by Nomagcaleka.

[5] It was put to warrant officer Somdaka that earlier that morning, community members went to the homestead of the accused and searched his room including the beds. His response was that it was never brought to his attention that members of the community had done that. He was only aware of the community members that went with them to the accused's home when the phone was discovered. It was further put to him that during that search the members of the community did not find anything in his room. He testified that he did not know about that. It was then put to him that the phone that was allegedly discovered must have been planted there for him to have recovered it, which he disputed and said that they found the phone in the accused's presence. Warrant officer Somdaka disputed that other than the phone he discovered, other phones which belonged to the accused were taken by the police. Another of the accused's version which was put pointedly to warrant officer Somdaka was that upon the police's arrival at his home in his room, police conducted a search and told him that they found a phone underneath a mattress of a bed other than the bed he was using. The accused was shown that phone but he never saw the picture of the deceased. Warrant officer Somdaka testified that police did not go to the accused's room with him. They found him already in his room sleeping and conducted the search in his presence and found the phone under the mattress. They showed him the phone which had the picture of C[...]. Accused was questioned about it still in his room and denied any knowledge of it. The picture was identified by a community member as being the picture of one of the two deceased persons. The father of the deceased also arrived and identified the phone as being that of C[...], one of his daughters. Nomagcaleka was asked to come into the sitting room to only assist in paging through the phone.

[6] Warrant officer Somdaka denied that community members were present inside the accused's room when the police conducted the search and maintained that members of the community were outside. It was put to him that the second bed was used by a student who was schooling at X[...] High School who was not from that locality but stayed at the accused's home to be closer to school. Warrant officer Somdaka said that the accused did not tell them that on that day. It was further put

to him that the said scholar finished writing the examinations towards the end of November and returned back to his home. He had already left before the 1 December 2015.

[7] The evidence of Dr Potelwa was that on 4 December 2015 he conducted a post mortem examination on the body of S[...] K[...] (S[...]) who was a 12 year old girl. His findings were that the deceased had seven stab wounds to the face and six stab wounds to the anterior lower neck. These wounds were incised wounds, meaning that they had smooth edges but were not very deep. There were also eight wounds in the anterior of the chest wall with multiple stab wounds to the heart. There was also a vaginal tear in the posterior wall of the vagina which extended to the perineum. Her trousers were tied around her neck but not tightly enough to have caused her death. He testified that S[...] died of multiple stab wounds. Because of the vaginal tear he took specimen from the vagina of S[...] for forensic analysis.

[8] Dr Potelwa also testified that on that same day he conducted a post mortem examination on the body of C[...] K[...] (C[...]). His findings were that C[...] had twenty stab wounds in the anterior chest wall, eight stab wounds in the anterior abdominal wall, two stab wounds at the back and most of these wounds had penetrated into the chest and abdominal cavities. As a result, there were multiple stab wounds to the lungs, to the heart, the aorta and to the liver. Her pair of trousers was tied around her neck but not tightly enough to have been the probable cause of her death. He also took vaginal specimen for rape as he did in respect of S[...].

[9] The evidence of Xola Gqibile (Xola) was that he was a friend of the accused whom he had known for many years. They stayed in the same locality where they grew up together and had a very good relationship. He testified that he did not and still does not drink alcohol but the accused drank alcohol before his arrest. On 1 December 2015 there was an initiation ceremony at a certain homestead at Lower Nqadu locality. He and the accused are from Upper Nqadu locality. He, together with the accused and Lwando Siguca (Lwando) went to that homestead at about 20:00 at night. They started in a room that had youngsters as he was looking for Yamkela, his younger brother. When they arrived, the accused and Lwando had not yet consumed alcohol. They only started drinking alcohol there. They saw Yamkela

there but Yamkela ran away as they had gone there to fetch him. They then went to the room where there were adults which was where alcohol consumption was taking place. The three of them sat together in that room and the accused and Lwando started drinking alcohol which was brandy, mqomboti and beers. After some time, they went outside of that room. While they were outside, C[...] and the accused met and had a conversation in front of the big house. The premises were well lit with electricity. C[...] was with other girls at the time he met the accused. He then went into the room which had youngsters and he never saw the accused again. He knew C[...] and he had known her for a very long time as she grew up there. The accused also knew C[...] but he was not aware of any relationship between them. He also never saw C[...] again after he had seen her talking to the accused. After having been in the room where the youngsters were, he also went to the room where the drinking took place but the accused was not there. He was with Lwando and the two of them looked for the accused for about 30 minutes. They even called him on his phone but they could not reach him. At some point they gave up and went to their homes without him. The time was already after 03:00 am when they left that homestead.

[10] He arrived at his homestead at about 06:00 that morning. At about 07:30 am he went to the shop to buy himself a drink. On his way back from the shop he came across Lwando. Lwando asked him if he had heard that C[...] had passed away to which he said he had not heard anything. They parted ways and he went home but after he arrived home, community members in two bakkies arrived. Some men alighted and asked him who was present at the homestead at Lower Nqadu locality in which there was a traditional ceremony. He was then taken to the crime scene in one of the vehicles. Lwando and the accused were brought to the crime scene whilst he was already there. He was questioned about the two deceased. They were questioned separately in the presence of the police. They were then taken to their homes and at his home, nothing was found. After his home was searched, they were taken to the accused's home which was also searched. A cellphone which was a black and white vodaphone smart phone was discovered. When that phone was turned on, the picture of C[...] appeared. He testified that accused was present in the room when the phone was discovered but there were also many other people there. He testified that the phone was taken to the living room where it was switched on.

The house was also searched and accused's clothing was also discovered soaked in water in a bath tub behind the door. It was a vest and trousers which had blood stains.

[11] Xola testified that when they were at the ceremony, accused was wearing the jean trousers that was soaked in water and a lumber jacket that was black. He did not see what the accused was wearing underneath the lumber jacket. Police were present when the phone was discovered under a mattress but he did not see exactly who discovered it. The accused was asked about the phone and was assaulted and handcuffed. Accused was assaulted by the police and members of the community with fists and open hands inside the house. After the discoveries that were made at the accused's homestead, Lwando's home was also searched but nothing was discovered at Lwando's home.

[12] Under cross-examination, Xola testified that accused was fetched from his home and taken to the crime scene by community members. He was present when accused's home was visited for the second time during which it was also searched. Accused was present when his (Xola's) home was searched because from the crime scene the community members and the police took them to his home first which was searched but nothing was found. From his home the group proceeded to the accused's home. The door was opened and a mattress got lifted and the cellphone was discovered. They were all not handcuffed when they left the crime scene. Accused was only handcuffed after the phone was discovered. When they were at the homestead where there was a traditional ceremony, he saw accused talking to C[...] but at no stage did he see S[...] with the accused. Xola disputed the version of the accused that he (accused) left after 12:00 am accompanied by Lwando. He further denied that after having accompanied him, Lwando turned back at the gravel road and returned to that homestead. Xola explained that he and Lwando looked for the accused, they could not find him and even called him on his phone but they could not get through. They then left after 3:00 am without having found him. He further testified that there would have been no need for Lwando to accompany the accused to the gravel road as the gravel road was just outside the gate of that homestead. Furthermore, he was always with Lwando looking for the accused. Xola further testified that there was one bed in the accused's room but there was also a

mattress that was behind the door. Xola also testified that he knew accused's girlfriend and as far as C[...] was concerned, he saw them together for the first time in that ceremony.

[13] The evidence of Mr K[...] was that he was the biological father of the two deceased children. C[...] and S[...] had asked him for permission to attend the traditional ceremony which was taking place at a homestead in their community. He gave them permission to attend that ceremony. They left at 19:30 and they never came back. In the morning at about 4:00 am he received a telephone call in which he was told that his children were found dead in a forest. The forest is in the same locality but closer to the homestead that had a traditional ceremony. He and his wife proceeded to the crime scene where they found the dead bodies of their children lying close to each other. When they arrived at the crime scene, they found community members and the police already there. The community members enquired from the young men of the locality what they had seen the previous night. The young men told them that the last time they saw the deceased was at about 2:00 am at the ceremony and that was also the last time they saw the young men from Upper Nqadu locality.

[14] Mr K[...] testified that he then said that the Upper Nqadu young men should be fetched so that they could tell them when was the last time they saw the deceased. The members of the Lower Nqadu community fetched those three Upper Nqadu young men who were mentioned amongst whom was the accused. He remained at the crime scene when those young men were fetched. The first to be questioned was the accused but he was not part of the group of locals that questioned the accused. At some point he also got an opportunity to speak to the accused and the accused said to him that he knew that he was C[...]’s father. He asked the accused about a blood stain that was on the zip of his jacket and the accused told him that he had a wound on his knee and that blood stain came from that wound. He asked the accused to show him the wound. The wound was on the accused's right knee and he observed that it was similar to the wounds on the bodies of the deceased.

[15] The police said that the homes of the young men should be searched. He then went home for a prayer session. He later received a call from sergeant Zide asking

him to come to the home of the accused to identify a cellphone. When he got there he found the police with other people standing in front of the house. Accused was present and the other two young men, Xola and Lwando were also present. Sergeant Zide showed him a cellphone and he identified it as that of his daughter, C[...]. It was a vodaphone phone which was white at the back and black at the front. After sergeant Zide switched it on, C[...]'s photo appeared on the screen. He took out his own phone and called C[...]'s number and that phone rang. The police said that they should also go to Lwando's home to conduct a search. Sergeant Zide told him that the phone was found between a base and a mattress of the accused. There was also clothing in the accused room which the accused was wearing the previous night. That clothing had blood stains. He personally saw that clothing in the accused's room in a bath tub which was behind the door soaked in water. He was told by sergeant Zide that the accused had said that he had picked up C[...]'s phone the previous night. They then proceeded to Lwando's home where a search was conducted but nothing was found.

[16] Under cross-examination, Mr K[...] testified that the accused, Xola and Lwando were fetched by community members and brought to the crime scene but the police warned the members of the community not to beat them. He did not go with the people that fetch them but remained at the crime scene. He would not comment when it was put to him that when the community members that fetched the accused also searched his homestead and found nothing. He, however, added that the locals came back with the young men and that they had not gone to search their homes. He testified that he went into the accused's room and saw the bath tub with clothing soaked in water and he observed that the water had blood and the trousers had blood stains. When it was put to him that the evidence of warrant officer Somdaka was that the bath tub was outside, Mr K[...] testified that when he got to the accused's homestead, the bath tub was inside the house. When he got there, the police and community members were outside the house with the accused. He further testified that when the locals came back to the crime scene with the accused they were not carrying anything and the accused was not carrying anything. It was put to Mr K[...] that the accused had sustained an injury to his knee five days before the traditional ceremony to which he did not comment.

[17] The evidence of major Ndeleni was that at the time of the incident in this matter he was the commander of detectives in Willowvale. On 2 December 2015 he was at work when a report was received that certain young girls had been found dead in a forest in Nqadu. He asked sergeant Zide to attend to the incident. Sergeant Zide and other officers went to the crime scene. He also went to the crime scene in a separate work vehicle. He found sergeant Zide with members from the visible policing unit already there. Sergeant Zide showed him the crime scene and he saw deceased bodies of two young girls. The bodies were about three metres apart. Warrant officer Cupido from the LCRC arrived and took crime scene photographs and collected exhibits. Members of the community who were there at the crime scene said that they suspected three young men being the accused, Lwando and Xola. The members of the community left to look for the three young men. He together with sergeant Zide and another group of locals went to the home of the accused. They found him asleep. The locals waited outside while he and sergeant Zide got inside the house and woke him up.

[18] They introduced themselves and told the accused that they were investigating the death of the two young girls. They asked the accused for permission to search the house in which he was sleeping. Sergeant Zide searched the room starting with the bed in which the accused was sleeping. During the search it was sergeant Zide, himself and the accused who were inside the room. When sergeant Zide lifted up the mattress, he found a cellphone and asked the accused whose phone that was and the accused did not respond. He then asked the accused who then said that he had robbed it from C[...]. When sergeant Zide turned the phone on, C[...]'s picture appeared. Sergeant Zide paged through the phone and a picture of C[...]'s father appeared. C[...]'s father was called and he came and identified the phone as that of C[...]. When C[...]'s father was shown the phone they were all in the house.

[19] Under cross-examination major Ndeleni disputed that the accused was fetched from his home and brought to the crime scene. He denied that warrant officer Somdaka was the one who found the phone between the mattress and the base of the bed. He also disputed the evidence of warrant officer Somdaka that he found the phone in another bed in the room of the accused saying that there was only one bed in that room. He also disputed Xola's evidence about how the phone was found. He

disputed Mr K[...]’s evidence that the accused was fetched from his home and brought to the crime scene. He also denied Xola’s evidence that the accused was assaulted by community members and that the police tightened his handcuffs. It was put to major Ndeleni that the version of the accused was that he was fetched from his home by members of the community who first searched his home and found nothing after which he was taken to the crime scene. Major Ndelelni disputed the accused’s version of events.

[20] The evidence of sergeant Zide was that he was the initial investigating officer of this case before it was handed over to sergeant Sogwangqa. On 2 December 2015 he was at work when he received a report about this matter from warrant officer Somdaka. He, together with warrant officer Somdaka proceeded to the crime scene. The crime scene was located near a small forest next to the mealie fields. They found members of the community already there at the crime scene. The deceased bodies had stab wounds. C[...] was strangled with a jean trouser around her neck and S[...]’s hands were tied to the back with a belt. Warrant officer Cupido from the LCRC in Butterworth arrived and did his work after which Mrs Lupondo from the Forensic Unit removed the bodies and took them to the mortuary. Major Ndeleni also arrived and the members of the community spoke about young men from Upper Nqadu locality who had attended the traditional ceremony. The locals said that those young men should be fetched and brought to the crime scene. Those were the accused, Xola and Lwando.

[21] Before they could go to look for the three young men, Xola arrived with some local young men and they reported that they could not find the accused and Lwando. It was decided to go to Xola’s homestead to conduct a search. Xola’s bedroom was searched and nothing was found. They, together with community members proceeded to Lwando’s home and found that he was not there and there was no one there. They went to the accused’s home and knocked in a flat roofed structure which was not locked and they pushed the door open. They got inside and saw a door that led to another room. They knocked at that door and there was no response. The door was also not locked and they pushed it open. He, together with warrant officer Somdaka and major Ndeleni entered the room but told other people to wait outside. They noticed someone sleeping on a bed. The said person confirmed that he was

the accused person. After introducing themselves and telling him why they were there, they asked him for permission to search his room. The accused was in his clothing when they woke him up. He started searching and at some point, he lifted the mattress of the bed in which the accused was sleeping. After lifting up the mattress he saw a vodaphone cellphone that was white with a black screen. At that time, inside the room it was himself, the accused, warrant officer Somdaka and major Ndeleni. He turned the phone on and the picture of C[...] appeared on the screen. He just tapped it and the screen saver which was C[...]’s picture appeared. He asked the accused where he got the phone from and the accused said that he had robbed it from the deceased after he had raped and killed her. He then asked the members of the community for C[...]’s father’s phone number. He got it and phoned Mr K[...] who then arrived. Mr K[...] identified the phone as that of C[...].

[22] He then took that phone together with three other phones that they found there. The accused said that the three other phones were his. He then saw a bath tub in which there was some clothing which was soaked in water that looked like it had blood. He lifted up the pair of trousers that was soaked in the bath tub. He also took it for investigation. All of this happened in the presence of the accused. He then arrested the accused. Under cross-examination sergeant Zide denied that the accused was brought to the crime scene by members of the community. He said that he was present when members of the community said that the suspected young men should be fetched and brought to the crime scene. He disputed Mr K[...]’s evidence that the accused was fetched and brought to the crime scene for questioning. He, however, confirmed that the police and members of the community went to Xola’s home but said that when they went to Xola’s home, the accused was not part of the group that went to Xola’s home. He disputed Xola’s evidence that the accused was present when his home was searched but confirmed that Xola went with them to the accused’s home. He had made a mistake in his statement when he said that the members of the community fetched the accused and insisted that it was only Xola who was fetched by community members and brought to the crime scene. He confirmed that he was with warrant officer Somdaka throughout but denied warrant officer Somdaka’s evidence that he was the one who found the phone under a mattress. He insisted that he was the one who found that phone under the mattress of the bed in which the accused was sleeping.

[23] Admissions in terms of section 220 of the Criminal Procedure Act¹ were entered into the record. In those admissions the accused admitted that he had sexual intercourse with C[...] on 1 December 2015. He admitted the chain evidence relating to the samples and specimens that were collected and sent to the forensic laboratory for DNA analysis and their safe custody throughout. The accused also admitted the Biology Report compiled by warrant officer Heyns and her conclusion that he was positively linked to the vaginal swab that was taken from C[...].

[24] Accused opened his case by testifying in his defence. He testified that he is 31 years old, born on 26 January 1995. Before his arrest, he resided in Willovale at Upper Nqadu locality. He testified that he knew C[...] in that in May 2015 following his return from Cape Town he had a love relationship with her. He spent the day on 1 December 2015 in his locality. He later attended a traditional ceremony at a homestead at Lower Nqadu locality with Xola and Lwando. He met C[...] there whom he did not know would also be in attendance. He had several conversations with her several times as lovers because they would meet and separate and meet again as there were many people there. In one instance they agreed to go out of the yard of that homestead. They got out of the yard and had a conversation about her going with him to his homestead. However, C[...] refused to go with him indicating that it would not be possible for her not to sleep at her home because her father was very strict. He said that there was a hedge between the yards adjacent to that homestead. They went to that hedge and sat down and continued with their conversation. After a while, they engaged in consensual sexual intercourse. However, they did not stay for too long and C[...] left with another group of girls after they had returned to the ceremony.

[25] The time was between 22:00 and 23:00 when they engaged in consensual sexual intercourse. He saw C[...] again at the ceremony in the yard after they had had sexual intercourse. He left the ceremony at about 02:00 am but he could not remember the exact time. When he left he asked Lwando who was the one who was

¹ Section 220 of the Criminal Procedure Act 51 of 1977 provides that: An accused or his or her legal adviser or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact.

close to him at the time and with whom he had been drinking alcohol to accompany him up to the gravel road as he was not familiar with that area. Lwando accompanied him up to the gravel road after which he turned back. He went home but he was not sure what time it was when he got home. When he was told that Xola's evidence was that Xola and Lwando looked for him and even called him on his phone but could not get through, he said that he did not know that they looked for him and that the battery of his phone had died. He added that when he left, it had been a while since he last saw C[...].

[26] He did not know S[...] and he never saw her at the ceremony. When he got home he got into his room and slept. He woke up at 07:00 and prepared as he needed to go to town. He had already finished taking a bath when he received a call from Lwando. At this stage he had charged his phone hence he was able to receive Lwando's call. Lwando told him that he was in another homestead near his home and asked him to urgently meet him at that homestead. He proceeded to that homestead which is close to his homestead. Lwando told him about the death of C[...] asking him if he had heard that his girlfriend had passed on. He then asked which girlfriend was Lwando referring to and Lwando said that it was C[...]. He was shocked by this news and while they were talking about that, Xola arrived coming from a shop as they were going out. Thereafter they parted ways, each one going to his home. When he got home he decided to clean his room. After he was done cleaning his room and making up his bed he decided to wash all his dirty clothes especially the bright coloured ones.

[27] He put all the bright clothes in a big metal bath tub and soaked them with the intention of washing them when he returned from town. At some point six men arrived at his home. One of the men told him about the death of two children one of whom was C[...]. This man told him that he was required at Lower Nqadu locality and they were there to fetch him. They requested to get into his room and asked him about what he was wearing at the ceremony the previous night. He told them that he had soaked the pants he was wearing on that day. They took his camouflage trousers which happened to have some blood stains as he had an injury on his knee after falling on a broken glass. Those men searched his room and left his clothes scattered. After conducting the search, those men took him with them. They told him

to lock his flat and took him in their vehicle to the crime scene. There were many community members, vehicles and police officers at the crime scene. When he got there, Xola and Lwando were already there.

[28] Accused further testified that he did not meet Mr K[...] at the crime scene. He only got to meet him at his home. At the crime scene he showed the community members his wound on his knee but he never interacted with the police there. At some point it was decided to go to his home to conduct a search. He was taken in a vehicle to his home and community members also came to his homestead. The vehicle he was in was driven by major Ndeleni. They first started at Xola's homestead which was searched and thereafter proceeded to his homestead. When he was earlier taken to the crime scene, he had locked his flat and the key was in his pocket. Sergeant Zide pushed the door open instead of asking him to open it. Police and community members got inside but Xola and Lwando remained outside. He was also left outside. He was not inside the room when the phone was allegedly found. Police told him that they had found a phone between a mattress and a base in the bed his was sleeping in. He denied the evidence of the police that they found him sleeping in his bed saying he met them at the crime scene. He was asked about the evidence that there was a bath tub which had trousers with blood stains that was soaked in water. Accused said that it could be true but the blood was his own blood. His pair of trousers were stained with blood as he was wearing it the previous night at the ceremony. The wound on his knee became septic and wet which caused the stain in his trousers. He denied kidnapping and killing the deceased, robbing C[...] of her phone and denied raping her.

[29] Under cross-examination, accused testified that he had a love relationship with C[...]. He said that he was born in Cape Town and would come to Nqadu for a visit only during school holidays. In 2015 from May he stayed in Nqadu until his arrest in December 2015. He got to know that C[...] stayed in Lower Nqadu after they met at a certain shop in May 2015 where she was doing hair for somebody. He and C[...] started a love relationship on that day. They never exchanged phone numbers because his girlfriend had access to his phone. Their mode of communication was only through texting each other on facebook. His girlfriend did not have access to his facebook because she did not have the password. Although their relationship started

in May 2015, he never saw her again until they met at the ceremony in December 2015. He described their love relationship as not having been serious. They could not meet because her father was very strict. He was not sure if she was schooling but he later said that she could have been schooling with his sister at X[...] High School. He could not remember her grade and he did not know her birthday.

[30] He testified that he had never been to C[...]’s home and she was not allowed to leave her home because her father was strict. He never tried to meet C[...] after school because his main girlfriend was also schooling with her. C[...] did not tell him that she had been given permission to attend the traditional ceremony that night. Accused testified that he only got to know Xola after his return from Cape Town as Xola grew up in another locality. They became friends as they would meet at Xola’s home where liquor was being sold and they would sometimes walk together. He knew Lwando from Cape Town. He and Lwando bought half a bottle of white brandy at Xola’s home and they were drinking it on their way to the ceremony. They went there with Xola and they were looking for Xola’s brother. They went to that ceremony at about 20:00 that night. He saw C[...] outside in that homestead for the first time since May 2015 and he spoke to her. He saw her three times that night. The second time he saw her was in a flat because it was drizzling that night. The third time he saw her was when he asked her to leave with him. They went through one of the gates in that homestead and went next to a hedge. They talked and ended up having consensual sexual intercourse after they had kissed. He never asked her for an engagement in sexual intercourse. They just had sexual intercourse. He said that this was because C[...] had a choice to say no if she did not want to have sexual intercourse with him.

[31] After having sexual intercourse, they went back into that homestead and C[...] went into the flat where other girls were. He went to the house where he had left Xola and Lwando and found them there with other young men. At some point he decided to leave. He asked Lwando who was still going to remain there to accompany him up to the gravel road which he did. He did not tell Xola that he was leaving because he could not find him. Accused testified that Lwando knew about his relationship with C[...]. When he was asked if Lwando would confirm that he had a relationship with C[...], he said that that would depend on Lwando. He conceded that

it was never put to Xola that his phone battery died when Xola said that they phoned him but their calls could not go through. Accused was asked if before he left that homestead, he went to C[...] to tell her that he was leaving. He said that he did not need C[...]’s permission for leaving. He also conceded that it was never put to sergeant Zide that his pair of trousers that was soaked in water which looked like it had blood was caused by the bandage as a result of the injury on his knee. He also confirmed that C[...] had never been to his place. He could not explain how C[...]’s phone was found in his room. He further said that his wound on the knee was an old wound. On being asked questions by the court, he testified that his wound was not deep. It was just on the knee cap and he never took it to any clinic or health facility.

[32] The evidence of the State was given by five witnesses as it relates to the events leading to the arrest of the accused. I consider it prudent to start with the inconsistent aspects of the State’s evidence. All three police officers being warrant officer Somdaka, sergeant Zide and major Ndeleni testified that from the crime scene, they went to Xola’s home, searched and found nothing linking him to this offence. From Xola’s home they proceeded to accused’s homestead and found him sleeping in his bed. After waking him up and introducing themselves, they asked him for his permission to conduct a search, they searched his room and found the phone between the mattress and a base of the accused’s bed. All this took place in the accused’s presence. They also found clothes with blood stains soaked in water in a bath tub. However, there were also a few inconsistencies between the evidence of the three police officers even among themselves.

[33] When the evidence of the police is juxtaposed with the evidence of Mr K [...], the father of the deceased, some inconsistencies become evident. In essence, Mr K [...]'s version was that following the discovery of the bodies of the deceased at a forest in Lower Ngadu, the community took a decision in the presence of the police that the three young men that the community suspected of complicity in the death of the deceased should be fetched and brought to the crime scene for questioning. This was done. After the three suspected young men were brought to the crime scene, they were questioned and a decision was taken to go and conduct a search at their homes being the accused, Xola and Lwando. Mr K [...] testified that he did not go to the young men’s homes but remained at the crime scene. At some stage, he went

home for prayers. He later received a call from sergeant Zide asking him to come to the home of the accused. He went to the home of accused and on arrival there, he was shown a phone which he identified as that of C[...]. The evidence of Xola was along the same lines, the common thread being that on Xola's evidence as well, accused was brought to the crime scene. After they were questioned at the crime scene, a decision was taken to search their homes. His home was searched first after which the members of the community together with the police proceeded to the home of the accused, with the accused. On Xola's evidence, accused, Lwando and himself were taken from the crime scene a result of which, accused was present when his home was searched. He, Xola was also present when the home of the accused was searched. Accused's evidence in this regard was also that he was taken to the crime scene and then from the crime scene they were all taken to Xola's home which was searched and after that they went to his home which was also searched.

[34] I find the evidence of Xola and Mr K[...] considered together with that of the accused, at least as it relates to the accused being taken to the crime scene before police and members of the community returned to his house to conduct a search, to be more probable. I do not think that the three police officers were merely mistaken in giving the court the sequence of events in the manner they did, which sought to suggest that at no stage was the accused brought to the crime scene. The court's attention was drawn to their corroboration of one by the other in this respect. I, however, have a disconcerting feeling that the police in this regard were trying to cover the impropriety of remaining at the crime scene and allowing members of the community to look for and bring the suspected young men to the crime scene. This conduct was inappropriate and unprofessional. In conducting themselves in that manner, the police could easily have compromised this case out of mere lack of foresight, into the importance of conducting their investigative work with the care, diligence and professionalism that it requires. This is more so in a case as serious as this one where two innocent children lost their lives due to criminality, in an unimaginably brutal fashion. Worse still, vigilantism could easily have happened if the members of the community of Lower Nqadu had decided to take the law into their own hands and deliver mob justice to the suspects. Police cannot and should

not allow members of the community to look for suspects on their own and bring them for questioning as that could easily have disastrous consequences.

[35] That having been said, I do accept that as Mr K[...] and Xola testified, accused was fetched from his home by members of the community and taken to the crime scene where he was questioned by members of the community where police, while present, remained supine, which, on its own was shockingly inappropriate. During the questioning by members of the community, Mr K[...] was, on his evidence, not amongst the members of the community that questioned the accused initially. This was because there was somebody who arrived and who wanted to be shown the bodies of the deceased. Mr K[...] attended to the said gentleman and showed him the bodies of his deceased children. Mr K[...] then came back to the group of the members of the community who were questioning the accused. When he came back to the community members that were questioning the accused, he and the accused had occasion to look each other in the eyes. He then asked the community members to stop with the questioning momentarily so that he could talk to the accused. He then established from the accused, if the accused knew him and the accused confirmed that he knew that he was C[...]’s father. His evidence was also that he then said to the accused: *“My spirit tells me that you have killed my children. Even after 30 years you will say that I did say that you are the one who killed my children.”* After this painful conversation, he told the members of the community that they could continue questioning the accused.

[36] With all of this exchange on the evidence of Mr K [...], having taken place at the crime scene, the three police officers told this Court that accused was never taken to the crime scene. The police’s evidence that if the community members took the accused to the crime scene, it did not happen in their presence could not possibly be true. This is so because the chronology of events as narrated by Mr K[...] was that when he was called to the crime scene, he found the police already there. Besides, Mr K[...]’s evidence was that the police were present when the accused sought to explain the blood stains in his lumber jacket that were noticed by a certain Mr Magafela. After the blood stains were noticed, Mr K[...]’s evidence was that he then came close to the accused and asked him how he got to have blood stains in his clothing. Accused told him that he had an injury on his knee and Mr K[...] added that

he then asked the accused to show him that injury and he saw it on the accused's right knee. He then formed an opinion that the accused's wound was caused by a knife and that it was similar to the wounds inflicted on his deceased children. He added that during that interaction with the accused, the police were present and it took place at the crime scene.

[37] What became clear was that not only did the three senior police officers allow members of the community to be at the forefront of the actual questioning of the suspects, they also left the questioning of the suspects entirely to the members of the community. This was highly irregular as it is the duty of the police to investigate crime. That they allowed the suspects to be questioned by members of the community in their presence was unfortunate and was a high degree of unprofessionalism. What was worse was the police all disavowing the presence of the accused at the crime scene. This was clearly done to hide their indiscretions and lack of foresight on the significance of properly handled investigations in the evolution of a criminal trial. Most importantly, its essentiality on whether or not, at the conclusion of a criminal trial, the court returns a guilty verdict or that of an acquittal. An acquittal is often not a judgment on whether the criminal who is charged is the one who actually committed the offence. It is often a determination and a judgment on the thoroughness and professionalism with which an investigation was conducted. By this I mean a clearly guilty person often walks free because of the failures of the police to do their job properly. I am mindful of many other police officers who go beyond the call of duty to do their investigative work with professionalism and care which result in convictions across our country. However, it would be remiss of this Court not to comment and express its disquiet when it becomes aware of elements of improper conduct on the part of some police officers. It is worse when some of the evidence seems to have been suspiciously told as if it was first discussed.

[38] The accused's version was that he was fetched by the members of the community from his home. He testified that those members of the community first searched his room turning the place upside down and leaving clothes scattered all over the place. This version was never put to any of the State witnesses. The importance of the failure of the accused to put this version to the police officers when

they testified is that their evidence was that they conducted the search and found C[...]’s phone in the room of the accused. Surely if they got there and found the accused’s room upside down as he testified, it was very important that the accused himself would have told those questioning him at the crime scene that his room was already searched when it was resolved by the community members that the homes of the three suspects be searched. It was also important that in addition to that, it be put to the police that because of the search that some members of the community had conducted earlier, his room was upside down when the police searched it. While the accused lied in this court a number of times, I find his evidence that he was fetched by members of the community from his home and taken to the crime scene to be more probable, especially when considered together with that of Mr K[...] and Xola. He, however, lied when he said that those community members first searched his room and left his clothes scattered. That was patently false and a deliberately crafted strategem to mislead the court for purposes of creating the false impression that the phone could have been put where the police found it by a person other than the accused himself.

[39] This brings me to the second visit to the accused’s home by members of the community who were, on this occasion, led by the three police officers. During this visit to the accused’s homestead, all three police officers testified that only the three of them entered the accused’s room and conducted the search in his presence. Save for warrant officer Somdaka, their evidence was that they found the cellphone belonging to C[...] under the mattress of the bed on which the accused was sleeping. The evidence of warrant officer Somdaka was that he was the one who found the phone under mattress of another bed in the accused’s room. Similarly, the evidence of sergeant Zide was that the phone was found by him under the mattress in the accused’s room. Both of them said that they found it in the room in which they found the accused sleeping with one saying under the mattress of the accused’s bed while the other said he found it under the mattress of another bed in that same room.

[40] I do not consider the question of which one of the two police officers actually found the phone as that material considering that a substantial period of time had elapsed since they searched that room. It makes no difference as to who was mistaken as far as who actually found it. What is important is that the deceased’s

phone was found in the accused's room at a time when he was staying alone in that homestead, a few hours after the death of the deceased. All three police officers testified that accused was present when the phone was found in his room. Xola's evidence was that accused was present when the phone was found in his room. Xola's evidence was also that he was present during the second visit at the accused's home. He testified that the door was opened and a mattress lifted as a result of which the deceased's phone was discovered. The only debate was whether the mattress that was lifted was the one of the accused's bed or the one that was behind the door in the accused's room. What was beyond cogent dispute was that C[...]s phone was found in the room of the accused a few hours after C[...] and her younger sister's murders. Fundamentally, this phone was found shortly after the bodies of the two young girls were found lying naked each having been stabbed several times and his poorly explained blood stained clothing was also found soaked in water.

[41] While the accused had no duty to prove his innocence, he did have a duty to provide an explanation that was reasonably probably true about the presence of the deceased's phone in his room. In this regard, accused invented false conspiracy theories. One was that he did not stay alone. He stayed with a student who stayed at his home so as to be closer to a local school. Confusingly, he then said that that student went home sometime in November after finishing writing his end of the year examinations. That being the case, it was bewildering that he incoherently mentioned that student, assuming that it was even true that such a student stayed at his homestead. His second explanation was that the members of the community who visited his house first searched his room before taking him to the crime scene. In this regard, he was lying. I accept that the people that fetched him did not conduct a search on any of the suspects' homes. The first suspect to be brought to the crime scene was Xola. He was fetched and his home was not searched at that stage, which begs the question, why then would the home of one of the suspects be singled out for a community search. The fact that the accused's home would not have been searched was aligned with Xola's own experience when he was fetched by member of the community and his home was not searched. It was also Mr K[...]s evidence that the people who were sent to look for the three young men were told to fetch them and bring them to the crime scene for questioning, not to conduct a search.

The accused's attempt at suggesting that the phone that was found at his home could have been planted by members of the community when they fetched him was a fabrication. This was patently false as no search was conducted when he was fetched from his home by members of the community.

[42] There was more evidence pointing to the accused's guilt. It was not just the finding of what was indisputably C[...]s phone in the accused's room shortly after her and her sister's brutal murders. The pair of trousers which the accused admitted that he was wearing at the traditional ceremony in that homestead was found with blood stains soaked in a bath tub so early that morning. He did not deny the blood stains in his clothing. Instead, he said that his pair of trousers had blood stains that would have come from his wound being septic and wet and the bandage being soiled. The problem though was that there was no evidence of a bandage that was found in that bath tub. It follows that accused lied again. Even if there was a bandage in that bath tub, it, like the wound itself, would have been part of the accused's diversionary tactics to create a veneer of innocence. His other lie was his evidence that the wound that was on his right knee had been inflicted a few days before the incident by him falling on broken glass. The circumstances in which he incidentally fell on broken glass remain unexplained by him. He said that he fell on broken glass five days or four days before the incident. He testified that indeed his clothing had blood stains and on the evidence of Mr K[...], even on the zip of the lumber jacket that he was wearing when he arrived at the crime scene had a stain or stains of blood which was shown to Mr K[...] by a Mr Magafela. Accused never dealt with Mr K[...]s evidence in this regard. The wound which Mr K[...] saw on accused's right knee was clearly a self-inflicted wound which he probably inflicted on himself in an attempt to explain the blood stains on his clothing after he had slaughtered those two young victims as mercilessly and as psychopathically as he did.

[43] Again, that is not the last of the accused's problems. There is also evidence which he could not deny. That evidence was that in the vaginal vault, which was deep in the C[...]s vagina, his DNA was found through scientific analysis. He admitted his DNA being in C[...]s vagina. Of course he could not deny sexual intercourse with C[...] because he was aware that his DNA had been found in C[...]s vagina. However, accused came with another lie, a patently false explanation that

C[...] was his girlfriend since May 2015. However, his own evidence was that he last saw her on the day they met at a shop on which day C[...] allegedly agreed to be his girlfriend. He said that he never saw her again and they never called each other. This is very strange in light of the accused staying at Upper Nqadu locality and C[...] at Lower Nqadu locality in the same Administration Area. He then admitted the evidence of Xola as being true, that he did speak to C[...] that night at the homestead in which there was traditional ceremony. Xola's evidence was that after he saw the accused speaking to C[...], he never saw any of them again. At some stage Xola wanted to go home in the early hours of the 2 December 2015. He and Lwando looked for the accused. They could not find him. They phoned him but they could not get through to his phone. After their disappearance, C[...] was found with her younger sister dead having been stabbed with unimaginable savagery. She was also found having been raped and a scientific analysis of the DNA had accused's DNA. It is disappointing that the accused was not charged with the rape or sexual violation of S[...]. Dr Potelwa's evidence was that S[...] had a vaginal tear in the anterior perineum. The Sexual Offences Act 32 of 2007 defines sexual violation as including *"any act which causes direct or indirect contact between the genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal or any object including any object resembling or representing the genital organs or anus of a person or an animal."*

[44] The accused's explanation in regard to C[...]’s rape charge was that he had consensual sexual intercourse with C[...] behind a hedge near the homestead that had a ceremony was yet another falsehood. This was not only so improbable as to be false, it was evidently false beyond reasonable doubt. This story was concocted in a desperate attempt to explain the presence of his DNA in C[...]’s vagina in circumstances in which he could not explain in any other way other than alleging false consensual intercourse.

[45] In *Tom*² from which I quote liberally, Van Zyl DJP, writing for the full court of this Division stated, the applicable law as it relates to circumstantial evidence as follows:

² *Tom v S* [2022] ZAECKMKHC 98; 2023 (2) SACR 283 (ECMKK) paras 9-11 (29 November 2022)

[9] The determination of the probative value of DNA evidence is done in the context of the facts to the case, the nature of DNA evidence, and the rules of evidence which apply thereto. It is in the latter aspect that the second characteristic of the DNA evidence lies. It is, in law, regarded as circumstantial evidence. Circumstantial evidence is evidence of a fact or facts from which the court is asked to infer from another fact in issue. The fact that DNA evidence sets out to establish is that the DNA profile of the crime scene sample matches that of the accused person, from which the court is then asked to infer that the accused was the perpetrator of the crime. The two facts may conveniently be referred to as “**primary**” and “**secondary**” facts respectively, the primary fact being used for drawing an inference(s) as to the existence of the secondary fact. DNA evidence is consequently by its very nature indirect, or as is commonly referred to, circumstantial evidence. With regard to the degree of certainty with which the primary facts must be proved in a criminal case, it always depends on the probative value of the individual facts themselves. Where, as in the instant matter, the fact on which the prosecution relies, constitutes an indispensable link in the chain of reasoning towards the fact in issue, namely the identity of the perpetrator, that fact must be proved beyond a reasonable doubt. This is in contrast with the situation where the State places reliance on a combination of a number of facts which are not individually capable of supporting the inference, but may do so when taken together, in which event it may not be necessary to prove the existence of each beyond a reasonable doubt. It was explained as follows in *R v Mtembu*:

“Circumstantial evidence, of course, rests ultimately on direct evidence and there must be a foundation of proved or probable fact from which to work. But the border-line between proof and probability is largely a matter of degree, as is the line between proof by a balance of probabilities and proof beyond reasonable doubt. Just as a number of lines of inference, none of them in itself decisive, may in their total effect lead to a moral certainty (Rex v de Villiers (1944, A.D. 493 at p. 508)) so, it may fairly be reasoned, a number of probabilities as to the existence of the

facts from which inferences are to be drawn may suffice, provided in the result there is no reasonable doubt as to be accused's guilt. That was the view, I think, which underlay the use of the words "either proved or shown to be probable" in *Rex v Mthlongo* (1949 (2), S.A.L.R. 552 at p. 558 (A.D)) and see Wigmore on Evidence secs. 216 and 2497."

[10] The principles in relation to inferential reasoning are well established. The standard of proof beyond a reasonable doubt in criminal proceedings requires the application of, what the court in the oft-quoted case of *R v Blom* (Blom) referred to, as the two "cardinal rules of logic":

"In reasoning by inference there are two cardinal orders of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.**
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."**

[11] Some of the key principles underlying the test in *Blom*, as amplified in *R v de Villiers* are the following: the facts from which the prosecution seeks to draw the inference of guilt must not also be reasonably consistent with a hypothesis other than the one relied upon, in other words, the inference of guilt must be the only reasonable inference; there must be some evidential foundation to support the inference to be drawn, and speculation, conjecture or a bare possibility will not be sufficient; as the inferential conclusion sought to be drawn is determined against the strength of the factual premise provided by the context of the facts of the case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether the inference is consistent with the proved facts. The evidence must be considered as a whole, and not by a piece-meal approach; and, following from the fact that the burden of proof rests on the State throughout criminal proceedings to prove the

guilt of the accused beyond a reasonable doubt, the accused person is not required to establish that some other inference should be drawn, or to prove particular facts which are to support such other inference.”

[46] The totality of all the evidence in this matter reminds one of the foundational principles of inferential reasoning as profoundly stated in *Mlambo*³ from which I quote copiously:

“It is obviously impossible to formulate the principle in language which will produce any measure of certainty and endeavours are made to afford more definite and reliable guidance to those engaged in the solution of tantalising problems by unravelling inferences from circumstantial evidence. The language employed in the more popular way of enunciating the principle does not appear to offer much relief. It is no more precise than, and it is exposed to the same dangers of misinterpretation and misapplication as, the form which at one time found almost universal favour and which has served the purpose so successfully for generations. In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after nature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must in other words, be morally certain of the guilt of the accused. An accused’s claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case. Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused

³ R v Mlambo 1957 (4) SA 727 A at page 737 H-738 A-D.

did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so. The logical result of the contrary view would be to place a premium upon false testimony and to afford protection to the cunning and ingenious criminal who could with impunity commit murders and, by destroying the body, defy detection of the cause of death and thus escape condign punishment.”

[47] In all the circumstances, I find that the State has proved the guilt of the accused beyond reasonable doubt on all the charges. The State has proved that accused kidnapped both S[...] who was 12 years old at the time and C[...] who was 16 years old at the time. While there was no evidence of S[...] being seen by the only witness called by the State who was present at that ceremony, it is not without significance that the two sisters were found murdered in the same place at the same time. The accused must have lured them or forced them to a secluded spot in a nearby forest where he also raped C[...] and killed both of them in the most savagely cruel manner by stabbing S[...] no less than 23 times and by stabbing C[...], no less than 33 times. These crimes were not committed by chance but were, at some point, planned so carefully that nobody saw the accused leaving with his victims or possibly even following them on their way home that morning whom he abused and thereafter brutally murdered.

[48] The accused is therefore found guilty as charged as follows:

1. Accused is found guilty in respect of count 1, the kidnapping of S[...] K[...].
2. Accused is found guilty in respect of count 2, the robbery with aggravating circumstances of the vodaphone cellular phone of C[...] K[...].
3. Accused is found guilty in respect of count 3, the murder of S[...] K[...].
4. Accused is found guilty in respect of count 4, the murder of C[...] K[...].
5. Accused is found guilty in respect of count 5, the rape of C[...] K[...].

M.S. JOLWANA
JUDGE OF THE HIGH COURT

Appearance

Counsel for the State : M.D. Nyendwana
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