

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: SS41/2012

DATE: 11 JUNE 2013

5 In the matter between:

THE STATE

and

SANDISILE MAKHAKHA

Accused

10

J U D G M E N T

BOQWANA, AJ:

The accused before this court faces six charges. Count 1 is a charge of common law rape as read with sections 256 and 261 of the Criminal Procedure Act, Act 51 of 1977 and section
15 51(1) and part 1 of schedule 2 or part 3 of schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997. Count 2 is a charge of murder read with section 51(1) of the Criminal Law Amendment Act. Count 3 is that of robbery with aggravating circumstances as contemplated in sections 1 of the Criminal
20 Procedure Act read with section 51(2)(a) and Part 2 of schedule 2 of the Criminal Law Amendment Act.

Count 4 is one of attempted murder read with section 51(2)(c) of the Criminal Law Amendment Act. Count 5 is that of rape as
25 contemplated in section 3 of the Criminal Law (Sexual

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Offences and Related Matters) Amendment Act, Act 32 of 2007 read with the provisions of sections 1, 56(1), 57, 58, 59, 60 and 61 of the same Act and with sections 256 and 261 of the Criminal Procedure Act and section 51(1) and Part 1 of
5 schedule 2 of the Criminal Law Amendment Act. Count 6 is that of murder read with section 51(1) of the Criminal Law Amendment Act.

In respect of counts 1 and 2 the State alleges that on or about
10 18 October 2007 and at or near the bushes behind Brown Street, Masakhane, Gansbaai, the accused had sexual intercourse with Nozukile Ntshoze, hereinafter referred to as deceased 1, a female person without her consent and on the same date and place he unlawfully and intentionally killed
15 deceased 1 by strangling or throttling her with his hands and/or any other item and/or doing an act or acts which cut off her supply of air.

In respect of counts 3 and 4 the State alleges that on or about
20 25 November 2007 and at or near the bushes near the industrial area at Gansbaai the accused unlawfully and intentionally assaulted Phindiwe Cecilia Keswa, hereinafter referred to as Keswa, by threatening her with a knife, dragging her into the bushes and choking her and then with force took
25 her purse containing R300,00 and a cell phone from her and

on the same day and place the accused attempted to kill Keswa by strangling and/or choking her and thereby cutting off her air supply.

5 In respect of counts 5 and 6 the State alleges that on or about 4 to 6 July 2011 and at or near the Balasi grazing fields, Bisho, Eastern Cape, the accused unlawfully and intentionally committed an act of sexual penetration with Azavela Ziwele, hereinafter referred to as deceased 2, a female person without
10 her consent and during the same time and at the same place killed deceased 2 by strangling or throttling her with his hands and/or doing an act or acts to cut off her supply of air.

In order to confirm the jurisdiction of the Court in relation to
15 counts 5 and 6 the State submitted a certificate as Exhibit A, issued in terms of section 111 of the Criminal Procedure Act, dated term October 2012, with the National Director of Public Prosecutions directing that counts 5 and 6 relating to offences allegedly committed at Bisho in the Eastern Cape be tried in
20 the area of the Director of Public Prosecutions of the Western Cape High Court.

The accused was legally represented and pleaded not guilty to all the charges against him. In terms of the provisions of
25 section 115(1) of the Criminal Procedure Act the accused

elected not to give a plea explanation. The accused submitted various admissions in terms of section 220 of the Criminal Procedure Act which were read into the record as Exhibits C, S and XX. The most relevant admissions are the following:

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1. The deceased were correctly identified as Nozukile Ntshoze and Azavela Ziwele.

2. The bodies of deceased 1 and 2 suffered no further injuries after the removal from the scene of crime to the mortuary.

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3. The correctness of the contents and findings of both post mortem reports, Exhibit D and H.

4. The correctness of all photo albums and the keys thereto relating to the different crime scenes and/or post mortem examinations.

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5. Blood samples in respect of counts 1, 2, 5 and 6 were regularly taken from the accused and sealed in a reference sample collection kit and submitted to the Forensic Science Laboratory for analysis.

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6. The panties which deceased 1 and deceased 2 had on their bodies during the post mortem examinations were correctly placed inside the sexual assault evidence collection kit by Dr Potelwa and Dr John respectively and regularly submitted to the forensic laboratories.

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Turning to the common cause facts. In respect of counts 1 and 2 it is common cause that deceased 1 was killed on 18 October 2007 at the bushes in Masakhane, Gansbaai. Her body was transported to the mortuary at Hermanus and did not sustain any further injuries or wounds after the removal from the scene of the alleged crime until the post mortem examination was conducted by Dr Potelwa on 22 October 2007. The accused admitted the contents of the post mortem report to be true and correct.

According to the post mortem examination conducted by Dr Potelwa the cause of death was asphyxia due to manual strangulation. The vulva, vestibule, vaginal vault and cervical os swabs were taken from the body of deceased 1. The swabs, together with the panty that deceased 1 was wearing, were placed inside the sexual assault evidence kit by Dr Potelwa. The blood sample was taken from the accused by Dr H Barnard on 11 December 2007.

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The accused's blood sample and the evidence collection kit were submitted to the Forensic Science Laboratory for forensic analysis. The forensic analysis examining the presence of semen showed a positive result on all the swabs undertaken as well as the panty. The DNA result from the panty matched the

reference sample of the male donor L Msengana. It is common cause that the accused was also known as Lunga Msengana and used that name interchangeably with his official name, Sandisile Makhakha.

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With regards to counts 3 and 4, it is common cause that Keswa was robbed on Sunday, 25 November 2007, between 12:00 and 13:00 at the bushes near the informal settlement of Masakhane and at Gansbaai and that her wallet containing R300,00 and
10 her Nokia 2300 cell phone were taken from her during the attack. A male person attempted to kill her by dragging her into the bushes and strangled her up to a stage that she became unconscious. She suffered injuries to her knee and wrist during the attack. It is also common cause that the
15 accused resided in Masakhane, Gansbaai during the period of the alleged offences and that he gave his name as Lunga Msengana when he was arrested.

In regard to counts 5 and 6, it is common cause that deceased
20 2's body was found on 6 July 2011 at the grazing fields between Zinyoka and Balasi and that her body was transported to the mortuary in Bisho and during the transportation the body sustained no further injuries or wounds. A post mortem examination was conducted by Dr John and his finding was
25 that the cause of death was suggestive of strangulation. A

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blood sample was taken from the accused by a registered nurse, N C Solwandle, on 13 July 2011. The cervical os, vaginal vault, vulva and vestibule swabs were correctly taken from deceased 2.

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Those swabs together with the panty that deceased 2 was wearing were placed in the sexual evidence assault kit, sealed packet and sent for forensic analysis. Possible semen was detected in respect of all four swabs as well as on the panty of
10 deceased 2. The DNA result from the reference sample, S Makhakha, was read into the mixture DNA results from the panty.

The accused denies liability in respect of all counts. He raises
15 an *alibi* that he was sitting at home during the period of the commission of these offences. Accordingly the sole issue to be determined by this Court is the identity of the perpetrator of the crimes the accused is charged with. Turning to the evidence led in respect of each of the counts, various
20 documentary exhibits which were not contested were handed in as evidence of which the following are the most important:

1. The post mortem examination reports and sketch plan relating thereto of Dr Potelwa, that is Exhibit D, in
25 respect of deceased 1 and Dr Dominic Thadathilankal

John, that is Exhibit H and his supplementary affidavit, Exhibit ZZ, in respect of deceased 2.

2. Affidavit of Constable Lazarus Kaotsane, attaching photographs relating to the post mortem examination of deceased 1, which were admitted as Exhibits E1 to 23.

3. Affidavits of Mzimkulu Jamba, Hendrik Johannes Janse van Rensburg, Riaan Otto Mostert and Thuso Tsoanayana attaching photographs, photo albums of the crime scenes relating to deceased 1 and an aerial photograph of the Masakhane, Gansbaai area admitted as Exhibits F1 to F3, G1 to G11, L and M respectively. Affidavit of Constable L Gantsho attaching photo albums of the crime scene in respect of deceased 2, admitted as Exhibit J1 to J7.

Several documentary exhibits relating to the collection of DNA and blood samples, the handling and processing thereof and the analysis of the samples and swabs taken from both deceased and the accused which were also not contested, were handed in as follows:

1. Reference DNA blood sample taken from L Msengana by Dr H C Barnard admitted as Exhibit P.

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2. Affidavit by Karen Taljaard admitted as Exhibit Q who received the body of deceased 1, took it to the mortuary and identified it to Dr Potelwa.
- 5 3. Sexual assault evidence collection kit in respect of the collection of the panty and genital samples, also known as swabs, taken from deceased 1 by Dr Potelwa, admitted as Exhibit T.
- 10 4. Affidavit of Buhle Boyana who is a forensic analyst and a reporting officer who tested the panty and swabs from deceased 1 for possible semen and blood admitted as Exhibit U. The defence questioned the administration of the oath of the affidavit of Boyana, but did not challenge the content thereof. Boyana however confirmed the contents of her affidavit under oath in court.
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- 20 5. Photographs of the stained panty for deceased 1 as Exhibit V.
- 25 6. Affidavit of Ulrich Koenze, the senior forensic analyst and reporting officer, who received the crime scene reference samples which were the panty and swabs of deceased 1 and blood sample

of the accused and conducted the DNA analysis of the panty of deceased 1 and the reference sample of the accused admitted as Exhibit W1 to W6.

- 5 7. Collection of forensic reference blood sample taken from S Makhakha by registered nurse Solwandle in respect of deceased 2, admitted as Exhibit HH.
- 10 8. Reference blood and hair and collection kit taken from Thulani Daweti in respect of deceased 2 admitted as Exhibit KK.
- 15 9. Covering letter regarding control blood sample of Daweti addressed to Forensic Science Laboratory for DNA analysis in respect of deceased 2 admitted as Exhibit LL.
- 20 10. Letter from the head of the Forensic Science Laboratory, Wilson Ramalamo Morejeli confirming receipt of exhibits by the laboratory in Port Elizabeth admitted as Exhibit MM.
- 25 11. Adult sexual evidence collection kit in respect of the panty, marshal cassettes and genital samples taken by Dr John admitted as Exhibit PP.

12. Affidavit by Morejeli, who tested for possible semen and blood from the swabs and the panty of deceased 2, admitted as Exhibit TT.

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13. Affidavit by Irfaan Abdullah regarding his receipt and safekeeping of Daweti's blood sample in respect of deceased 2 admitted as Exhibit UU.

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14. Affidavit by Riedwaan Boltman who is a forensic analyst and reporting officer who received case file pertaining to deceased 2 containing swabs, panty and accused's reference blood samples and conducted DNA analysis on the samples received admitted as Exhibit VV.

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15. Photocopy of brown paper bag marked and sealed containing panty of deceased 2 admitted as Exhibit WW.

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Dealing with other evidence. The State led various witnesses many of whom gave formal evidence. With regard to counts 1 and 2 Mostert testified that on 18 October 2007 at approximately 19H50 he was called out and arrived at the scene of crime in Masakhane, Gansbaai where he took

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photographs of the body of the deceased and of the scene with a normal digital camera. On his arrival the body of the deceased was under the bushes and covered in sand lying face down in a shallow grave. He testified that no-one
5 interfered with the position of the deceased's clothing and he was present when the body was turned over.

Jamba who also took photos and prepared key to photos testified that he seized a cigarette butt, a condom, a condom
10 wrapper at the scene and those were taken to the Paarl laboratory for testing and results came back negative. Sukile Ntshose, hereinafter referred to as Ntshose, testified that deceased 1 was his wife. The two of them resided in an informal settlement called Masakhane at Gansbaai. He
15 testified that the house they lived in had no toilets and in order to relieve themselves they had to go into the nearby bushes. Deceased 1 was about seven and a half months pregnant when she died and was unemployed. Ntshose testified that on 18 October 2007 he left home at 7:30 in the morning to go to
20 work. When he returned home at 17h30 in the afternoon his wife was not at home and the door was not closed.

He noticed a wash basin with water as if his wife wanted to wash herself. There was no indication of any disturbance in
25 the house and the house was in a normal state and nothing

was missing. He then called his wife on her cell phone and the phone was not answered. He then phoned his wife's brother, Vuyo Tshitshi who also resides in the same area. Tshitshi also did not know about his sister's whereabouts. The family and
5 other community members accompanied them to search for his wife in the bushes. Ntshose noticed that there were footprints on the sand and he followed the trail and found his wife's body buried in a shallow grave and covered with bushes.

10 He recognised her clothing as the traditional dress she had on in the morning when he left her. He was very shocked and disturbed by what he saw. He did not interfere with the body. One of the men then went to call the police. The police arrived on the scene. Ntshose was not present when they removed
15 the body of his wife from the scene. Ntshose further testified that the accused was unknown to him and his wife and that he and his wife had a good marriage relationship and he had no reason to believe that his wife had extramarital affairs. Tshitshi, who also was called to testify, corroborated
20 Ntshose's testimony and therefore it is not necessary to repeat his evidence.

Taljaard, who gave evidence before the Court under her married surname, Van der Bergh, testified that she is
25 employed at the Forensic Pathology Laboratory at Hermanus.

She was present on the night of 18 October 2007 when deceased 1's body was removed from the bushes. The deceased had a panty on. The body was handed over to her by Constable Ralekwa. She transported the body to the mortuary at Hermanus. While the body was in her care and transported by her it sustained no further injuries or wounds. On 22 October 2007 she identified the body of the deceased to Potelwa. The deceased's panty was removed by Dr Potelwa when he conducted post mortem examination on the body. On 10 1 November 2007 she handed over a sealed blood sample plus a sexual assault kit marked WC/190/2007 to Warrant-Officer Roux at the SAPS police station in Gansbaai.

Dr Potelwa testified that he is a registered medical practitioner and forensic pathologist. On 22 October 2007 he examined the corpse of an adult female which was pointed out to him by Taljaard as being that of WC03/0190/2007, estimated to be 22 years old. He conducted a post mortem examination on the body and recorded his chief post mortem findings on the post mortem examination report. Photographs of the deceased's body were taken. He removed the deceased's panty and placed it in a container, then took all the swabs. He found that there was evidence of manual strangulation and evidence of intra-uterine pregnancy of approximately six months intra-uterine life. He defined manual strangulation as a situation

where there is an obstruction of the airway around the neck with the use of hands.

He further stated that the deceased had blooded dot on the
5 eye which is associated with the pressure around the neck of a
person. He further testified that the abrasions on the neck of
the deceased are ascribed to manual abrasions and that the
injuries and black spots on the neck indicated that there was
an obstruction on the neck of the deceased using more than
10 one finger. He further testified that there was a fracture on
the hyoid bone. He referred to the hyoid bone as a strong
bone and for that bone to be broken a lot of force is needed.
There were also multiple scratches on her legs.

15 Dr Potelwa noted in his report that there was no evidence of
injuries to the genital organs of the deceased. He however
testified that an absence of injury to the genital organs of a
female does not necessarily mean that there was no forceful
penetration. He could not rule out that there may have been
20 penetration. Even if there was penetration, however, the only
thing that would assist the Court in this instance would be
evidence on the swabs. No semen was visible from the body
during his examination. Dr Potelwa testified that if the female
was lying face down in a shallow grave, such as in the case of
25 the deceased, there was a possibility of the semen oozing out

of the genital area of the vagina.

Boyana testified that on 7 June 2008 she was attached to the Biology Unit of the Forensic Science Laboratory as a forensic
5 analyst. She examined the relevant exhibits by a process requiring competence and biology. The presumptive testing revealed possible semen detected as positive in the vestibule, cervical os, vulva, vaginal vault swabs and the panty. The tests for blood on the panty were negative. She took
10 photographs of the panty from the area of the panty that covers the vagina and cut the crotch part of the panty for further analysis. She testified that the exhibits and control blood samples were in her safekeeping from the date of receipt to the date of completion of all analysis.

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Koenze, who testified that he was a major in the SAPS attached to the Biology Unit of the Forensic Science Laboratory in Plattekloof, gave evidence as an expert witness.
20 He testified that on 15 December 2009 he received the case files of deceased 1 and evaluated and interpreted the DNA results of the crime scene and reference samples pertaining to CAS134/10/2007, LAB or lab numbers 174314/07 and 94997/08. His findings are recorded on the table in Exhibit
25 W5.

Referring to Exhibit W5 Koenze testified that the DNA profile of L Mgengana, seal number 01D3AA7618XX, was compared with the crime sample which was panty A105D1AG1149PS.

5 The DNA found on the panty was exactly the same in terms of numbers with that of the reference sample L Mgengana. The most conservative occurrence for the DNA result from the panty that can be calculated is one person in every 32 billion. On the vestibule, cervical os, vulva and vaginal vault swabs a
10 mixture profile was obtained, but there was not enough male DNA profile to interpret and make any sense as to who the specific donor was.

When it was put to him that the surname of the accused was
15 Msengana and not Mgengana he stated that he read the reference sample to be L Mgengana instead of L Msengana and to him the letter in the reference sample collection kit on Exhibit P looked like a 'g' instead of an 's'.

20 Joseph George Hayes testified that he was the investigating officer in relation to counts 1 and 2 and was handed the docket on 18 June 2009. At that stage no suspect was identified. When he received the DNA report dated 21 December 2009 a suspect was identified. At that stage the name of the suspect
25 was Lunga Msengana. After receiving this information and

after applying for a J50 warrant he proceeded to Bisho accompanied by Constable Thulani Mtokwana. When they arrived in Bisho a suspect was already arrested on a similar charge.

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They brought the suspect from Bisho to Hermanus on 15 May 2010. Hayes completed a warning statement, Exhibit N, and then obtained the name of the suspect as being Sandisile Makhakha. This information was confirmed by the accused's
10 sister who also provided him with his date of birth and residential address. Mtokwana corroborated Hayes's testimony and therefore it is not necessary to repeat his testimony.

As regards counts 3 and 4, Keswa testified that she was 26
15 years old and married. At the time of the incident she was residing at Masakhane settlement at a backyard in Gansbaai and was employed by OK Foods. On Sunday, 25 November 2007, she worked until 12:00 when she brought bread and walked home. At that time she walked alone on the tarred
20 road near the bushes and was carrying a jacket and a bag in her hands. As the houses in Masakhane became visible she heard a sound of shoes behind her.

As she turned to look back she saw a male person running
25 towards her. This person was about 6 to 7 metres away from

her and he told her to 'stop there'. She continued to walk and ignored him. He then told her in Xhosa to go into the bushes. At that stage he was about 3 metres away from her. She kept walking. This person came closer and she turned around and
5 then she noticed a knife in his hand. This person who was now right in front of her attacked her and a struggle ensued between them.

They started to wrestle and Keswa grabbed the blade of the
10 knife injuring her hand. She managed to get hold of the knife and threw it away. As the result of the wrestling the bread and jacket fell. She then tried to escape towards the house, but this person grabbed her leg on the pavement causing her to fall down. She could not stand up again. She started to cry,
15 but her attacker told her to go into the bushes as he wanted to kill her. He said he did not want to rape her, but repeatedly said he wanted to kill her. He then dragged her towards the bushes and kicked her. She grabbed a tree and this person kicked her and then she let go.

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At this stage of the proceedings and as she was busy relaying her evidence Keswa started to cry very emotionally. She further testified that the male person dragged her for about 8 metres into the bushes. She could not see the tar road from
25 that position and there was no-one else in the vicinity. She

was still on the ground and the man had climbed on top of her. She continued to cry and he then said to her that he did not want to rape her, but wanted to kill her and then she said: 'rather rape me', as she wanted to leave. He then pressed his
5 thumb on her throat that she could not breathe.

Keswa demonstrated to the court that this male person pressed his thumb in the middle of her neck in front, above the collar bone on the soft tissue. Keswa again became very
10 emotional and continued to cry as she relayed her testimony. She went on further to state that he pressed her very hard, that she became dizzy, unconscious and not aware of what was happening around her. When she looked again another man stood next to her and the man who assaulted her was
15 gone. She however did not see her assailant walking away. This stranger helped her out of the bushes and walked her home. She testified that this man was unknown to her and she does not know his whereabouts. Keswa testified that she also had a Nokia 2300 cell phone which was grey in colour and a
20 wallet which had an amount of R300,00 inside in the pocket of her pants. Those fell out of her pocket when she was dragged towards the bushes by her attacker. Her attacker picked those items up and placed them in his pocket. The cell phone had a SIM card in it and it was switched on. The ordeal took about
25 20 minutes. She testified that it was a hot, sunny day. She

does not wear spectacles and her eyesight is good. She saw the face of her attacker and his physical built and his clothing.

He was of a dark complexion, wore blue denim pants, a faded
5 black T-shirt and sunglasses. He had a scar next to his nose on the right-hand side. During the struggle his sunglasses fell and he did not pick them up. Afterwards she went to the scene with her brother and picked up the sunglasses. They handed those over to the police. She laid a complaint at Gansbaai
10 police station on the same day.

Early Monday morning at approximately 1:00 am Constable Vuyani Gcolotela came to her house in Masakhane settlement. Gcolotela asked her to identify the person who was at the back
15 of the police van. Gcolotela lifted a green sail at the back of the police van and lit his torch. She identified that person in the van as the accused who is before the Court. The accused was the only person in the back of the police van at the time. The accused was wearing the same clothes as when he robbed
20 her and she recognised his face which was dark with a scar. She stated that she was sure that the person in the van was the man that robbed her.

In cross-examination it was put to her that the accused said he
25 never saw her and that she must be mistaken with his identity.

She replied that the accused was lying, it was him. She further pointed out the scar on the photo, Exhibit Y, circled as Y1. She again pointed the scar in Court when asked to identify it whilst the accused's face was about 1 metre away
5 from her. She went on further to state that she retrieved her cell phone on 26 November 2007 when Tsoananyana showed it to her. Plaatjie was also present at the time. She recognised the cell phone as hers based on the serial number, the description and the contact numbers that appeared when the
10 SIM card was inserted.

According to her the value of the phone was about a R1 000,00. Her evidence is corroborated by Dr Makoti's medical report which is admitted as Exhibit DD. The content of
15 the report was not disputed by the defence and Dr Makoti recorded that Keswa suffered injuries due to an assault on 25 November 2007 by an unknown assailant who tried to strangle her and kicked her on the chest, arms and abdomen. She suffered bruises on her left knee and scratches on right wrist.
20 Dr Makoti also recorded on the diagram attached to his report: pain on neck or throat, left-side of the chest and behind the arms. Keswa left Gansbaai in January 2008 and moved to George.

25 Gcolotela testified that he is a constable in the SAPS stationed
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at Gansbaai police station. On Sunday, 25 November 2007, he was at work having commenced his shift at 18:00. He became aware of the robbery at Masakhane bushes just after he reported for duty after having been briefed by members on the
5 earlier shift. At about 1:15 that morning a man who wished to remain anonymous arrived at the charge office and requested to speak to someone who could communicate in Xhosa.

Gcolotela was the only policeman in the charge office who
10 could speak Xhosa. This man reported to him details of the robbery. At this stage of the proceedings the State requested that the hearsay information given by this unidentified person be provisionally admitted in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 as hearsay evidence
15 and that at the end of the State's case it would be argued that the evidence be admitted into evidence. The defence had no objections to this application and accordingly the evidence was provisionally admitted.

20 Gcolotela then proceeded to give details of what the unidentified man told him which was that the person who robbed somebody in the bushes lives in 481 Mbeki Street, Masakhane and his name is Lunga. He then gave a description that Lunga had a scar on his face and that he was
25 wearing a blue overall and a black shirt and a blue and white

beanie.

Gcolotela visited the address furnished to him by this unknown informant and found the accused who responded to the name
5 Lunga. The accused also fitted the description given by this person. He then arrested the accused and proceeded to a house where Keswa was living in the backyard. He then called Keswa and asked her to identify the man who was sitting in the back of the police van. He lifted a sail and turned on a
10 flashlight and Keswa identified the accused as the person who attacked her on the Sunday.

The Court deals with the admissibility of the hearsay evidence later on in its judgment. Plaatjie testified that he is the
15 investigating officer in CAS342/11/2007 and he received the docket on the morning of 26 November 2007. The accused stated his name as Lunga Msengana and that he was residing at 481 Brown Street in Gansbaai and that he was unemployed. On the new information received from the accused Plaatjie and
20 Tsoananyana accompanied the accused to his residence.

When they arrived at his house the accused lifted up the mattress and took out a grey Nokia 2300 cell phone. A SAPS
299 document marked as Exhibit CC was completed by
25 Tsoananyana at the police station which the accused signed
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with letters LM in both Plaatjie's and Tsoananyana's presence, who signed as a police official who delivered the object and as a witness respectively. The accused also signed on the reverse side of the form confirming the description of the cell
5 phone.

In cross-examination Plaatjie testified that he explained the contents of the form to the accused and the accused had no problem signing it. According to Plaatjie Keswa identified the
10 cell phone as hers by comparing the serial number on the phone with the serial number on the cell phone box. She also inserted a SIM card in the cell phone and the contact numbers stored on the phone appeared. The cell phone was then handed back to Keswa at her home.

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With regards to counts 5 and 6, Mbuzeli Moyeni testified that he is a warrant-officer in the SAPS stationed at Izele police station near Bisho. On Wednesday, 6 July 2011, at 11:40, he was looking after his goats in an open grazing field near
20 Balasi. He saw a body of a female person dressed in a pink tracksuit, a cap and a pair of blue pants lying on her stomach under a tree.

He was shocked and called: 'Girl! Girl!' There was no
25 movement from the person and he then contacted the police.

He remained on the scene until the police arrived. He then handed the scene and the body over to Warrant-Officer Patrick Soyana. He did not interfere with the body and on that morning he did not see anyone walking around in the field.

5 Soyana testified that he is employed by the SAPS at Bisho as a warrant-officer and on Wednesday, 6 July 2011, he was on duty and was instructed to go to the grazing fields near ZK Secondary School at Balasi.

10 He knew the area and if one goes by foot from Balasi to Zinyoka one has to walk through the grazing fields. Constable Luyolo Gantsho was present at that stage and he took photographs. Gantsho turned the body over and he noticed a wound on the deceased's right ear as depicted in photo 7 on
15 Exhibit J. He observed no other injuries. The body was then handed over by him to Monica Klaas who removed it to the mortuary. At that stage the standby detective, Warrant-Officer Velile Zola, was also on the scene.

20 The State then called four witnesses, namely Odwa Mabala, Siphosethu Kilani, Zimkhitha Thobani, Nolusindiso Khethani, between ages of 15 and 20 years who testified that they knew deceased 2. They were all living in the area of Balasi and Zinyoka. Except Kilani all the others knew the accused's name
25 by 'Thithithi' and saw him in the company of the deceased in

the village of Balasi a few days before the incident.

Kilani, Thobani and Khethani, the three girls, testified that on 4 July 2011 they were walking from Balasi to Zinyoka and
5 whilst they were walking in the *veld* they met Mabala who came from the same footpath from the direction of Zinyoka. Mabala advised them to take a different route as something was happening in front. According to Kilani and Thobani Mabala did not say what the problem was, but Khethani told
10 them that Mabala had told her that the accused was raping deceased 2.

All three girls testified that as they were walking in the field between Balasi and Zinyoka they heard a female person
15 screaming. Khethani testified that she recognised the voice as that of deceased 2. When pressed under cross-examination about how she recognised whose voice it was that was screaming she stated that she had known deceased 2 for a very long time and knew her voice.

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Mabala testified that on the morning of 4 July 2011 he was coming back from walking his girlfriend, Siphelele, to Zinyoka and in the bushes between Zinyoka and Balasi and he met the accused and deceased 2 in the same footpath. They greeted
25 him and the accused was walking behind the deceased.

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Mabala walked on and shortly afterwards he heard a scream which initially sounded like a laugh. Mabala denied that he told Khethani that deceased 2 was being raped by the accused. Whilst his evidence was inconsistent regarding what
5 he told the girls about what was happening ahead and who was screaming he was adamant that he saw the accused and the deceased that morning and that he heard a scream.

Zola testified that he is a warrant-officer in the SAPS and
10 stationed in Bisho and an investigating officer in counts 5 and 6. On 6 July 2011 he went to the area as depicted on photograph 1, depicted on Exhibit J1. When he arrived on the scene other police officials were already there. The body of the deceased was dressed up and covered with her clothing.
15 The body was then transferred by Klaas to the mortuary in Bisho.

Dr John conducted the post mortem and Zola was present. He was informed by Dr John that the deceased died as a result of
20 strangulation. From the date of the post mortem on 8 July until 13 July 2011 the sexual assault evidence kit was kept at the place where the post mortem was done. On 13 July 2011 he received a sealed sexual assault evidence kit relating to this case from the mortuary which was then recorded in the
25 SAP13 exhibit register, Exhibit FF, under number 142/2011

and he handed over to the exhibit clerk for safekeeping.

He further explained the processes regarding the handling of the exhibits. On 19 July 2011 he received the exhibits from
5 the exhibit clerk and handed it over to the station commissioner for safekeeping in his safe. His further evidence was that he received the said exhibits from the station commissioner on 21 July 2011 at 5:00 in the morning to deliver it on the same day to the forensic laboratory in Port Elizabeth.
10 Zola stated further that on 6 November 2011, after he received the report from the forensic laboratory he obtained a name from one of the female witnesses and a suspect with the name of Thithithi was identified.

15 He was then taken to Thithithi's house by one of the witnesses and established his address. The accused before the court was then arrested at Balasi where he was staying with his sister. The accused gave his identity document reflecting his real name as Sandisile Makhakha, a copy of which was handed
20 in as Exhibit GG. On 21 July 2011 he personally took the sealed blood sample and sexual assault evidence kit collected by Dr John to the forensic laboratory in Port Elizabeth for presumptive testing.

25 This was forwarded to Cape Town Forensic Science
/LL /...

Laboratory. Zola stated that he had nothing to do with the transfer of the exhibits from Port Elizabeth to Cape Town. On instructions of Advocate Willemse a blood sample was also taken from Daweti, the alleged boyfriend of deceased 2 who
5 allegedly had sexual intercourse with deceased 2 the previous night. In cross-examination the defence questioned the safekeeping of the exhibits whilst under the control of the police. It was also put to Zola that he on an occasion when he transported the accused from Pollsmoor Prison, Cape Town to
10 Bisho for court appearance at Zwelitsha stopped in Port Elizabeth at the forensic laboratory and then told the accused that he had connections with people in that laboratory and that he would make sure that the blood results came out positive.

15 Zola denied that. Zola further stated that Morejeli, the head of the Forensic Science Laboratory, Ms Mandaba, the person to whom enquiries could be made and Boltman at the Cape Town Science Laboratory were all unknown to him. It was also put to him that the accused feared him and that he told the
20 accused to admit his guilt and make a confession. Zola denied that and stated that the prosecution instructed him to take the accused to a magistrate for a confession, but the accused did not make a confession.

25 Klaas testified that she was employed by the Department of

Health in the capacity of regional manager for East London region. In the year 2011 she was employed at the government mortuary. On 6 July 2011 she transported the body from an open field at Balasi camp of deceased 2. On 8 July 2011 when
5 the post mortem was held she was employed as a senior forensic officer at Bisho Forensic Laboratory. She was present when Dr John performed the post mortem examination and she assisted him whilst he was doing the post mortem.

10 During the post mortem examination the body was fully clothed and Dr John instructed them to remove the clothes. During the post mortem examination swabs and blood samples were taken from the body of deceased 2 and together with the panty placed in special individual envelopes. Klaas further testified
15 that contamination of exhibits was not possible and the body could not be tampered with. Klaas further testified that Dr John had a neck operation and was booked off sick. She had gone to enquire from Dr John when he would return back to work and his wife advised her that he was booked off sick for
20 more than a month.

Boltman testified that in 2011 he was a lieutenant in the SAPS and attached to the Biology Unit of the Forensic Science Laboratory as a forensic analyst. He testified as a DNA expert
25 and confirmed his qualifications. He gave an overview of DNA

processes, results and interpretations. He testified that the DNA molecule is found within every cell of the human body, that it does not change and it can be used as an identification tool. DNA obtained from semen can be compared to DNA from
5 a blood sample or hair, skin cells or any other tissue from the human body. At the Forensic Science Laboratory ten places within the DNA molecule are tested and these places are referred to as loci or a DNA markers.

10 One of these markers test for the gender of the DNA where XY constitutes male DNA and XX female DNA. To go within the proceedings of the analysis Boltman mentioned the different processes that the DNA follows through the laboratory. The first column on the table is the gender marker, the next nine
15 columns are the STR which are Short Tandem Repeats, that is the nine loci used to determine DNA and are reflected in the form of numbers.

According to the DNA analysis the main findings are that in
20 respect of the vestibule swabs and the cervical os swab, S Makhakha is excluded as a donor. He is excluded because his entire DNA profile differs from the profile obtained from the vestibule swab and the cervical os swab, both internal. There is no complete match in the vaginal vault and vulva. Daweti's
25 DNA was read into all four swabs. However, although there

was no complete match for the accused in all markers in the swabs additional DNA was picked up in the vaginal vault and vulva swabs which constitute a mixture.

5 This means that another person's DNA other than that of Daweti was present on those swabs. That additional DNA was similar to that of the accused. The DNA profile obtained from the panty was a mixture DNA profile. The accused was represented at all ten markers which clearly meant that he was
10 the donor of the DNA on the panty. Only in respect of one marker, vWA, of the panty was there a 15 which is an additional piece of DNA which constitutes a mixture DNA profile. It means that another person's DNA was also present at that one marker and that was similar to Daweti's DNA
15 profile.

The most conservative occurrence for the DNA result of the panty that could be calculated for all the possible contributors to the mixture result was one person in every 64 million
20 people. The donor of reference sample S Makhakha was excluded as a donor of the DNA on the vestibule swab, cervical os swab, vaginal vault and vulva swab because he could not be read on all ten places which is a requirement. However, the additional DNA markers identified on the mixture
25 in the vaginal vault and vulva swabs were identical to that of

the accused.

In regard to Dr John's availability, Mr Badenhorst, the prosecutor, advised the Court as an officer of the court that he
5 had spoken to Dr John and Dr John had a neck operation and would not be able to travel to Cape Town. The earliest he could get back to work was early June. The date was however not certain. The State accordingly closed its case. The Court found that it would be in the interest of justice and of the
10 parties for Dr John to be called, however, in view of the practical difficulties the Court invoked the provisions of section 212(12) of the Criminal Procedure Act read with section 186 of the Criminal Procedure Act by directing Dr John to file a supplementary affidavit and call for evidence via written
15 interrogations.

On 17 May 2013 the Court issued a directive admitted as Exhibit YY, requesting Dr John to clarify certain aspects of his report and invited the parties to also submit their questions.
20 The State filed its questions which were marked as annexure A of the directive, whilst the defence filed a notice stating that it had no questions so far. The defence's notice was marked as annexure B of the directive. A copy of Dr John's supplementary affidavit was received by the Court on 20 May
25 2013 and read on the record on 22 May 2013. Parties had no

objections to the copy of the supplementary affidavit being admitted pending the arrival of the original supplementary affidavit. The original was received by the Court on 27 May 2013 and admitted accordingly.

5

Dr John's evidence taken from his affidavit and supplementary affidavit which were not contested by any of the parties was briefly that he is in the services of the State as a chief medical officer attached to the Forensic Pathology Services Mortuary, 10 Mdantsane, Eastern Cape. He is responsible for medical legal autopsies at the Forensic Pathology Services Mortuary in Bisho and has been doing post mortem examinations since his full time employment in Mdantsane, since 1 July 1992.

15 On 8 July 2011 he conducted a post mortem examination on a corpse of a black female estimated at 16 years old bearing number DR326/11, pointed out to him by Klaas. The body was collected by the senior forensic officer on 6 July 2011 and was kept refrigerated until the commencement of the post mortem 20 examination on 8 July 2011. The deceased was wearing a long jean trouser buttoned properly, a pair of black shoes, underpants, tracksuit top, golf shirt and a T-shirt all properly dressed. The body did not show significant decomposition changes. Decomposition could have been inhibited by the 25 lower atmospheric temperature possible in the month of July.

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The possibility that death took place on 6 July 2011 or a day or so earlier could be entertained when looking at the stage of the body and other factors which could contribute like the
5 winter temperature. The post mortem findings were suggestive or indicative of strangulation as a cause of death and there was nothing detected to the contrary. Bleeding into the salivary gland below left side of lower jaw bone, the major muscle obliquely across the right side of front neck, the small
10 thin muscle on front and sides of neck and the covering sheath around the thyroid gland were noted.

This bleeding into the soft tissue in the neck was possibly produced by the application of a blunt force on the neck and
15 these findings were possible in manual strangulation. The cause of death was reconcilable with a scenario where the deceased was strangled with bare hands. Congestion of internal organs was detected and it is one of the findings noticed in asphyxial death like strangulation. No abnormality
20 was detected on the deceased's genital organs.

Just before closing argument and after both parties had closed their cases the State applied for the reopening of its case. It advised the Court that Daweti, the alleged boyfriend of
25 deceased 2, who could not be located earlier on to testify, had

now been found and it was crucial that the Court heard his evidence. The defence had no objection to Daweti being called. The Court accordingly allowed the reopening of the State's case.

5

Daweti testified that he was 20 years old and resided in Bisho at Balasi location. In July 2011 he knew deceased 2 and had known her for three months before her death. He testified that deceased 2 resided in Balasi. He and deceased 2 had a sexual relationship which was not serious. In other words, he was the deceased 2's boyfriend. He testified that he last saw the deceased alive on Saturday morning, 2 July 2011. When he walked her home the deceased had asked him to turn back because she did not want her parent's friends to see them together. Daweti and the deceased were together since Friday night, 1 July 2011. He testified that he might have mixed the dates around, but thinking back he thought that he had seen the deceased on Friday night.

20 They had sexual intercourse on Friday evening and again on Saturday morning. Daweti also testified that he knew the accused just by seeing him and he stayed at the flats. He did not know if the accused knew deceased 2. He and the deceased had a good relationship. The police asked for his blood to be drawn. He gave his blood to a sister at the

hospital and confirmed his signature as depicted in Exhibit KK. Under cross-examination he stated that he was shocked when he heard about what happened to deceased 2 because he had just spent time with her a few days earlier. Police came to him
5 and told him who the perpetrator was.

The accused testified in his own defence and called no witnesses. He testified that he is single and 26 years old. With regards to counts 1 and 2 he testified that on 18 October
10 2007 he was staying in a shack at Brown's Estate, Masakhane, Gansbaai with his brother. He testified that he knew the bush adjacent to Masakhane, the place where other people normally go to relieve themselves. There was a communal municipality toilet in the vicinity and he used that toilet and did not go to
15 the bushes. On 18 October 2007 he went to the shop and returned back home. He was at home all the time, just sitting there. It is a long time ago, but he remembered that he walked quickly to the shop and then came back home.

20 On 18 October 2007 he was at no stage at or near the bushes. He repeated that he was never in the bush and did not know what happened there. He could not dispute that deceased 1 was found dead and buried in a shallow grave because he had no knowledge about that and also did not know those people.
25 He denied any knowledge about the alleged rape and murder

of deceased 1.

The accused testified further that he was taken to the doctor and a blood sample was extracted and sealed and handed over
5 to the police. He also confirmed that he was informed that the blood was going to be tested, but he did not know what they did with the blood because he was not present when the test was executed. He also understood that no-one tampered with the blood, but again stated that he was not present when the
10 blood tests were being done.

He stated that he remembered that no rights were ever explained to him after his arrest for the alleged rape and murder of the deceased. The accused further stated that he
15 heard at some stage about the incident, but did not know deceased 1.

In regard to counts 3 and 4, the accused testified that on Sunday, 25 November 2007, he was residing at Brown Street,
20 Masakhane, Gansbaai and on that day he was sitting at home and that he never went near the bushes at the industrial sector. He was not there at all. He did not know Keswa at all. He was not the one who attacked her with a knife and threatened to kill her. He did not take her wallet with R300,00
25 and her cell phone. He is not the one who dragged her into

the bushes. He is not the one who strangled her at the bushes.

He denied that the cell phone was retrieved from his shack by
5 the police in his presence. He could not confirm whether or
not the cell phone was retrieved because he did not see it. He
further denied that a policeman went to his shack and found
the cell phone there and that the phone was taken from under
his mattress. He knew nothing about the handing over of the
10 cell phone to Keswa. He did not sign that the phone be
handed over to her. He stated that that is not the truth.

The accused further testified that he was only requested to
undersign the document on the day after his arrest when he
was being charged. He could not read the content as he was
15 just shown the place where to sign. After his arrest and on the
way to the police station they stopped at some place. The
police officer alighted and entered a house and came back with
two persons.

20 A flashlight was lit and it was aiming into the van from behind
him. The back window was open. The accused looked behind
him and saw the person with the torch lit. He could not hear
the conversation or recognise the people outside the van as it
was dark. It was put to the accused that Keswa identified him
25 that night as the person who attacked her during the day. The

accused replied: 'No, I disagree with her'.

In regard to counts 5 and 6 the accused testified that around 4 to 6 July 2011 he resided in Bisho at Balasi with his sister, 5 Mthembu and on that day he did not leave Balasi township to go to another township. He confirmed that there are bushes between Zinyoka and Balasi. He denied that he was there on Monday morning, 4 July 2011, and stated that he never put his foot there. He also denied that he met Mabala there on that 10 date because he, the accused, was never in the vicinity. He also denied that he was in the company of deceased 2 on that day. He stated that he knew Mabala from Balasi and deceased 2 whom he use to see at Balasi. He denied ever being in her company with her in a shebeen because he did not drink.

15

The accused testified that he heard about the body of deceased 2 that was found in the bushes between Zinyoka and Balasi. He denied that he raped and killed her as alleged by the State. He stated that he was not the perpetrator. He did 20 not dispute that the DNA results were positive with regards to the rape case, but testified that the investigating officer, Warrant-Officer Zola, said that he would see to it that the results would be positive. He told him that when they were on their way from Pollsmoor to Bisho and stopped in Port 25 Elizabeth at the laboratory.

Zola further said that the accused must please admit to the commission of the offence because he would speak to the people working with the blood samples and that the DNA
5 results will be positive. Zola also threatened to beat him. He then promised to make a confession, but when he was brought before the magistrate he did not fulfil his promise. He did not make a confession.

10 In cross-examination the accused basically confirmed his examination-in-chief. The following aspects of his evidence are to be highlighted out of importance:

1. That the accused was resident at Gansbaai since
15 2002 and stayed there continuously until 2007. He was residing in Gansbaai at the time of the commission of the offences on 18 October 2007 and 25 November 2007.

20 2. That he was 20 years old in the year 2007. He was not permanently employed and worked on a casual basis at the Atlantis factory in Gansbaai. He normally got up in the morning and went to the Atlantis factory for casual work and if there was no
25 work he went to the place on the outskirts where

the other unemployed people would stand for work. He normally stayed there until 12:00. He could not recall whether he worked during the week of 15 to 19 October 2007 or on the morning of 18 October 2007. He worked at least once a week. When he did not find work he turned back and went straight home. He then remained at home until his brother returned from work. He remembered it because it was his routine.

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3. That when he was arrested for murder the police informed him that the incident took place on 18 October 2007. He did not enquire from his employer whether he worked on that day. He also did not ask his girlfriend whether she visited him on that day.

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4. The accused agreed that all three women were attacked in the areas of the neck, that at the time they were alone. The two deceased had facial injuries, that the two were apparently raped and that the person who raped them pulled their clothing up and partially up. He further agreed that a person that murders women like that has a serious problem because he is not only a murderer,

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but also a rapist. Accused denied that he is such a person. He stated that he did not do it and so he is not going to stand responsible to that or admit as he had no knowledge thereof.

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5. With regard to the DNA evidence by Koenze, that the panty where the private part of the deceased was tested for DNA and it matched the accused, the accused replied that they were trained in their work and learned people in that field and he was not disputing his evidence, but he was quite sure that he was not the one who did it and that he was not going to admit to the commission of offences that he never committed. Regarding the semen found on deceased 1's panty he explained that he did not know how it landed there because he had never been to her. He had never met the deceased and did not know her from a bar of soap.

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6. During further cross-examination the accused stated that on 18 October 2007, after he went to the spaza shop to buy bread, he remained at home the whole day. On 25 November 2007 he also remained at home. He admitted that he was not able to recall where he was on certain other days

as it was dates too long ago. On the Sunday, 25 November 2007, between 12:00 and 13:00, when Keswa was robbed he was at home. He did not go to the shop and was just sitting there. He went to the communal toilets and outside tap to fetch some water. It is possible that someone might have seen him there, but they might not remember seeing him.

5

7. The accused further denied wearing a blue jacket and an overall suit at any stage before his arrest. He however admitted that one could see something blue on the photo taken by Mostert in Exhibit Y.

10

8. The accused agreed that there is a mark on his right-hand side of his nose as depicted on photo Exhibit Y and marked point Y1 on the photo. According to him it is as a result of a pimple he had in 2010 and it was not there in the year 2007. Accused denied that the photo was taken with the mark on his face alongside his nose on 3 December 2007.

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9. The accused again stated that he was not the person who dragged Keswa into the bushes and not the person that put his thumb on her airway and

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told her that he was going to kill her and robbed her with a knife. He testified that Keswa was lying, but he could not give a reason why she would tell a lie.

5 10. The accused denied that he gave to the police a cell phone which was under his mattress and that belonged to Keswa. He further stated that both Plaatjie and Tsoanayana lied about this and he never handed the cell phone.

10

 11. That on Monday, 4 July 2011, the accused was sitting alone at the flats and that he was not at any stage walking over the field between Balasi and Zinyoka. He has nobody to verify that he was sitting at the flats. He admits that he knows Mabala, but they are not friends. According to him Mabala has nothing against him. Accused stated that Mabala was lying when he testified that he saw deceased 2 and himself in the *veld* on that morning.

15

20 Mabala was making a mistake.

 12. The accused stated further that he could not dispute the evidence of the DNA expert that his semen was found on the panty of the deceased and that it matched his blood reference sample. He

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however denied having sexual intercourse with the deceased. His only explanation was that Zola manipulated the analysis in order to get a positive result, but he could not explain how Zola did it.

5 The accused did not dispute that the DNA mixture was found inside deceased 2's vagina.

Turning to the analysis of the evidence. The State's case in respect of counts 1, 2, 5 and 6 rests mainly on circumstantial
10 evidence, evidence in relation to counts 3 and 4 is both direct and circumstantial in nature. In deciding whether the State has proved its case beyond reasonable doubt, based on circumstantial evidence, the Court needs to take into account the cumulative effect of the evidence before it as a whole. It
15 is impermissible and an incorrect approach to consider the evidence piecemeal. In this regard see S v Reddy 1996(2) SACR 1 (A) at 10B to D. See also S v Snyman 1968(2) SA 582 (A) at 589F.

20 The questions to be answered in this case are whether the inferences sought to be drawn, that is that the accused is a murderer and rapist, in relation to the relevant counts are consistent with all the proved facts and whether the proved facts are of such a nature that they exclude every reasonable
25 inference from them, save the ones sought to be drawn,

namely that the accused had murdered and raped the deceased women.

In S v Isaacs and another 1974 SA 1 (AD), at 16D, Mullah, JA
5 quoted with approval the remarks of Lord Wright in Caswell v
Powell Duffryn Associated Collieries 1940 AC 152 at 169
where he said the following:

“Inference must be carefully distinguished from
10 conjecture or speculation. There can be no
inference unless there are objective facts from
which to infer the other facts which it is sought to
establish. In some cases the other facts can be
inferred with as much practical certainty as if they
15 had been actually observed. In other cases the
inference does not go beyond reasonable
probability, but if there are no positive proved facts
from which the inference can be made the method of
inference fails and what is left is mere speculation
20 or conjecture.”

The State also relies on similar fact evidence. It is firmly
established in our law that this type of evidence is only
admitted in exceptional circumstances. In Schmidt and
25 Rademeyer: The Law of Evidence, at 15 to 22, the following

useful summary is contained regarding similar fact evidence:

5 “Similar facts are admissible if they are relevant
and evidence can be relevant only if a reasonable
inference may be drawn from them about a fact in
issue. Similar facts must be distinguished from
criminal propensity and it is therefore improper to
draw an inference of guilt merely from a propensity
to commit crime. There must of course be a logical
10 connection between *factum probans*, that is similar
fact, and the *factum probandum*, that is the facts to
be proved.”

In Stephen: Digest of the Law of Evidence 11th edition on 171
15 at footnote 7, the learned author states the following:

20 “You are not to draw inferences from one
transaction to another which is not specifically
connected with it merely because the two resemble
each other. They must be linked together by the
chain of cause and effect and in some assailable
way before you can draw your inference. Such a
connection may be found for example through the
improbability of coincidence. What is meant here is
25 that the more striking the similarity of events is the

more improbable the possibility of coincidence will
be.”

Schmidt and Rademeyer *supra*, 15 to 16, footnote 26, cite the
5 example of R v Sims 1946(1) ALL ER 697 where the accused
had been charged with committing indecent acts with four
persons. The four complainants each gave an identical
account of how they had met the accused and what he had
subsequently done. Evidence given by each complainant was
10 held to be relevant in respect of each incident because the
Court held that it was improbable that all the complainants
would think up an identical version. See further generally
Hoffmann and Zefferdt: The South African Law of Evidence 4th
edition at 55.

15

From the evidence placed on record it appears that the three
incidents in this case involved three young females between
the ages of 16 and 25 years. All the three women were alone.
All these young women were strangled in exactly the same
20 manner by putting of pressure with the hands on the front part
of the neck above the collar bone on the soft tissue leading to
the death of the two deceased and one of them rescued by an
unknown person.

25 The two deceased had facial injuries and were turned on their

stomachs when found. Semen was found on the panties of both deceased and both had no genital injuries. All three of the women were attacked in bushes. It appears from the injuries sustained by two of the women that they were dragged
5 into the bushes.

In all instances the accused lived near where the victims resided. The State submits that there was such a close proximity or similarities in the method used to attack the
10 victims, the place which is in the bushes, where those incidents took place and the way in which the victims were attacked, such that the circumstantial similar fact evidence points cumulatively to the accused as the only attacker. The Court is satisfied that there are similarities in all these
15 incidents.

Against that background the Court proceeds to deal with each of the three incidents. In dealing with counts 1 and 2, evidence given in relation to these counts was mostly common
20 cause. The accused simply denied that he was the perpetrator of these alleged crimes. In recounting their evidence the witnesses of the State were cogent, clear and generally gave a good impression in court. They were not significantly cross-examined on the material aspects of their evidence. The
25 accused also stuck to his version which was a total denial of

being the perpetrator of the alleged crimes and placed an alibi regarding his whereabouts on the day of the incidents.

Regarding his candour and demeanour in the witness box he
5 was soft spoken and tended to avoid eye contact at times. On
seven occasions he contradicted himself and tended to be
evasive, especially when asked about what he did on particular
days, but on the whole his evidence throughout was that he
was sitting at home on days that he did not go to his casual
10 work at Atlantis factory and on 18 October 2007 he was at
home the whole day doing nothing. What remains is for the
Court to analyse the conspectus of evidence before it to
ascertain whether the State has proved its case beyond
reasonable doubt.

15

The total proven relevant facts before this court on counts 1
and 2 are that deceased 1 lived in an informal settlement in
Masakhane, Gansbaai. The accused also lived in the same
vicinity. Deceased 1 lived next to the bushes where members
20 of the community went to relieve themselves as there were no
toilets next to their settlement. Deceased 1 was married to
Ntshose and their marriage relationship was a happy one.
When Ntshose left for work he left the deceased at home.
When he returned home his wife was not there. The house
25 was undisturbed.

Ntshose noticed the washing basin filled with water as if she was going to wash herself. Ntshose, his brother, Vuyo Tshitshi and others went to search at the bushes for his wife. Ntshose
5 noticed footprints which he followed. He found the deceased buried in a shallow grave lying face down, having recognised her clothing. The grave was covered with loose branches. There were drag marks towards where the deceased was lying. Police arrived and turned the body over. The deceased's
10 panty was partially pulled down and the body had injuries. The cigarette butt and unused condom were found next to the scene. No fingerprints were noted after these items were taken for testing.

15 The body was taken to the mortuary and a post mortem was done which revealed that the deceased died as a result of asphyxia due to manual strangulation and there was a fracture of the hyoid bone on the right indicating severe pressure on the neck. Multiple scratches were found on the lower limbs.
20 No injuries were detected on the deceased's genitals nor was there any indication of forceful penetration. A panty and vaginal swabs were taken to the laboratory for presumptive testing. Possible semen was detected on all of the swabs and the panty. Blood sample was also taken from the accused.
25 DNA was done on the crotch part of the panty that contained

the semen and that of the accused's blood sample.

It is clear from the evidence that Koenze misread the letter S
5 for a G in Msengana's surname. The evidence clearly shows
that reference sample and seal numbers are that of L
Msengana. There was a complete match between the DNA
found on the panty and that of the accused on all the nine
markers applied in the STR profiling. There was not enough
10 male profile on the swabs to interpret in order to identify who
the donor was.

The accused testified that he was at home the whole day on 18
October 2007 and only went to the shop. He did not challenge
15 the DNA evidence, but denied that he was on the scene on 18
October 2007. He could however not explain how the semen
landed on the panty. He testified that he had no problems with
erection and was a healthy young man.

20 The State seeks the Court to draw an inference from the
totality of the evidence referred to above, that the accused
was the attacker of the deceased 1 and he committed offences
of both rape and murder. In respect of count 1, that is the
count of rape, it is common cause that no injuries were
25 detected on the genitals of the deceased nor was there any

evidence of forceful penetration found. It is true that there need not be injuries or even a presence of semen for rape to have occurred, however, it is imperative for the State to prove beyond a reasonable doubt that a none consensual penetrative sexual act of the deceased's vagina by the accused penis had occurred, in other words, that must be the only reasonable inference that can be drawn from the proved facts.

Consent can be safely excluded because the accused has denied knowing deceased 1 at all. The issue that remains is that of penetration. The State submits that rape should be inferred from the presence of the semen on the crotch part of the panty of the deceased. According to the State it is highly unlikely that semen would be deposited on that area or zone of the panty that is underneath the part that covers the vagina if there was no penetration.

Furthermore, the State argues that the accused could not have attacked the deceased, which includes taking her into a secluded area, simply to ejaculate on her panty. It must be remembered that the test according to R v Blom 1939 AD 188 at 202 to 203, that:

“The inference sought to be drawn must be consistent with all the proved facts. If it is not then

the inference cannot be drawn. The proven facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they do not exclude other reasonable inferences then there must be doubt whether the inference sought to be drawn is correct.”

Whilst there is a possibility suggested by Dr Potelwa that semen could have oozed out of the vagina into the panty owing to the manner in which the body of the deceased was lying, there remains other reasonable inferences. In any case, one would have expected traces of the accused's semen in the deceased 1's vagina to still be detected. One of the other inferences that could be drawn is that the accused pre-ejaculated or ejaculated on the deceased merely by lying on top of her private parts or by aiming his penis on her panty.

The deceased was definitely not a willing person and she obviously struggled underneath the accused when her air supply was cut off. The inference can be drawn that at that stage he was aroused and then ejaculated on her. No semen was noticed on the vagina during the post mortem itself, but it was detected during the presumptive testing in the laboratory from the swabs. The deceased was married and Ntshose could not say when last did he have sexual intercourse with his wife

before she died.

It could therefore not be conclusively said that the possible
5 semen detected on the swabs belong to the accused. In the
final DNA analysis the donor could not be identified as there
was not enough male profile on the swabs for the purposes of
the DNA analysis. Dr Potelwa's scenario on how semen could
be lost owing to how the deceased lay is quite compelling. It
10 however remains speculative in the absence of any other
evidence suggestive of penetration. In the circumstances the
State has therefore not been able to prove that rape had
occurred.

15 Whilst it is so, there remains presence of semen found in the
deceased's panty which the accused has not explained.
Evidence does show that her panty was partially pulled up
which suggests that it must have been removed from her body
and a sexual act performed on her, albeit not penetrative. In
20 the absence of any contrary evidence from the accused it is
reasonable to infer that there was at least an attempt to rape
deceased 1.

The accused may not have succeeded in the actual intended
25 purpose which was to rape the deceased due to whatever

obstacle that he might have faced which the Court cannot speculate on. There is however enough proof that he had commenced with his plan to rape deceased 1, but did not fully succeed in what he intended to do.

5

In light of all the evidence taken together accused's version that he was at home all day doing nothing cannot be reasonably, possibly true and therefore it is rejected as being false. The semen found in the panty was his. He lived in the same vicinity as the deceased and must have been in her company on 18 October 2007. The Court is therefore satisfied that attempted rape had been proved beyond reasonable doubt. The Court therefore finds the accused guilty of the commission of attempted rape.

15

Turning to count 2, that is the count of murder. The Court is not going to repeat the facts that had been alluded to in the Court's findings on count 1. The State's case on this count also rests on the circumstantial evidence, similar facts and the modus operandi applied in the commission of the offences involving the two other victims, that is Keswa and deceased 2. The State also submits that the motive for the attacks on the three women was to commit a sexual act. That is why the accused dragged them to the bushes in a secluded area.

25

The State seeks the Court to infer that the act of blocking the airways of victims by the attacker was to get them to the state of surrender so that he could perform the sexual act or rape them. The motive for killing them was to prevent them from reporting the attack to the police. The State also submits that it is evident that deceased 1 resisted her attacker and he assaulted her by causing her a blue eye. It is common cause that the deceased was murdered and the cause of death was asphyxia due to manual strangulation.

10

Evidence showed that an amount of pressure was applied on her neck leading to a fracture on her hyoid bone on the right. She was dragged into the bushes and buried on a shallow grave face down. The semen of the accused is a definite indicator that he was in the company of deceased 1 before she died. The defence submits that there is doubt that the panty tested was the one the deceased was wearing before the panty depicted on the photographs because the panty depicted on the photographs was white whilst Boyana testified that the panty she cut for testing was pink.

This submission does not make sense. Taljaard testified that the panty that the deceased wore was removed from her by Dr Potelwa during the post mortem examination. Her evidence in that regard was not strongly challenged. The accused

admitted that the panty that the deceased was wearing was placed inside the sexual assault evidence kit by Dr Potelwa. Boyana testified under cross-examination that whilst the panty worn by the deceased looks white or cream on the photos in Exhibit L, it looked light pink on Exhibit F and this might be due to the reflection of the light and the fact that the person who took the photographs in Exhibit F may not have been a professional photographer.

10 The fact that the photograph was taken in the evening with a flash camera might have contributed to the change in the colour of the panty in the photographs. She however testified that she could see embroidery on the front of the panty depicted on the photo and the panty she tested had
15 embroidery on the front which confirmed that it must have been the same panty. The point remains that semen was found on the panty that was tested. There is no explanation from the accused as to how his semen got into that panty that was tested for the semen or who the panty that was tested with
20 semen belonged to if it was not worn by the deceased when she was killed.

The submission by the defence that the panty with semen was not that of the deceased must be rejected. The defence
25 submitted that the DNA experts could not be said to be

independent because they all are members of SAPS. The accused did not dispute or challenge the independence of the experts nor their evidence. This submission is also rejected. Reference to general literature on research that showed that
5 accused persons often did not have means to acquire experts is not helpful at this stage as it was up to the accused to approach Legal Aid to acquire experts on his behalf if he so wished.

10 The defence cannot simply raise that issue during closing argument having made no attempts to raise it with the State witnesses or Legal Aid during the hearing of the evidence. That submission accordingly has no merit and in any event contradicts the accused's testimony that he did not dispute
15 expert evidence. The totality of the evidence places the accused on the crime scene and the manner in which deceased 1 was killed had not been placed in dispute. The accused's version that he was at home is rejected as not being reasonably possibly true.

20

The accused failed to call any witnesses to corroborate his *alibi* in the face of evidence that points to him as the perpetrator. In the circumstances the State has proved its case on count 2 beyond reasonable doubt. The accused is
25 found guilty of murder as charged.

Turning to counts 3 and 4, these two counts highlight a number of important legal principles, those being admissibility of hearsay evidence by an unknown informant, identification of an
5 assailant by the complainant, single witness testimony and similar fact evidence. It is upon a conspectus of all that evidence that the State has presented which it seeks the Court to consider in making a finding that it has proved its case beyond reasonable doubt. During the hearing of the evidence
10 dealing with counts 3 and 4 the State applied for admission of hearsay evidence regarding a report given by an unknown male informant to Gcolotela at Gansbaai charge office after midnight of 25 November 2007.

15 After hearing submissions from both sides the Court admitted hearsay evidence with reasons to be part of this main judgment. Those reasons are dealt with later in the Court's findings on counts 3 and 4. The evidence in respect of these counts is more direct in nature. There is also hearsay
20 evidence which was admitted by the Court as already indicated. The counts involved a complainant who gave a personal account of what happened to her on 25 November 2007.

25 The impression the Court formed of Keswa was that she was
/LL /...

cogent. While she became emotional at times as she relayed the incident she collected herself and gave a clear account of the details of what occurred on the day of the alleged attack. Other witnesses of the State on these counts were members of the SAPS who were involved in the investigation or who apprehended the accused. They contradicted each other in some respects of their evidence, but those were not material. In many respects they corroborated each other.

10 The accused denied that he was the assailant of Keswa and placed his identity in dispute, denying that he had a scar in 2007. Whilst he admitted that he was arrested on 26 November 2007 he denied that Keswa's cell phone was found in his possession. He maintained that he was at home on 25 November 2007. He testified that the document he signed giving permission to the police to hand the cell phone over to Keswa was not explained to him. He was just told to sign.

The question is whether his version is reasonably, possibly true in light of all the evidence before court. Keswa lived in the back yard of a house in Masakhane, Gansbaai. On 25 November 2007 on her way home she was attacked by a male person whom she identified as the accused. This person dragged her into the bushes and strangled her by pressing his thumb on her throat while she could not breath to the point of

unconsciousness.

She was rescued by an unknown man who helped her home. She did not know where the accused had gone. The accused
5 did not rape her, but he took her cell phone and wallet containing an amount of R300,00 when those fell during the struggle between the two. Keswa's evidence that she sustained injuries as a result of the attack by an unknown assailant was corroborated by Dr Makoti's medical report.
10 Keswa identified the accused as her attacker based on the fact that he was in close proximity to her during the attack.

He was sitting on top of her as he was busy strangling her and she made a clear observation of who he was. She testified
15 that he had a scar on the right-hand side of his nose and she remembered the clothes he wore during the attack which were off colour black T-shirt and denim jeans. She testified that the attack happened in broad daylight and the sun was shining and the ordeal took about 20 minutes which meant she had enough
20 time to observe his features.

The police went to Keswa's house with the accused for her to identify him in the early hours of 26 November 2007 in a police van. A flashlight was lit on the accused and she then
25 identified him as the person who was wearing the same

clothing he wore during the attack which was an off colour black T-shirt and a blue denim and he had a scar on his face. Keswa identified the accused on the dock as the man who attacked her.

5

She pointed out a scar in court when she was standing within one metre of the accused. She hesitated a bit whilst doing that. Her hesitation does not raise doubt, but could simply suggest that she wanted to have a good look at the accused.

10 The defence submits that there should have been an identification parade in order to put the identity of the suspect beyond doubt.

It is trite that evidence of identification should be treated with
15 caution. In S v Mthethwa 1972(3) SA 766A at 768A the Court stated the following:

“Because of the fallibility of human observation
evidence of identification is approached by the
20 Courts with some caution. It is not enough for the
identifying witness to be honest. The reliability of
his observation must be tested.”

In S v Tandwa 2008(1) SACR 613 (SCA) at 652 at paragraph
25 129 the Court said the following:

“Dock identification may be relevant evidence, but generally unless it is shown to be sourced in an independent preceding identification it carries little weight.”

The Court agrees with the remarks made by Bam, AJ as he then was in S v Ramabokela 2011(1) SACR 122G and P at paragraph 21, where he stated that:

“The latter part of the above quote indicates that the weight to be attached to dock identification depends on the circumstances of the case which may differ from case to case. At the end of the day identification of the accused must be evaluated with all the evidence.”

Keswa’s evidence is confirmed by a photograph of the accused handed in by the State as Exhibit Y which was taken on 3 December 2007. The photograph showed a scar on the right-hand side of the accused’s nose. The accused denied that he had a scar in 2007. He testified that he had a pimple which left a mark on his face in 2010. This cannot be reasonably, possibly true for a number of reasons. One of the reasons is that the photograph was taken in 2007, shortly after the

incident, depicted a mark on the accused's face.

Whether it was caused by a pimple or not, the point is that there is still a mark. Nothing turns on Keswa referring to it as
5 a scar instead of a mark. The accused's version in this regard is found to be unreliable and it is an attempt to lie about his identity. Keswa's evidence is corroborated by the hearsay evidence that the State sought to introduce during Gcolotela's evidence.

10

During the evidence of Gcolotela the State gave notice that it would request the report by an anonymous person who visited Gcolotela to be provisionally allowed in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 as
15 hearsay evidence. At the end of the State's case the State applied for admission of the unknown informant's report as hearsay evidence. The Court allowed admission of that evidence and reserved reasons which it now gives as part of this judgment.

20

An unknown male person who arrived at the Gansbaai charge office just after midnight of 25 November 2007 informed Gcolotela that the person who robbed somebody in the bushes was Lunga who lived 481 Mbeki Street, Masakhane. The
25 informant described Lunga as a person who had a scar on his

face and he was wearing a blue overall and a black shirt and blue and white beanie. Gcolotela testified that he immediately went to the address and found the accused that fitted the description given by the anonymous person and later went to
5 Keswa's address with the accused for her to identify the accused.

This person elected to remain anonymous and refused to divulge his name. The State submitted that the probative
10 value of the said evidence was high as it provided independent corroboration of the version of the complainant. It linked to the circumstantial evidence in that it provided the initial link which led to the arrest of the accused and fitted the male person who came to Keswa's rescue.

15

In Mamushe v The State 2007 SCA 58 RSA, paragraph 16 and 18, Brand, JA encapsulated the legal position in relation to admissibility of hearsay evidence as follows:

20 "What has now become axiomatic is that our courts apply considerable restraint in allowing or relying on hearsay evidence against an accused person in criminal proceedings. The reasons for this restraint have become equally well settled. They flow mainly
25 from the nature of the onus that rests on the State

and from the rights of an accused person underwritten by the Constitution. See e.g. S v Ramavhale 1996(1) SACR 639A, at 647I(2), 648B, S v Ndhlovu 2002(2) SACR 325 (SCA), paragraph 16
5 at 337A to C. An important consideration in deciding whether the Court should overcome its general reluctance to admit the hearsay evidence under consideration in a particular case relates to the role that the evidence will play. It stands to
10 reason that a hearsay statement will only serve to complete a mosaic pattern will be more readily admitted than one which is destined to become a vital part of the State's case. By its nature hearsay evidence cannot be tested in cross-examination.
15 The possibility of mistake can therefore not be excluded in this way. The result is in my view that hearsay evidence of identification can only be admitted if the possibility of mistake can safely be excluded in some other way, e.g. with reference to
20 objectively established facts."

The Court will not go into detail on each of the aspects detailed in section 3(1)(c) of the Law of Evidence Amendment Act, save to emphasise that the true test for whether hearsay
25 evidence should be admitted is whether the interest of justice

demand its reception. In this regard see S v Shaik and others 2007(1) SA 240 (SCA) at 171. The hearsay evidence that the State sought to introduce in this case implicated the accused as the person who attacked Keswa.

5

This evidence standing alone would not be sufficient grounds for admission of hearsay evidence. However, sufficient grounds exist for its admission if regard is had to the further evidence based on the version of the State. Keswa identified
10 the accused as the person who attacked her. Further as alleged by the State the accused was asked where the cell phone was and a cell phone was according to Plaatjie and Tsoananyana retrieved by the accused under the mattress at his home approximately 12 hours after the attack on Keswa.

15

It was objectively ascertained that the cell phone belonged to Keswa based on its make and all contact numbers that came up when the SIM card was inserted. All of this served to confirm *prima facie* that the accused at least must have been
20 in the presence of Keswa when she was attacked. This therefore served to strengthen the hearsay evidence that this unknown person saw the attack perpetrated by the accused on Keswa. The mosaic of the hearsay evidence therefore completed the State's evidence and could in the circumstances
25 not be ignored. Interest of justice demanded admission of this

evidence.

This evidence has high probative value in that the report made by the unknown informant about the description and address of the accused turned out to be true because when the police reached the address given by the informant they found the accused and he confirmed that his name was Lunga as indicated by the informant and the clothing he wore fit the description given by the informant. In the end the hearsay evidence was reliable.

Taking into account the totality of the evidence which includes the version of the accused it is highly probable that the unknown male person is the person who came to the rescue of Keswa when she was being attacked. He not only knew about the robbery, but he knew the female person was robbed and the identity of the attacker as Lunga. Furthermore Keswa's cell phone was found in the possession of Lunga Msengana, the accused. Had the unknown person not rescued Keswa whilst the accused was applying pressure on her airway with his thumb she would have probably died like the two deceased women in counts 2 and 6.

The accused's version that he was at home in the Court's view could not reasonably be possibly true. In light of the positive

identification and overwhelming evidence against him it is highly improbable that he would sit at home every day doing nothing. Once again the accused called no witnesses to support his *alibi*. It is trite that the *alibi* raised cannot be
5 considered in isolation, but in the context of the totality of this matter.

His evidence that he did not notice who might have seen him when he went to the toilet and tap outside does not help his
10 version. The accused conveniently remembered what he was doing on the dates of the specific incidents and not on other dates which is highly improbable if he had nothing else to hide. His *alibi* is therefore rejected.

15 The accused's credibility is also questionable in many respects. First to deny that he signed a document giving consent to the police to hand over Keswa's cell phone when his signature is clearly on the document is absurd. There is no evidence of inducement or threat by police to force him to
20 sign. The accused has also failed to place any motive behind him being forced by the police to sign consent that the phone be returned to Keswa.

Second, the accused testified that he never owned a blue
25 overall whereas the photo, which he did not dispute, Exhibit Y,
/LL /...

showed him with a blue overall on. The accused also lied about having a pimple that caused a mark in 2010 whereas it was put to the State witnesses that the pimple he had was in 2007. The accused also testified that he had no parents since 5 2002, however, in his bail application in 2007 he stated that he had a responsibility of supporting his sick parents whenever he had money.

The Court finds the accused's evidence to be untruthful and on 10 the whole unreliable. Taking into account all the evidence led on counts 3 and 4 the Court finds that the State has been able to prove beyond reasonable doubt that the accused is guilty of robbery with aggravating circumstances and attempted murder as charged. Therefore the Court finds the accused guilty of 15 robbery with aggravating circumstances and attempted murder as charged.

Dealing with counts 5 and 6. The circumstantial evidence that the State relies on in respect of these counts is that the 20 deceased and the accused knew each other, having been seen together at a tavern by the deceased's friends on or about 1 July 2011. Daweti was the deceased's boyfriend who testified that he had sexual intercourse with the deceased on Saturday, 2 July 2011, which was the last time he saw her alive, but 25 could be mixing up the dates between Saturday, 2 July 2011,

and Sunday, 3 July 2011.

The deceased was last seen in the company of the accused on 4 July 2011 by Mabala who was walking in the bushes from Balasi to Zinyoka coming back from accompanying his girlfriend. Mabala greeted them and passed. After he had passed the two he heard the deceased scream, but had initially mistaken it for a laugh. Mabala met Kilani and Thobani who were walking to Balasi. He told them to take another route. The two met Khethani who was going to Zinyoka on the road. There are discrepancies between the evidence of various witnesses as to what Mabala exactly told them.

Despite this the two young girls changed their route. All of them testified that they heard a female person scream or a cry. Khethani was specific that she recognised the voice as that of deceased 2. There were discrepancies between the evidence given by these witnesses. Despite this they were consistent on the fact that they were told by Mabala to change their route and that they heard a scream from a female person which was quite sustained.

The body of the deceased was found on 6 July 2011 in the grazing field between Balasi and Zinyoka. The deceased's body was lying face down on her stomach fully dressed with

her jeans zipped up. Dr John, who conducted the post mortem, found that the external and internal injuries found on the body were suggestive of strangulation. He further found that the injuries on the front of the neck were possibly
5 produced by the application of blunt force in the neck.

Semen was detected on the crotch part of the panty worn by deceased 2. The DNA results showed a mixture DNA sample which linked the accused to the semen stain found on the
10 panty. There was a complete match between the accused's DNA profile and semen found on the panty on all nine loci. Daweti's DNA profile could be read on the vestibule, vulva, cervical os and vaginal vault swabs. There were however additional markers present on the vaginal vault and vulva
15 swabs. There was a 14 on D8S1179 of the vaginal vault, a 14 on D8S1179 of the vulva swabs. A 27/30 on D21S11 of the vulva swab, a 13 on DS18S51 of the vulva swab and a 12 on D5S818 of the vulva swab. All these markers are similar to the accused's profile.

20

Although the accused was excluded as a donor on the swabs due to the match not being on all markers the State submitted that those similarities should be an important factor to infer amongst others that there was penetration of the deceased's
25 vagina by the accused. The accused denies that he was at

any stage in the company of the deceased. He testified that he knew her only by seeing her in the community and had no personal relationship with her.

5 He testified that while he could not dispute the expert evidence that match his profile with the semen on the panty he denied that he was the perpetrator. He also testified that Zola, the investigating officer, informed him that he would make sure that the DNA results were positive. According to him Zola
10 stopped at a laboratory in Port Elizabeth and this act confirmed his suspicion that Zola was in cahoots with those testing his blood sample to make sure that the results came out positive. Zola denies this in cross-examination.

15 In regard to his whereabouts between 4 and 6 July 2011 the accused stated that he lived in Balasi during that period. In the mornings he would walk his sister to Bisho to work and fetch her later in the day. The route he took, he alleged, did not pass through the bushes between Balasi and Zinyoka.
20 Although Mabala's testimony had certain discrepancies Mabala was adamant that he had seen the accused in the company of deceased 2 on 4 July 2011 in the Balasi grazing fields.

Mabala knew who the accused was and as he had seen him in
25 the community before, the accused confirmed that he also

knew Mabala. There is no doubt as to the identification made by Mabala. The fact that he had seen the accused before and the short distance between them when he saw him walking with the deceased in the morning at approximately 10:30 and they
5 greeted each other was conducive to a favourable opportunity for reliable identification. In this regard see S v Zitha 1993(1) SACR 718A at 720I.

The fact that the accused was the last person seen walking
10 with the deceased while alive and that his semen was found on the panty worn by the deceased makes the accused's version that he was at home on the morning of 4 July 2011 unreliable. Those factors put together with the fact that the deceased was heard screaming, the manner in which she was killed which
15 was manual strangulation, similar to counts 2 and 4 relating to deceased 1 and Keswa, all point to the accused as the person who attacked deceased 2.

With regards to count 5, the State raises an argument similar
20 to the one it raised in respect of deceased 1, that the position of the panty where semen was found, which is the crotch part, was suggestive of penetration. The State's submission in this instance however goes further. The State submits that the markers that are similar to the accused's profile in the swabs
25 are factors to be taken into account in determining whether

penetration did occur.

Once again a reasonable inference must be drawn from the proven facts and the inference to be drawn must exclude all other reasonable inferences. The proven fact is the presence of semen of the accused on the crotch part of the deceased's panty. The inference that can be drawn from that is that the accused ejaculated on the panty that was worn by deceased 2. As with deceased 1 no injuries or evidence of forceful penetration were detected from the vagina of the deceased.

These facts are different from those involving deceased 1. In this instance the DNA interpreted on the various swabs illustrated markers similar to the accused found in the vaginal vault and vulva. This together with the semen found on the crotch part of the panty suggest that the only reasonable inference that can be drawn is that the accused penetrated deceased 2's vagina with his penis. This is further bolstered by Boltman's evidence who testified that the presence of the mixture on more markers on the vulva swab is understandable because the vulva is the closest to the panty.

Only two person's DNA profiles were found on the deceased 2's vagina and panty, namely Daweti and the accused. It is improbable that the additional markers found on the swabs

could be that of any other person other than the accused. This is coupled with the accused's admission in cross-examination that he could not dispute the expert's evidence that a mixture of DNA bearing DNA markers similar to his with that of another
5 person was found in the vagina of deceased 2.

The accused has offered no explanation as to why his semen was found on the deceased's panty except a bare denial. The Court therefore finds that the State has succeeded in proving
10 penetration of deceased 2's vagina by the accused penis and it has been able to show beyond reasonable doubt that the only reasonable inference that can be drawn is that the accused has committed an offence of rape. Accordingly the Court finds the accused guilty of rape as charged.

15

As regards count 6, the only reasonable conclusion that can be drawn is that the accused strangled the deceased with his hands. It is reasonably possible that his motive was for her not to be a witness of sexual act that he had performed on her.
20 The State has been able to prove beyond reasonable doubt that the accused committed an offence of murder and the Court finds him guilty as charged.

In conclusion the Court repeats for record purposes the
25 findings in respect of the different charges:

COUNT 1, ACCUSED IS GUILTY OF ATTEMPTED RAPE AS CHARGED.

5 **COUNT 2, ACCUSED IS GUILTY OF MURDER AS CHARGED.**

COUNT 3, ACCUSED IS GUILTY OF ROBBERY WITH AGGRAVATING CIRCUMSTANCES AS CHARGED.

10 **COUNT 4, ACCUSED IS GUILTY OF ATTEMPTED MURDER AS CHARGED.**

COUNT 5, ACCUSED IS GUILTY OF RAPE AS CHARGED.

15 **COUNT 6, ACCUSED IS GUILTY OF MURDER AS CHARGED.**

20

N P BOQWANA
ACTING JUDGE OF THE HIGH COURT