

SOUTH AFRICA / JUDGMENT

S v Luruli and Another (SS 63/11) [2012] ZAGPJHC 293 (17 July 2012)

[2012] ZAGPJHC 293**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Weiner

CASE / FILE NUMBER

SS 63/11

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NOT REPORTABLE

REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO:SS63/11

DATE: 2012/07/17

In the matter between

STATE

versus

RICHARD TSHIFHIWA LURULIAccused 1

MICHAEL KHOROMBI..... Accused 2

J U D G M E N T

WEINER J:

- [1] This case epitomises the dire state of crime in our country. The rape statistics are horrific, up there as one of the worst in the world. According to a study of the South African Medical Research Council, in 2011, the statistics are a strong reminder of the severity and gravity of rape in South Africa. The figures stand at approximately 55 000 reported incidents per year, and unreported incidents are something like 500 000 per year, that is one rape every minute in this country. We are considered by some as the rape capital of the world, something to make us hang our heads in shame.

- [2] Rape is used as a weapon of power and control over those with lesser physical strength. No-one is safe in the streets of South Africa because of people like the perpetrators of the crimes in this case, and what this case demonstrates is that rape is regarded by some as part of a night out on the town, a way in which weak, drunk men entertain themselves whilst humiliating the women upon whom they prey.
- [3] The facts of this case are an example of the depths to which certain persons in our community have sunk. It involves two paramedics entering a dimly lit and isolated area, to assist a toddler who had been severely burnt. Whilst attending to the toddler they were dragged from the ambulance into the veld, where they were raped by three men, sexually assaulted and humiliated in the most base fashion. These brave and dedicated women's lives will never be the same again.

CHARGES

- [4] The accused in this case are charged with the following: - Count 1, on 05 March 2010 and at or near Durban Deep in the district of Roodepoort, they unlawfully and intentionally assaulted two women; Ms T and Ms R, and did, with force and violence, take from their possession cell phones and jewellery. They also assaulted and took from the possession of one Daleni Desmond Masinga, certain items. They are therefore charged with robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977.
- [5] Count 2 relates to the unlawful possession of a firearm by the accused without being the holder of a licence, permit or authorisation issued in terms of the Firearms Control Act, 60 of 2000.
- [6] Count 3 relates to the unlawful possession of ammunition, the quantity and calibre of which are unknown to the state without being the holder of; a licence; permit; dealer's licence; manufacturer's licence; gunsmith licence or an; import, export or in-transit permit issued in terms of the Firearms Control Act, 60 of 2000.
- [7] Count 4 relates to the act of sexual penetration with the complainant Ms T, by penetrating the complainant's mouth with his genital parts, without the consent of the said complainant.
- [8] Count 5 relates to the act of sexual penetration with Ms T, by penetrating her genital parts with a finger, without the consent of the complainant.
- [9] Count 6 relates to the act of sexual penetration with Ms T, by penetrating her genital parts with his or theirs, without her consent.
- [10] Count 7 is framed in the same way as count 6, as these complainants were raped several times.

- [11] Count 8 relates to the accused unlawfully and intentionally compelling a third person, a Mr P, without his consent, to commit an act of sexual violation with the complainant Ms T, in that they beat and kicked him to compel him to have carnal sexual intercourse with the complainant without her consent.
- [12] Count 9 relates to the fact that the accused unlawfully and intentionally aided, abetted, induced, incited, instigated, instructed, committed and counselled or procured another person, to wit one another, or their co-accused, to commit a sexual offence by helping each other to intimidate the complainants to succumb to their sexual acts, with one accused standing by with a gun while the others were raping the complainants and by instructing each other to exchange the complainants when one was done with the first complainant, Ms T.
- [13] Counts 10, 11, 12, and 13 relate to the same offences as counts 7 to 10, but in relation to the second complainant Ms R.
- [14] Count 14 relates to the accused compelling Mr P to commit the act of sexual violation with Ms R.
- [15] Count 15 is in the same terms as count 9 in regard to the second complainant, Ms R.

STATE'S SUMMARY OF MATERIAL FACTS

- [16] The State, in the summary of its substantial facts, alleged that MsT and Ms R are female paramedics who attended an emergency call at Durban Deep, in the district of Roodepoort, on the evening of 05 March 2010. Whilst they were busy rendering first aid care to the toddler, who had been burnt, the accused and their companions arrived. The accused pointed a firearm at the two paramedics, as well as at two other men who were in the ambulance with the toddler, and robbed them of their personal belongings. The accused further dragged the complainants out of the ambulance and took them to the bush where they raped them more than once.
- [17] Mr P, who was passing by, was dragged by the accused and compelled to perform sexual acts with the complainants. As will be seen from the evidence presented by Mr P and the complainants, he pretended to do so and whispered to the complainants to pretend that they were being raped. He too has been affected by this incident.
- [18] The complainants were taken to hospital for medical examination and specimens were taken to be sent for forensic analysis. Accused 1 is linked to the sexual acts through forensic evidence.

ADMISSIONS

- [19] The State alleges that the accused, at all relevant times, committed the offences in the execution of a common purpose which existed, at the latest, immediately prior to the commission of the offences and continued for the duration thereof.

[20] The charges were put to both accused and they pleaded not guilty to all of the charges put to them. Their counsel, Mr Lebea, stated in opening that there would be no explanation in terms of section 115 of the Criminal Procedure Act, as they exercised their right to remain silent. Certain admissions were made in terms of section 220 of the Criminal Procedure Act. They are the following:

20.1. That a medical examination was conducted on Ms T, the complainant in counts 1, 2, 3, 4, 5, 6, 7 and 9 by Dr Ngomo on 06 March 2010 at about 01:00;

20.2. That the observations and findings, made by Dr Ngomo during the medical examination, and as recorded on the attached form, were true and correct;

20.3. Similarly, that the medical examination conducted on Ms R, the second complainant, was conducted by Dr Ngomo on 06 March at 02:00.

20.4. These reports were handed in by consent.

20.5. According to Dr Ngomo's report, he stated that there was an alleged sexual assault with vaginal and oral penetration by two males. There were no visible injuries on either of the complainants but they were in an anxious state at the time, and he concluded, in both cases, that there was an alleged sexual assault.

20.6. That Constable Thabang Shilajoe, on 06 March 2010, collected the sealed sexual assault kit of Ms T's vaginal swabs and Ms R's vaginal swabs from Dr Ngomo, which were packed and sealed in exhibit bags with serial numbers 09DIAB6119 and 09DIAB6080.

20.7. That Constable Shilajoe, on 10 March 2010, forwarded the forensic kits mentioned above, to the Forensic Science Laboratory, and they were packed and sealed in exhibit bags, which had certain serial numbers.

20.8. That there was no damage or tampering with the forensic sexual assault kits from Dr Ngomo, until they reached the Forensic Science Laboratory for

analysis.

20.9 That the blood specimens or samples which were drawn from the body of Leruli Richard Chifiwa, accused 1, on 05 November 2011 at 21:20, by Dr Lloyd H Thompson, was packed and sealed in exhibit bag, with serial number 063116390XX, and was then packed in a forensic bag, with a seal, and taken to the Forensic Laboratory by Constable Shilajoe.

20.10 That blood specimens were drawn from accused No. 2, Michael Khorombi on 02 November 2011 at 15:10 by Sister DM Segotso, and packed and sealed in exhibit bag, with serial number 06D30A6384XX, and was then packed in a forensic bag, sealed, and taken to the laboratory for analysis, by Constable Shilajoe.

20.11 There was no tampering with the blood samples mentioned above, from the hospital until they reached the laboratory.

[21] The affidavit of Doctor Shameer Roman Govan, referring to the analysis of the exhibits mentioned above, was admitted and the exhibit was handed in. Dr Govan confirmed that during the course of his duties on 07 April 2010, 12 April 2010, 22 April 2010 and 24 November 2010, he received the case files and interpreted the DNA results of the samples pertaining to this case. He made the following findings on the DNA analyses: -

21.1 The male DNA results obtained from the sample from accused No. 1 Leruli, matched the DNA results obtained from, the vaginal vault swab, the cervical vault swab, the vestibule swab, the valve swab and the panty stain received from Ms T, the first complainant. It was also matched to the specimen obtained from the underwear of Ms R. He concluded, in that regard, that the most conservative occurrence for the DNA result from the abovementioned exhibits is 1 in 110 billion people. He also found the same DNA results relating to the Accused No. 1, Mr Leruli, from the sample obtained from the vaginal vault swab of the second complainant Ms R. He concluded that the most conservative occurrence for the DNA result from the vaginal swab for the corresponding loci was 1 in 4.8 billion people.

21.2 The DNA results of accused No. 2, Mr Khorombi, were negative, as were those obtained from other suspects or persons who were investigated, one Michael Mapopo and one V Ngotha.

[22] The exhibits were accepted and handed in by consent, and admitted by counsel for the accused.

EVIDENCE

MS T (FIRST COMPLAINANT)

[23] Ms T was employed by the City of Johannesburg emergency services, and was on duty on the evening of 05 March 2010, a Friday. They attended a scene, around Durban Deep in Roodepoort, to attend an emergency of a baby who was burnt. The mother and the child were accompanied by a neighbour and a relative when they brought the child to the ambulance. The mother left the ambulance to go and fetch clothing for the child, as same had to be removed from the child when he was examined. While the two paramedics and the two male relatives were attending to the child, she suddenly noticed another male person standing at the sliding door of the ambulance, pointing a firearm inside the vehicle. They were instructed by him to keep quiet, and their cell phones were demanded. Another male then appeared from behind, got into the ambulance and took the cell phones from the paramedics and the other two persons.

[24] Ms T confirmed that they took from her possession a cellular phone, a Nokia N70, a few coins, as well as a Sony Ericson cellular phone from the second complainant, Ms R. They also took a cellular phone from one of the relatives of the baby, and some cash from the second complainant.

- [25] The person with the firearm then got inside the vehicle, grabbed the first complainant and pulled her out of the vehicle. He then got back into the ambulance and grabbed Ms R, pulling her out of the ambulance as well. Although there were lights in the vehicle, the shock and the suddenness of the incident did not enable the witness, Ms T, to identify the persons in the ambulance, and outside the vehicle there were no streetlights.
- [26] Ms T stated she was unable to observe any of them because whenever they tried to look at them they were assaulted with open hands and were told not to look at their faces. They were then pulled into the veld by these men, and followed by the male with the firearm. As they were walking along, the man with the firearm forced the complainant to remove her wedding ring and wristwatch.
- [27] The complainants were then taunted by these men as to whether they knew what they were going to do with them. They told them that they were going to be raped by 'vuil pops', which apparently refers to someone who is dirty, disorganised and untidy. Ms T and Ms R were then instructed to take off their clothes. Ms T, as she was undressing slowly, was hit by the man with the firearm who told her to undress faster.
- [28] They were then told to put their clothes back on as it appeared that the perpetrators did not think the place was safe. The complainants were told to carry on walking. The man with the firearm again taunted them by saying that they were taking them to lock them in a shack and rape them for a week.
- [29] They came across a tar road, Randfontein Road, and had to get down on their knees and wait for the vehicles to pass. When they got to the other side where there was another veld area, the man in possession of the firearm instructed them to take off their clothes. MsT attempted to look at him, and he hit her in her face, telling her he told her not to look at him.
- [30] The man with the firearm then unzipped his trousers and instructed her to go closer and put his penis in her mouth. They suddenly stopped because it appeared that there was someone approaching from the other side. The three men confronted the approaching man (Mr P) and started assaulting him, telling him that he was disturbing them. They made him go down on his knees and covered his face with his woollen hat.
- [31] The men then began telling the women that they thought that because they were paramedics or nurses, that they were smart during the day and more educated than them. The man with the firearm then returned to Ms T and instructed her again to go down on her knees. He put the firearm at the side of her head and told her to take his penis in her mouth.
- [32] After a while, he told her to stand up and turn around to face the other direction, and bend over. He inserted his finger into her vagina and then penetrated her with his penis, and, as she stated, he raped her until such time as he ejaculated. She could not see what was happening to her colleague, but the man with the firearm told his friends that he was done with her, and asked whether they wanted to have their turn. She was then instructed by the

other person who came over to where she was, to lie on her back, and he then also raped her until he ejaculated.

- [33] The men then grabbed the passer-by, Mr P, and threw him onto MsT, and told him to have sexual intercourse with her. The men were telling the passer-by that today he was going to have sexual intercourse with nurses. Ms T remembered also that the person who raped her the second time, placed a jersey over her face.
- [34] The men were still assaulting Mr P, and took the complainant's boots, and were assaulting him with the boots. Mr P whispered to Ms T that she should pretend as if he was raping her. He did not penetrate her at all, nor, according to her, did he ejaculate. They then pulled him away from her and he sat beside her. The man with the firearm instructed her to stand up, and the man with the firearm then again inserted his fingers into her vagina. He then attempted to kiss her and she saw that Ms R was then standing beside her as the jersey was removed from her face. They were instructed to get dressed.
- [35] The men instructed the two women to swap their underwear. One of the men then came up to her and twisted her breast and told her that she was a whore. The men were laughing and chatting to each other telling the two paramedics that they were free to go to the police because the police would never find them.
- [36] They, once again, began assaulting and kicking Mr P. The two women were then instructed to run away, and they ran towards the road. They realised that Mr P was running behind them. He accidentally fell into a pit, and the two women helped him out of the pit, and the three then ran towards the road. As they got onto Main Reef Road, they saw a police vehicle coming towards them and they hailed it. They got into the vehicle. They were driven to where the ambulance had been left, and they were taken to the Flora Clinic.
- [37] Ms T said that later the police recovered her cellular phone, and she identified it from some scratch marks that were on it.
- [38] Ms T was asked how she felt about this incident. She said that it was so painful, and also that they were no longer able to operate like they did before. Before the incident they were willing to service the community freely, and would attend whichever call they got at whatever time. They had no panic in attending such calls, and would service several squatter camps in their daily routine. After the incident, they now have to call the police as backup before they go out to attend a call. This has resulted in their service being substantially delayed to the detriment of the community as a whole.
- [39] She had also been served with divorce papers by her husband because he could not cope with what had happened to her. She is unable to sleep because of the trauma and unable to concentrate.

- [40] The cross-examination of Ms T consisted in the main of cross-examination relating to the medical findings, particularly that no injuries had been sustained, and also whether they were in fact able to identify the passer-by, having regard to the dark surroundings and the trauma and shock of the incident.
- [41] The reason for this became clear in the cross-examination, when it was put by Mr Lebea, that the first accused's version was that he was the passer-by, that he was assaulted and forced to have sexual intercourse with the two paramedics. Ms T denied this on the basis of several issues. She said that the assailants had spoken to them in isiZulu all the time, whereas the passer-by had spoken in isiTswana. Also the passer-by was very slender and did not look like any of the accused.
- [42] It was then put to Ms T that the first accused's version was that he passed through the veld and was accosted and dragged to where the group was stationed, and was struck with a firearm, as a result of which he was bleeding. He was then forced by these assailants to have sexual intercourse with one or both of the ladies there. When questioned by the Court as to what his version was, whether he had it with one or both of them, the Court was informed that as he had been injured he could not remember whether he had sexual intercourse with one or both. He denied that he penetrated the ladies but says he had certain physical contact with their private parts.
- [43] On behalf of the second accused, his counsel stated that he would not ask any questions as the second accused would continue to exercise his right to remain silent.

MS R (SECOND RESPONDENT)

- [44] Ms R's evidence up until she and Ms T were dragged into the second veld, confirms that of the first complainant. Her cellular phone and some money was taken from her and she was unable to identify her assailants.
- [45] Whilst they were walking towards the veld, she was being slapped by one of the men, who demanded their rings, and she confirmed that they were first told to undress then they had to dress again to go to another place. She said that the man with the firearm told her to lie down on her back and two of the assailants then began accosting her when the one with the firearm asked them why they were both there, as they could not rape her at the same time. He said one of them should stand guard whilst the others were busy raping the two women.
- [46] She repeated what the first complainant had said about the passer-by arriving, and the assailants assaulting him. As she was lying there, one of the men came over to her, penetrated her with his finger and removed a tampon that she was using. One of them came over to her, put on a condom and began raping her. When he was done, he told the passer-by to have intercourse or rape her as well.

- [47] In explaining exactly what had happened to her, she said the one assailant put on the condom and penetrated her with his genital part into her vagina. She was told to lie down again so that the passer-by could rape her. She confirmed that the passer-by told her to pretend that they were having intercourse. At that stage, she could not see his face because they had covered his face with the black hat that he had on but she saw that he had dreadlocks, and spoke to her in Tswana.
- [48] The man with the firearm instructed her to stand with her back against him, but then forced her to turn around and told her to take his penis in her mouth while he held his firearm against her head. He was assaulting her and slapping her at the same time, and then he also raped her by penetrating her. She then witnessed that the passer-by was thrown onto her colleague, and confirmed that they were then told to swap panties before they got dressed.
- [49] She described the passer-by as having dreadlocks and wearing faun trousers and stated that he did not smell like the others did. The perpetrators seemed as if they had been consuming a lot of alcohol. She stated that they were laughing and telling the women that if they reported the matter to the police, the police would never find them. She confirmed that they then ran away and that the passer-by then joined them. They helped him out of the pit when he fell.
- [50] When they reached the police vehicle, the police thought the passer-by was one of the assailants but the women told the police that this person had in fact helped them.
- [51] When asked how she felt about this incident, she said that it is painful because when one is in the uniform of the paramedics, and you go into a community to deliver a service, you expect the community to protect you. She said that this incident affected not only the two paramedics but the victim- the child that they were unable to help. It affected the community as a whole because they cannot get to where they are needed as they now have to wait for police to be available, which is not always immediate. She says, in addition, both her and Ms T were put onto ARVs in case they had contracted HIV, and it has affected her married life and her relationship, and her and her husband have attended counselling.
- [52] The cross-examination, once again, went to the identity of the passer-by. The witness was very certain that the passer-by had dreadlocks and khaki/faun trousers. The first accused's version of him being the passer-by was put to Ms R. His counsel stated that he would deny that he performed sexual intercourse by way of penetration, and that when he was chased away by the assailants, he proceeded to his place of residence. Ms R denied this version.

MR P.

- [53] He testified that he was 20 years old. He was looking for a friend of his when he went into the veld and encountered the three males, one with a firearm, who pointed it at him and dragged him towards where other men and two females were sitting. He stated that he was assaulted and threatened, and told that they would shoot him in the head if he did anything that they did not want him to do.

- [54] They pulled his woollen cap over his eyes so he could not see who they were or what they were doing and they then threw him on top of one of the ladies that was lying there. One of the males knelt down beside him and the female who was lying on the ground. Mr P whispered to the lady that she should pretend to be having intercourse with him. One of the assailants then came over, picked him up and asked him if he was done. He said yes and they then threw him on top of the second lady and told him to have intercourse with her.
- [55] He stated that at no stage did his private parts come into contact with the private parts of the first lady. When he was pushed on top of the second female, he again told her to pretend that they were having sexual intercourse. He stated that, at this stage, the assailants were laughing at what they were making him do, whilst they continued to assault him. They then told the ladies to stand up and to watch as they assaulted Mr P.
- [56] His face was still covered with his hat. He confirmed that he had dreadlocks at the time, and that he was wearing faun trousers. He also stated that he spoke to the women in Tswana. Whilst he was still being assaulted, the assailants told the females to run away, and they did. He was also instructed then to run away, and he followed the females and caught up with them. As he was running, he fell into a pit and they helped him out. They continued running across the railway lines until they reached a road.
- [57] They encountered a police vehicle on the road, and one of the policemen pointed a firearm at him, thinking he was one of the assailants. The two female complainants told the police that he had helped them and they should not shoot. They were then taken in the police vehicle to where the ambulance had been left.
- [58] Mr P had given two statements to the police. The first one was given to the police on 05 March 2010, the evening after the incident occurred. In that statement, he had told the police about the assault but had mentioned nothing about the fact that he was compelled to have sexual intercourse with the two complainants. He gave the reason for this that when he made the statement he was frightened but also very embarrassed to tell the police what they had made him do. He stated that he was traumatised and he was too embarrassed to even tell his parents about the incident.
- [59] However, it appears that the police, having read the statements of the two complainants, later visited Mr P and asked him if he wished to make another statement having regard to what the other complainants had stated. He had kept this incident to himself until the police came to visit him on this occasion. The police had come to tell him when the next court date was and his parents were obviously surprised when the police visited. He said it was then that he explained the whole story to the police and his parents.
- [60] In his second statement dated 20 November 2010, he confirmed the story of the two complainants about the assailants telling him to have intercourse with the two ladies, and he pretending that he was doing so. He stated that he was still emotionally and physically affected and that this incident kept playing over and over in his mind.

- [61] Under cross-examination, counsel for the accused put to him that this second statement was an afterthought and he was trying to distance himself as he was one of the assailants. He denied this and stated that if he was, he would have run away and not gone with the two females, and with the police, and given a statement immediately thereafter.
- [62] Mr Lebea put to him that he had consumed alcohol on that evening but the witness stated that he had not. At that stage, Mr Lebea reserved his rights to consider the record in the previous proceedings which had taken place when Judge van Oosten was asked to recuse himself, and Mr Lebea wanted to have access to that record. That aspect was left over and dealt with later.

DAPHNE KHOZAMELA

- [63] Daphne Khozamela was the mother of the baby who had been burnt with boiling water. She told the story as to how she had called the paramedics who arrived and, after they saw to the child in the ambulance, she had gone to get clothing for her child. When she returned, the paramedics were no longer there, just her child and the neighbour and a relative, Zacharia and Daleni. Her child was screaming from pain and the nurses had not finished attending to the child. They phoned the police and another ambulance was summoned and the child was then taken to hospital. Ms Khozamela was not cross-examined to any extent in regard to her story.

ZACHARIA MUANDO

- [64] Zacharia Muando was the neighbour of Ms Khozamela and was with the mother and child when the paramedics arrived. He was accompanied by Daleni, Ms Khozamela's brother. He stated that whilst they were in the ambulance, and the mother had gone to fetch clothes for the child, he suddenly saw a man at the door of the ambulance pointing a firearm at them. The child was screaming and things happened very fast as two other men joined the first gunman and demanded phones and money from the occupants of the ambulance. They grabbed the two paramedics and took them with them, telling Daleni and Zacharia not to leave the ambulance or they would shoot them. Some while later, a police vehicle arrived and they thereafter left the ambulance.

WARRANT OFFICER ARTHUR MASHIDI

- [65] Warrant officer Arthur Masidi was a constable in the Roodepoort Crime Prevention Unit. At about 21:00, on the evening of 05 March, he was on duty in Durban Deep. He later received a call from Captain du Plessis, per radio, to come to a crime scene. He met Captain du Plessis at the scene where the ambulance had been left. Captain du Plessis explained that two female paramedics had been abducted by three males, and led off into the veld. He left to search for these paramedics. As he was driving around Myles Stoker Circle, he noticed three people coming into the road, two of whom were wearing reflectors, which are on the uniforms of paramedics. He saw that there were the two paramedics and a male person running between them, who was wearing khaki pants, and he thought that the male could

be one of the suspects. However, the paramedics explained to him that the man was not one of the

assailants but had assisted them. Both paramedics were crying at this stage. He said they were hysterical and in a high state of shock. It was the male person, Mr P, who disclosed some information to him about what had happened. He then took them to the ambulance and went off in search of the suspects but was, unfortunately, not successful in apprehending them.

CAPTAIN DU PLESSIS

[66] Captain du Plessis was stationed at Roodepoort on the night in question. He received a call at approximately 21:45, over the police radio, that an ambulance was being attacked at the Myles Stoker Circle in Durban Deep. He arrived and saw the ambulance but found that it was empty. He called for backup and also phoned the ambulance dispatch centre telling them about the incident.

[67] A man and woman then approached him and told him that they were inside the ambulance and attacked by three other men, one with a firearm, and robbed of their personal items like jewellery and cell phones. They also told him that the two female ambulance workers were abducted by the armed men and taken into the veld.

[68] A short while later Constable Masibi arrived with the two female ambulance workers. He saw that they were severely traumatised. One of them informed him that she had been raped by the assailants.

DR NGOMO

[69] Dr Ngomo was working at the Flora Clinic trauma unit on the evening in question. He had examined both complainants at 01:00 and 02:00 on 06 March. He confirmed the contents of his report, and that he had written; "alleged sexual assault" with vaginal and oral penetration by two males; tenderness over the right face and; no other injuries.

[70] The State asked him to clarify whether or not, if there is an allegation of sexual assault but no injuries are noticed and there are no tears or bleeding in the female genital organs but rather that they are still intact, whether that ruled out the possibility of rape. He stated that he could not rule out the possibility of sexual assault simply because the examination was normal, as they needed to take into account other factors and circumstances. He stated that individuals respond differently in different circumstances. In certain cases, the anxiety and secretion of adrenalin would make a person freeze but some other people try to resist with force. Others, physically, cannot resist and, therefore, the response differs from one individual to another. He concluded that the absence of injury does not rule out the possibility of sexual assault.

[71] Under cross-examination, Mr Lebea put to him that as there were no injuries he should have concluded that there was no sexual assault. Dr Ngomo answered by stating that when he examined a patient he received information from the patient, and he also does a clinical examination and arrives at his own conclusions. His conclusion was that, despite the absence of injuries, there was still an alleged sexual assault based upon his clinical examination and consultation with the two females.

[72] Mr Lebea further questioned Dr Ngomo about the absence of scaring, bleeding, swelling and tears, and stated that this should have been inconsistent with sexual assault. The doctor repeated that he could not rule out sexual assault because the clinical examination is normal.

[73] On a question from the Court to Mr Lebea, whether the first accused's version that he was a passer-by also included the allegation that the women were not raped, Mr Lebea stated that the first accused, at that stage, exercised his right to remain silent on that aspect. Mr Lebea stated that he would argue that the females were not raped, from what was contained in the medical reports. It is, however, noteworthy that it was never put to either of the two complainants that they were not raped and that they were fabricating the events.

THANDI PATRICIA KENAHOPÉ

[74] Thandi Patricia Kenahope resides in the same area in which accused No. 2 resides. She knew accused No. 2 as he was a boyfriend of her friend, Bongiwe. On 05 March 2010, a Friday, her, accused No. 2, Bongiwe and her boyfriend Bunny Mabena were at Joe's Tavern at about 19:00. They were drinking liquor, and accused No. 2's phone rang. He went out to speak and then came back saying he was going to "Uphanda" which was explained to be a local dialect word meaning "to go and devise means".

[75] A little while later, accused No. 1 appeared, accompanied by a man named Mtimba. Accused No. 2 left with accused No. 1 and Mtimba. Accused No. 2 told Bongiwe that he would see her later at the place where Mabena and Thandi were staying. Thandi, Bongiwe and Mabena then went to a tavern in their residential area called Mandela's. They left Mandela's place at about 23:00. Approximately 30 minutes after they arrived home, accused No. 2 arrived. He knocked at the door and Mabena opened the door. When accused No. 2 entered, he remarked to Mabena that because Mabena was more interested in being with women, he would not have good things like accused No. 2 had. He had some rings, watches, cell phones and earrings that he said he was going to sell to make money. He left with Bongiwe shortly after that.

[76] Thandi stated that the following morning, accused No. 2 came back to her residence with Mtimba. They had a lot of money and were buying alcohol. They were in the company of Mabena and accused No. 1 arrived sometime later. She saw accused No. 2 give accused No. 1 R300. A while later, they left, but about half an hour after leaving, accused No. 1, Mtimba and Mabena returned. She confirmed that she knew accused No. 1 as an uncle of accused No. 2 and that they often came to the place where she and Mabena were staying. She stated

that accused No. 1 was staying at a place called Light, which was in Mathole, but she did not know the exact number. She had visited his place with Mabena. She had also visited accused No. 2's place in Mathole, which is an informal shack settlement. He stayed there with his brother Kierrie. Accused No. 1 worked, and so did Kierrie, but other than that, none of the others were employed. She saw accused No. 2 virtually daily as he was a friend of Mabena's, and confirmed that he did not work.

- [77] Thandi was cross-examined by counsel for the accused on two main bases. It was put to her that she and her companions were under the influence of liquor and that it was very dark in the shack. This, according to counsel for the accused, affected their ability to see what was going on in the shack and what accused No. 2 allegedly brought with him. She admitted that they were under the influence but "not very much under the influence". Despite this, she stated that she was able to see exactly what accused No. 2 showed her.
- [78] In regard to accused No. 1, it was put to her that he worked every Saturday and that he only finished work at approximately 15:00 or 16:00 on a Saturday and, therefore, he could not have been seen by her on the Saturday at about 13:00. It was put to her that after finishing work in Randburg, he went directly to his place of residence as he was not feeling well as he had been injured. Her answer was that he would be lying, he was feeling well, he came to her place and she saw him. She was sober at the time and had no doubt that he was there. It was put to her that she was lying in order to prejudice the accused, the reason being that she was involved in a conspiracy with Mabena and Bongiwé, and the police (including Sergeant Shilajoe) to formulate lies and implicate the accused in the matter. She stated that she would not come to court to tell lies to people whom she does not know, and for no reason.
- [79] Counsel for accused No. 1 then put his version;- He would deny that he was there on the Saturday or that he got R300 from accused No. 2. It was also put to her that several other people, including one Ngotha and one Jaba and Vutsilo were also arrested in regard to this matter. She was asked to comment on that but had no comment in regard to why those people had not been charged.
- [80] Accused No. 2's version was that he would deny that he was ever in possession of the items, being the necklaces, earrings and the Nokia N70 cellular phone. He would also deny that he said that he was going to "Uphanda". He denied that he went to her place of residence either on the Friday evening or on the Saturday morning, or that he had lots of money with him. To all of these questions, Thandi replied that he was lying; he was in possession of those things and those are the words he had used. She had seen him both on Friday and on Saturday.
- [81] It was then put to her that due to the light that was emanating only from a single candle she could not have made out what items accused No. 2 allegedly had. She stated "I saw those items because the accused had them on both his hands and Bunny brought the light closer to him and we all went to see them".

- [82] For clarity the court asked whether accused No. 2 admitted that he was there, but not that he had those items. Adv Lebea clarified that his defence was that he was never there. However, it was being put to the witness in relation to credibility, that with a single light, she would not have been able to see those items.

BONGIWE MOYISA

- [83] Bongiwe Moyisi was the girlfriend of accused No. 2. She testified that she was at Joe's Tavern on 05 March 2010, with Thandi, Mabena and accused No. 2. Whilst they were drinking, two males arrived to have a conversation with accused No. 2. A little while later, accused No. 2 came back into the tavern and told Mabena that he was going to "Uphanda". He asked him to look after Bongiwe, and he would fetch her later at Mabena and Thandi's place. They then went to Mandela's Tavern and later to Thandi's place where she lived with Mabena.
- [84] Accused No. 2 arrived a while later. Mabena opened the door for him and he entered. There was a candle which was alight in the shack. Accused No. 2 came over to the bed and told Mabena that, while he was busy sleeping with women, he had missed out on what accused No. 2 now had, and could not share. They were shown a ring, necklace and earrings. Accused No. 2 was right next to the bed when these were being shown to them. They were sitting on the bed.
- [85] Bongiwe then left with accused No. 2. He took her to her place of residence and stated that he still had to go and "do the rounds". Sometime later, she heard that he had been arrested.
- [86] Again, the cross-examination centred on the quantity of alcohol imbibed by these witnesses. It appears that they had had quite a substantial amount to drink, but that this had happened over a few hours. Bongiwe confirmed that she was not that drunk that she could not hear or see what was going on at the time. She confirmed that she saw the items that the accused had quite clearly.
- [87] She confirmed that she also knew accused No. 1 as the uncle of accused No. 2. Accused No. 2's version of denial was put to the witness, who confirmed that what she had seen and said was correct. She denied that she would have conspired with the other witnesses and the police to prejudice accused No. 2. She stated "we are giving testimony about something that we know about".
- [88] It was also put to her that the real perpetrators are known within the area of Roodepoort but they are free and roaming the streets. She stated "we know no-one who is involved in this matter, the only people that we know is him". She admitted knowing several of the other people to whom reference was made, being Michael Mapopa and Magotha, but denied that she saw them that evening. She also stated that one of the people who had come to the tavern to speak to accused No. 2 was Mthimbane.

ASIF IQBAL

- [89] To link the cellular phone with these offences, the state called Asif Iqbal who was employed at a cellular phone shop in Roodepoort. He testified that in early March 2010, accused No. 2 sold him a Nokia N70 silver cellular phone. The accused approached him with the phone and said he urgently needed money to go home but did not have taxi fare. Despite the fact that he did not have his ID with him, he sold the phone to him for R500 because he knew him.
- [90] Iqbal stated that he had seen Accused No. 2 around Roodepoort prior to the incident. He had seen him at a club and had also seen him at the tavern next door his shop. He sold the phone three days later and the police traced the cellular phone to one Sambo, and brought it back to Iqbal for him to identify. He did so.
- [91] He told the police that he did not know the name of the person who had sold the phone to him but would be able to identify him as he saw him around the area. Iqbal was also arrested in this regard. Iqbal confirmed that he identified accused No. 2 at an identification parade which took place a while later. He said that when he was taken to the identification parade no-one told him who to point out and he immediately recognised accused No. 2 when he saw him.
- [92] Mr Lebea referred to the statement that Mr Iqbal made to the police on 21 November 2010. It was put to him that in the statement he described accused No. 2 as being tall and slender and light in complexion. He was asked to agree that the accused was in fact dark in complexion. He stated that it is possible that the police officer made an error because his first language is not English, and he had given the statement in a language which he was not familiar with. He recalls that he told the police that the person was black. He said that he and the police officer understood each other but he had to repeat several things in order for the police officer to understand what he was saying.
- [93] Accused No. 2 would, according to his counsel, dispute all these allegations as well as the fact that he was acquainted with Iqbal. When asked whether accused No. 2 would deny that he knew the person from around Roodepoort, accused No. 2's counsel stated that accused would exercise his right to remain silent in that regard.
- [94] Mr Lebea then challenged Iqbal's statement on the following basis:- in regard to the transaction, in paragraph 2 of his statement, Iqbal had stated the following:
- "I cannot remember the dates but it was the first week of March 2010, during the week."
- [95] The basis of the challenge was that the alleged robbery of the cellphone by accused No. 2 only took place on 5 March 2010, a Friday. Therefore, he could not have brought the phone from accused No. 1 in the first week of March 2010. Iqbal's response was that the incident took place over a year ago and he could not remember the exact date. What he could remember was that it was in March and was during the week, a Wednesday or a Thursday. It was put to Iqbal that he was detained in the same section of the prison as accused No. 2, and that accused No. 2 had seen him there. Iqbal stated that he did not see accused No. 2 in the

prison but remembers that he was detained around the end of March or the beginning of April.

[96] It was put to him that accused No. 2 would state that he had several conversations with Iqbal as an inmate. Accused No. 2 would say that the reason why he was pointed out by Iqbal is because he knew him from seeing him in prison, and identified him in that identification parade for that reason. Iqbal reiterated that he did not see the accused while in prison.

[97] Iqbal repeated

"I remember he is the one who came to sell it to me on that day, and we were sent for identification. I could remember that it was him".

[98] He also reiterated that Accused No. 2 brought a Nokia N70 and it was easy for him to point him out at the identification parade because he knew him.

[99] Iqbal was also accused by counsel for the accused of making a deal or conspiring with the police to save himself from the cellular phone debacle and implicate the accused. Iqbal denied this saying he pointed him out because he is the person who sold him the phone.

[100] The documents and forms relating to the identification parade were all accepted and admitted by counsel for accused No. 2. The photographs of the identification parade where 12 people were standing, and Iqbal pointing out accused No. 2, were admitted. There was also no dispute, and admissions were made in regard to the interpretation that took place at the identification parade. These relate to the facts that there were no irregularities or any false information passed from the interpreter's side. It was further admitted that the person who guarded the witness before the witness was taken to the identification parade committed no irregularities. A similar admission was made in regard to the person who escorted the witness from the room to the identification parade, and from the identification parade back to the room where the witness originally was. This was all confirmed on behalf of accused No. 2 by his counsel.

CAPTAIN RADEBE

[101] Captain Radebe gave evidence that he was in control of the identification parade. He confirmed that he had filled out the necessary forms which relate to the identification parade and that he had signed them. He confirmed that there were no irregularities and that everything he wrote down was in accordance with what he had seen on that day. He recorded that the accused had wanted people with clean-shaven heads on the parade, and that the accused on his own chose three persons in that regard. The accused had stated that he was satisfied with the parade, including the persons that were on the parade. He also confirmed that Iqbal pointed out accused No. 2 on the parade. It was confirmed by Mr Lebea that the contents of the form were not disputed. However, Mr Lebea put to Captain Radebe that the accused had had a complaint as he wanted to wear long trousers and that this was refused by Captain

Radebe.

[102] Captain Radebe stated that that was not the truth because all requests that were made by accused No. 2 to him were noted on the identification parade form which was handed in as Exhibit K.

[103] It was also put to Captain Radebe that accused No. 2 would say that he saw and spoke to the investigating officer in the morning of the identification parade, Sergeant Shilajoe, and he did not trust the prospective identification parade.

[104] Captain Radebe stated that if the accused had said that there was something that would prejudice him, it would have been noted on the form and the parade would not have proceeded.

MICHAEL MAPOPA

[105] The next witness to give evidence was Michael Mapopa. He gave evidence that he was informed by one Sipiwe Nefawi of "something" that had happened. As a result of this information he went to see accused No. 2 and told him what he had heard. Accused No. 2 told him to leave that alone and not follow it up. They were at Mapopa's girlfriend's place. They had gone to a tavern next door her house and later he, accused No. 2 and Sipiwe went to Backer's Tavern in town. He left them at around 22:00 and the following morning when he was cleaning his vehicle he found some female rings in the vehicle that they had used the previous night. He stated that he did not know who they belonged to but decided to sell them a little while later. However, during that week accused No. 2 approached him and demanded that he wanted his rings which he had left in the car. Mapopa told him he did not have the rings. Accused No. 2 told him that he knew that he had sold them but Mapopa denied this to him. He stated that he was arrested on 05 August 2010, on an unrelated offence, and he was placed in a cell with accused No. 2 who had also been arrested on an unrelated offence. They began talking and Mapopa asked accused No. 2 what had happened in the incident involving the paramedics. Accused No. 2 then divulged to him that he was involved in the rapes with accused No. 1 and Mthimbane.

[106] Whilst in jail together, he and accused No. 2 had an argument over a cellular phone voucher. Mapopa then threatened accused No. 2 that if he did not give him access to the cellular phone voucher, he would say words that would make Zuma, the president, "come and listen to the facts that accused No. 2 had raped the paramedics". On 10 November 2010, he was booked out of the cells by certain policemen. He was asked if he knew accused No. 2. He admitted that he knew him. They then asked what he knew about the matter concerning the paramedics.

- [107] He denied that he knew anything until they told him that accused No. 2 had informed them that he was with accused No. 2 during the commission of the offence. He denied this and stated that he wanted to be taken to a doctor to extract blood to prove his innocence. Blood was, in fact, taken from Mapopa. They then went back to the police station and Mapopa made a statement to the police.
- [108] In such statement, Mapopa said that he was told by accused No. 2 that there were two female paramedics; that he and two others had come across an ambulance and had seen the paramedics attending to a child. They had robbed these people and then took the two female paramedics into an open veld where they robbed them of jewellery and cellular phones, and also raped them. Mapopa confirmed that accused No. 2 had admitted to him that he was party to the rapes.
- [109] It was put to him that accused No. 2 had also had blood taken and that the results were negative. His answer was
- "yes, the accused told me that blood samples were taken from him and he told me that they would come back negative. He said that during the commission of the rapes he used a condom".
- [110] He stated to the court that he knew both accused No. 1 and accused No. 2 very well. In conversations with accused No. 1, the latter had admitted to being involved but that he had not used a condom. However, he stated he could not recall telling the police about this issue of condoms.
- [111] Under cross-examination it was put to him that he and accused No. 2 were friends but they had had certain quarrels. Mapopa stated that he had mentioned President Zuma because on Friday 07 March President Zuma and Premier Nomvula Mokonyane had come to Durban Deep concerning the matter. It was put to him that he got all of this information from the newspapers, but Mapopa denied reading the newspapers, and stated that accused No. 2 had given him this information. The question of the argument between Mapopa and accused No. 2 was traversed in some detail by counsel for the accused. There was some lack of clarity in regard to precisely what caused the argument, whether it was the cellular phone voucher or the fact that Mapopa had referred to telling President Zuma about the accused. Mapopa stated that when accused No. 2 came back from being interviewed by the police on 05 November 2010, accused No. 2 stated to him that the police had told him that Mapopa had told the police that accused No. 2 had raped the paramedics. He denied that this had occurred because he was only booked out by the police sometime later on 10 November
2010. He clarified that the original altercation was about the cellular phone and that is when he threatened about President Zuma. Later, when he came back from being interviewed on 10 November 2010, he was angry with accused No. 2 for implicating him.
- [112] It was put to Mapopa by counsel for the accused that all of the evidence he had tendered was untrue. He answered "all that I have testified about is the truth because I was saying what I was told by the accused". He was referred to his statement in which he had inter alia

stated that, it was when they were in prison that accused No. 2 told him the details of being involved with accused No. 1 and Mthimbane in the robbery and rapes. He stated that, at that stage, they were still friends and the relationship only soured later at the Krugersdorp prison as described above. Mapopa said he also realised something was wrong because when accused No. 2 returned to the prison on 05 November 2010 he appeared not to be speaking to Mapopa anymore and then he accused him of implicating accused No. 2 to the police. This did not appear to deal with Mr Lebea's question, but Mr Lebea took it no further.

- [113] In his statement, Mapopa had also referred to the fact that whilst they were in prison there was a Pakistani guy named Asif, that he knew from Roodepoort town, and that he worked at a cellular phone shop next to the Backer's Tavern. Mapopa testified that accused 2 appeared to be hiding himself from this man, fearing that Asif would recognise and identify him.
- [114] Mr Lebea put to Mapopa that that accused 2 would state that he was fabricating his evidence for two reasons; firstly, that whilst the accused was incarcerated from March 2010, and whilst Mapopa was on the outside, Mapopa had taken the money in accused 2's bank account and not paid it to his lawyers who were supposed to get it in order to apply for bail. Accused 2 would say that Mapopa was dodging him and denying everything and that is why the argument began.
- [115] The second reason was that Mapopa was apparently facing a charge of murder and that he was conspiring with the police to save his own skin. Mapopa said that the police officers involved in this case knew nothing pertaining to the matter that he was facing, and they did not promise him anything if he testified. The other matter was not mentioned.
- [116] It was also put to him that accused No. 2 would deny saying that he used a condom to rape anyone. Mapopa re-iterated that the accused had told him these things in detail.
- [117] On behalf of accused No. 1 it was put to Mapopa that he would say that when he arrived at prison, when he was arrested in connection with this matter, he was in great pain as he had been severely assaulted and tortured. Mapopa denied this saying he was lying, and also denied that the accused was so upset that he could not speak to anyone, Mapopa stated that he spoke to him that day.
- [118] It was put to him that accused 1 stated that there would be nothing for him to speak to Mapopa about because they were not friends. Mapopa's answered, "it is just that I never anticipated this can happen and it is late by now. If it was permissible I would have brought photographs whereby I held parties for my children, I was in the company of all the accused".

PITSO MATINYANA MABENA

- [119] Bunny Pitso Matinyana Mabena (Mabena) was the boyfriend of Thandi. He confirmed the evidence given by Thandi and Bongiwe in all material respects. He added that when accused 2 had finished speaking on the telephone on the Friday evening, he was told by accused 2 that it was Mthimbane and that accused 1 and Mthimbane were going to be there within ten minutes. He said they mentioned something about “Sibana” or “Uphanda”.
- [120] Mabena did not go with them and accused 2 said he would fetch Bongiwe later at Mabena's house. He confirmed that they later went to his place of residence and that sometime at approximately 23:00 accused 2 knocked on the door. Accused 2 came in and sat on top of the dressing table next to the bed, and told Mabena that he was 'bayisa'. This was interpreted by Mabena as accused saying that he could not see what was good in front of him, and he was making himself stupid.
- [121] Accused 2 then took out some rings and earrings and a silver N70 Nokia phone and some loose coins and notes. He wanted to sell the earrings to Mabena but he did not have money. Accused 2 then left with Bongiwe. He confirmed that on the following day at about 10:00 accused 2 and Mthimbane arrived at his place carrying beers. They showed him the money that they had got as a result of the ventures the night before, and showed them the R300 that they were going to give to accused 1. Accused 1 arrived at about 01:00 and was given his R300. At about 04:00 they met up with Mapopa and accused 2 got into Mapopa's vehicle and left with him.
- [122] The following day accused 2 inquired about the rings and Mabena reminded him that he had had them the day before. He started searching his pockets and then stated to Mabena that it appeared as if Mapopa had taken the rings. They then left and went to his place of residence where they found Mthimbane. He was sitting on a sofa which accused 2 pushed, and Mabena saw a bag behind it. He threw the contents on the sofa. Included in the contents were black female boots and some bandages and cotton wool. Accused 2 asked Mthimbane why he was keeping those items, and Mthimbane then took the bag and threw it on top of other shacks near his. They left but did not find Mapopa that day.
- [123] Mabena asked accused 2 where those rings came from, and accused 2 told him that he had taken them from the nurses. Accused 2 explained that they had found nurses in an ambulance and that they had taken the nurses with them, and that he had taken the one who was light in complexion and a "Pakistani" which meant a woman who was worshiped. Accused 2 then said that Mabena was stupid as he should have come with them and could have had sex with nurses the previous night.
- [124] Mabena was then questioned by counsel for the accused on how well he knew accused 1. He answered that he knew him very well. Counsel stated that accused 1 would tell the court that he came visiting on the Saturday, but late in the afternoon and not at 13:00. Mabena repeated that he saw him at about 13:00. Mabena admitted to having drunk quite a lot on the evening of 05 March. It was put to him that in his statement he did not mention the Nokia N70 phone. The statement was made on 11 November 2010, and Mabena said that at

the time of making the statement, which was some months after the incident, there were some things that he had forgotten which he did not include in his statement. He, however recalled, and had put in his statement that he had seen gold rings and gold earrings shown by accused 2.

- [125] He was questioned about the fact that he had earlier said that he did not know how much the cellular phones were sold for but in his statement said they were sold for R900. He said that he had overheard accused 1 being told that the phones had been sold for R900.
- [126] He stated that accused 2 had shown them about three or four cellular phones on the night of 05 March. It was put to him on behalf of accused 2 that accused 2 would say that they knew each other very well from Venda and the accused's version is that Mabena was here just to tell lies and fabricate evidence to his prejudice. Mabena responded "I love him very much and he is my friend and I am not telling any lies about him, I am just testifying about things that I know of". The reason put to him is that Mabena had apparently now been arrested for breaching his parole and therefore he was in a conspiracy with the police to tell lies, and that he would therefore receive some mercy from the authorities. Mabena stated that for breach of parole he was serving a very short term and it had nothing to do with this matter.
- [127] Mabena confirmed in his statement that he did not tell the police about the accused and Mthimbane, and their rape of the paramedics as he was afraid of accused 2 who had a firearm. That was the reason why he only gave his statement and evidence after accused 2 was arrested. He also stated that accused 2 had apparently implicated someone called Mokiyo, and that Mabena was then prompted to come forward as he knew that Mokiyo was not involved.
- [128] In regard to the firearm Mabena stated that he saw the firearm virtually on a daily basis whenever he saw accused 2; the last time being on 05 March 2010.
- [129] Mr Lebea applied at the stage of the proceedings for access to certain documentation that his clients are entitled to in terms of Section 35 of the Constitution. After legal argument on whether or not these documents were available and/or relevant, it appeared to me that they were relevant and necessary in order for the accused to be able to conduct their trial properly. I accordingly gave a ruling on 02 December 2011 in which I ordered the state to hand over to counsel for the accused, the entire contents of the docket being:
- 129.1 All statements of any witnesses or suspects that were made;
- 129.2 All forensic documents dealing with the blood tests taken in relation to any of the aforesaid witnesses and/or suspects;
- 129.3 Part C of the docket, being the investigative diary;
- 129.4 The occurrence book of the Roodepoort police station in relation to this case;

129.5 The pocketbook of the investigating officer and;

[130] In this regard, I ordered that the state is entitled not to disclose the identity of an informer or a state secret or information which might lead to the intimidation of witnesses.

[131] I ruled that the documents should be provided to counsel for the accused, either that afternoon which was a Friday, or early on Monday morning when the matter would recommence.

SERGEANT SHILAJOE

[132] Sergeant Shilajoe was the investigating officer in the present case. He was working at the Honeydew family violence and child protection and sexual offences unit in March 2010. He had been working for the police for seven or eight years. He was asked why the witness Mr P had given two statements. He testified that the first statement was obtained directly after the incident while the second was obtained after he had obtained the statements from the two complainants, Ms T and Ms R. He saw that Mr P had not mentioned that he was forced to have sex with the two complainants.

[133] He confirmed that many people were arrested or suspected as the victims were not able to identify the perpetrators. Some were released because they could not be linked in any way with the case. No-one who tested positive in regard to their blood was released. If the DNA was negative this did not mean that a person was automatically excluded. He was still investigated to see if there were any other links.

[134] He received an anonymous call from the Krugersdorp Prison. The caller informed him that an incident had taken place inside the prison. He informed him that two prisoners had a fight inside the prison and one of them said he will utter words that will make President Zuma come to the prison. One had accused the other of being involved with the rape of the paramedics. He gave him the names of the two prisoners who were in prison, being accused 2 and Michael Mapopa.

[135] In regard to the statements of Mr P, and the fact that he gave two statements, Sergeant Shilajoe stated that he confirmed that Mr P was very frightened on the night of the incident and when he interviewed him later. The explanation was given that Mr P had been very embarrassed and therefore had not given a full statement in regard to the fact that he was threatened if he did not have sexual intercourse with the paramedics. His second statement was taken after the police had received such information from the two complainants. Sergeant Shilajoe said he wanted clarity from Mr P.

[136] It was put to him the police decided to visit Mr P and connive with him to specifically mention the forced rape allegations. The reason was to implicate the accused, leaving the real perpetrators running free. Sergeant Shilajoe denied this, stating he had no reason to implicate these particular accused.

- [137] He was questioned in regard to the investigation diary, and in particular a note in the diary on 08 March 2010 from Captain Pretorius. It stated that, “in regard to the statement from Mr P, he must state that he was forced to rape the complainants”. At the time he had been communicating with Captain Pretorius re the proceedings, and had informed him that, having read the victims' statements, this incident was not mentioned by Mr P and that they should perhaps re-interview Mr P to see whether this had occurred. It took several months, however, for Sergeant Shilajoe to interview Mr P and obtain a second statement.
- [138] He testified in regard to the investigation diary, that he arrested accused 2 on 18 November 2010. Accused 1 was arrested on 03 November 2010, before midnight, but his warning statement was only issued after midnight on 04 November 2010. He stated that accused 2 had informed him of certain aspects of the matter and given a statement.
- [139] At this point, Mr Lebea objected on the basis that accused 2 would allege that he was assaulted by the police and by Sergeant Shilajoe which led him to admitting certain facts. He stated that accused 2 would say that he was told the police had certain information and they wanted accused 2 to verify it. The statement related to addresses that accused 2 pointed out when the police showed him certain names and asked him for the addresses of those persons [the issue of the statements and alleged assault is dealt with later].
- [140] Sergeant Shilajoe continued that when he received the information from the informer about the fight at the prison between accused 2 and Mapopa that he decided to interview both of them. The information, he said, was that one of them said to the other I will expose the information about you having raped the paramedics. Sergeant Shilajoe said that when he interviewed accused 2 on 5 November 2010, the latter informed him that he, accused 2, had fetched accused 1 and Ngotha at the area at which the alleged incident had taken place but only after the incident occurred. Mr Lebea stated that accused 2 would deny that he gave this information.
- [141] Sergeant Shilajoe stated that, at this stage, he regarded accused 2 as a witness and not a suspect. It was only after he proceeded with other investigations that they revealed that accused 2 had been linked to the matter.
- [142] It was put to Sergeant Shilajoe that he should have cautioned accused 2 in terms of the judge's rules, that he was entitled to remain silent and that what he said could be used against him. Shilajoe reiterated that at that stage he did not regard accused 2 as a suspect. He was only interviewing him about the altercation at the prison to see whether or not he knew anything about the incident involving the paramedics.
- [143] Certain media reports were put to Sergeant Shilajoe in regard to the fact that the media had stated that an arrest had taken place on 20 March

2010. Sergeant Shilajoe said he knew nothing of the media reports, he had not spoken to them and no one had in fact been arrested on 20 March. He also stated that there were numerous suspects and people arrested. In total 15 people were arrested including Ngotha, Mashini, Maphetse, Sambo, Moyo, Skosana and the others mentioned before. He stated those that were released could not be linked in any way to the crime.
- [144] Accused 1 was linked by evidence they had received from witnesses and by DNA evidence. Accused 2 had been linked by the evidence given by the witnesses, Mapopa, Mabena, Thandi and Bongiwe. The latter two confirmed the other witnesses' statements, as did the evidence of Iqbal and the identification of accused 2 by him. The statements of Mapopa and Mabena were given on 10 and 11 November 2010, according to Shilajoe. This is what led to the further investigation of accused 2, who was then arrested on 18 November.
- [145] According to the statement of accused 2, he and Mapopa were not aware of what had happened at the scene of the crime. It was only at a later stage, according to Sergeant Shilajoe, that information came that accused 2 was linked with the matter. This he got from the statements of Mapopa and Mabena.
- [146] As appears from the investigation diary, on 10 November 2010, they obtained the witness statement from Mapopa, which implicated accused 2. On 11 November they interviewed other witnesses and obtained statements from Mabena.
- [147] On 17 November 2010, Mapopa noted that consultation was made with the senior public prosecutor to discuss and brief her about this case, to have a full picture. It was agreed that due to strong information and witnesses' statements that linked the accused 2 as the possible suspect, he also needed to be charged and appear at court with the other two suspects.
- [148] On 18 November 2010, it is noted that accused 2 was arrested and charged at Krugersdorp prison, and a warning statement and additional forms were completed.
- [149] The statements from the other witnesses Thandi and Bongiwe were obtained on 19 November
2010. These also linked accused 2 to the crime, and on the following day, the further statement was obtained from Mr P.
- [150] On 21 November 2010, Asif Iqbal, told the investigating officer that he would be able to point out the person who sold the cellular phone to him. This led to the identification parade referred to above when Iqbal identified accused 2.
- [151] The objection by Mr Lebea related to the evidence that Sergeant Shilajoe was giving in regard to the witness statements of accused 2 and Mapopa. Adv Futshane, for the state, stated that Adv Lebea had opened this line of questioning in regard to the investigative diary and what was contained therein. That evidence was not led in chief and only elicited during cross-examination. When questioned in this regard, Adv Lebea clarified that there would be

no trial-within-a-trial in the sense that the statement was to be challenged in that way. There would be an argument only on credibility of the witness, Sergeant Shilajoe, in relation to the version of accused 2.

- [152] Sergeant Shilajoe repeated that when he obtained the statement from Mapopa, Mapopa said that he was not involved, as accused 2 had stated, in driving the car to fetch the other accused. Mapopa then told them that accused 2 should be the suspect and that accused 2 was just trying to exclude himself by involving everybody else.
- [153] It was put to Sergeant Shilajoe that when they interviewed Mapopa they told him that accused 2 had implicated him. Therefore, Mapopa denied that he was involved and then implicated accused 2. It was then that Mapopa gave a statement. Shilajoe denied that it was only as a result of accused 2 implicating Mapopa. The note in the diary states that they booked Mapopa out in order to confirm the statement of accused 2, that Mapopa was with accused 2.
- [154] At this stage, the involvement of accused 2 and Mapopa, was not in the commission of the offence but only in transporting the other accused. They did not know what the other accused had got up to. There was no offence alleged at this stage that had been committed by accused 2 or Mapopa. The confirmation the police required was that accused 2 and Mapopa were together in the car after the incident.
- [155] It was also put to Sergeant Shilajoe that the evidence regarding the cellular phone could not be accepted because Asif had said he had received the cellular phone from accused 2 during the first week of March, and the incident only occurred on Friday 05 March. Sergeant Shilajoe stated that it was not only Asif that gave evidence about the cellular phone. Evidence was also given by Mabena, and the cellular phone was also linked to the complainant who identified it at the police station.
- [156] Sambo, the purchaser, was linked to the cellular phone through a tracking device, and he was arrested on 27 March 2010 in this regard. He told the police from whom he had bought the cellular phone from Iqbal Asif. Iqbal then linked that cellular phone to accused 2.
- [157] Adv Lebea put to Sergeant Shilajoe that accused 2 would state that before he gave his statement he was assaulted and was influenced into giving that statement. This was denied by Sergeant Shilajoe. He stated that accused 2 was inspected by the chief of prisons, both before and after he was released into Sergeant Shilajoe's custody. This would be denied by accused 2, according to Lebea.
- [158] Mr Lebea put to Sergeant Shilajoe that, as a result of the assault and the threats, accused 2 gave the information in his statement to the sergeant. This information, according to Mr Lebea's instructions was true, but there might be certain inaccuracies because of confusion and because of the threats and the assaults.

[159] It was put to Sergeant Shilajoe that other suspects had also been assaulted and that the police were under pressure to solve this crime and make someone responsible. Accused 2, according to Shilajoe, had given the names of the people he had picked up after the incident. Mapopa, when booked out on a later date, linked accused 2 to the crime. Sergeant Shilajoe confirmed, when re-examined, that with the statements he had obtained from Mabena and the other witnesses, he realised that accused 2 was linked, and was then told to arrest accused 2.

CAPTAIN PRETORIUS

[160] Captain Pretorius made the note in the investigation diary that Mr P's statement had to be elaborated upon. He was the commander of the unit that was investigating this matter, and he instructed the investigating officer what to do. He said he discussed the two statements of the victims with Sergeant Shilajoe, and as a result made the note which is contained in the investigative diary.

[161] He stated that in remarking in the note that the witness Mr P “must” state that he was forced to rape the complainants, he meant that a further statement should be obtained from Mr P to confirm whether or not this was correct as reflected in the statements of the two female complainants. It was put to him that this was fabricated to prejudice the accused. However, he testified that there were no arrests of any accused at that time and there was therefore, no reason to fabricate anything against anyone. They just needed clarification from the witness. On a question from Mr Lebea, Captain Pretorius asked who it was that they were conspiring against as no-one had been arrested.

[162] That concluded the evidence for the state.

EVIDENCE FOR THE ACCUSED

ACCUSED NO. 1

[163] Accused 1 stated that he came home from work on Friday 05 March at about 20:30, and as there were no taxis he walked through the veld. He saw three people standing and two on the ground. Two of the three approached him and pointed a firearm at him and demanded money. They assaulted him and pulled him to where the others were standing and sitting. They were assaulting him whilst doing this.

[164] They instructed him to sleep with the ladies who were seated on the ground. He refused and they took off his trousers and threw him over to the ladies. They beat him and one grabbed his penis and said he must insert it, but he again refused and they hit him again. He was pushed on top of the first lady and could feel his private parts touching her. They then moved him over to the other lady and he was forced on top of her as well.

[165] He testified that he could not recall if he had an erection. He then stated that he did not have an erection because of the assault which frightened him. This related to both female victims. When this was over, the assailants told him to go in the opposite direction that the

ladies went and he was going straight home. Before he reached his home he met with Mapopa, who was driving past. Accused 1 was bleeding from his forehead but he could not remember what they had hit him with. Accused 2 was not in the car with Mapopa. He asked Mapopa to take him to the police to report the assault and the forced rape, but Mapopa said “no, if you go the police will arrest you”.

- [166] He did not tell anybody about these events, not his wife nor any of his friends. His explanation as to why he was linked to the victims by virtue of his DNA being found in the vaginas of both of the victims, was that he did not know how that happened. He then stated that as there were no visible injuries, it was clear that the women had not been raped. He stated that he could not remember whether he inserted his penis into their vaginas and could also not remember whether or not he ejaculated. He did not see what the others were doing or whether they raped the victims.
- [167] He testified that he was employed at a meat supplier and that he worked Monday to Saturday, and on Saturday from 08:00 until 15:00, and that he would get home after 16:00. He denied he received any money on 06 March 2010, or that he was with Mabena and that they had alcohol. He said that on the Saturday after work he went straight home and he does not know why he was arrested. He thought it was perhaps because Mapopa had informed the police after he had been with him in the car.
- [168] Under cross-examination, he denied that he had a close relationship with Mapopa or Mabena prior to the incident. He knew Mabena and Thandi as the girlfriend of Mabena. He knew Mabena owned a tuck shop and that Thandi worked there. He knew Bongiwe but did not know that she was having a relationship with accused 2. They all stay nearby in the Mathole squatter camp. There were no bad relationships between him and any of these people.
- [169] It was put to him that accused 2 had informed Mapopa that he, accused 1 and Mthimbane were parties to the rape. When asked why Mapopa would state that accused 2 had told him this, accused 1 said that Mapopa wanted to hurt him because he has a case in the High Court and he wanted him to feel the same pain.
- [170] He could give no reason why Mabena, Thandi and Bongiwe had all lied about seeing him on the Friday night and on the Saturday morning. When asked why the witnesses, including accused 2 would say that he was involved in the rape, his answer was "I did not rape them; if I did the doctor would mention that there were injuries, and would have found evidence from my blood". It was put to him that there was evidence found from his blood. He replied that he could not dispute the report because he was being assaulted and he cannot explain what happened.

- [171] He then testified that he did not have an erection and did not penetrate either of the victims. It was put to him that in light of his evidence that he was at the scene, in a different capacity, and the fact that he only told Mapopa about it, how was it possible that accused 2 knew what happened. He was unable to answer the question.
- [172] When it was put to him that DNA was found inside the victims, Mr Lebea objected on the basis that the DNA need not necessarily be semen. However, the report stating that his DNA was found inside the vaginas of the victims was not disputed. Having regard to the evidence of the two victims, and the undisputed DNA evidence, it can be accepted that the semen found contained the DNA of accused 1.
- [173] He testified he was beaten and injured and had a wound on his forehead, which was bleeding, but Mapopa still told him not to go to the police because they would arrest him for being amongst the rapists. He was then asked how he knew that they were rapists when he did not rape and he did not see anyone else raping according to his evidence. His answer was that he was in shock at the time.
- [174] He testified further that he went to work on 06 March and only left after 15:00. He was with a colleague Malebe and his boss Heino. Both of them saw him on the Saturday morning and knew that he did not leave work until after 15:00. He stated that at the time of the incident his head was clean-shaven and he was wearing blue jeans and a blue work top. When asked to comment on the fact that the evidence of the complainants was that the passer-by had dreadlocks, he stated he had no comment and that maybe there was another passer-by who came afterwards.
- [175] Accused 1 testified that he did not speak to these women, and when asked about their statements that they had been whispered to in Tswana to pretend they were being raped, his answer was “no comment”.
- [176] That was the case for accused 1.

ACCUSED NO. 2

- [177] According to accused 2, he was implicated in this matter by Mapopa, but denied that he was there and did not know the location of the events at all. He stated that the reason Mapopa was lying was because he and Mabena had visited him in prison and Mapopa had taken his bankcard to draw money for an attorney but had not done so. When they were detained together at Krugersdorp and he asked Mapopa for the money, Mapopa stated that he would show him what he was capable of.
- [178] In regard to the evidence of Thandi, Bongiwe and Mabena, he testified that their evidence was “pure lies”. In regard to the cellular phone being sold to Asif Iqbal, he answered that the dates were wrong. He could not have sold the cellphone to Iqbal in the first week of March and therefore the evidence of Iqbal should be rejected. According to him, all of the witnesses had been threatened by the police and that is why they were saying what they did.

- [179] He denied that he was with Bongiwe at the tavern earlier on, on 05 March, and stated that she knew he did not want her to drink and, therefore, she was not there either. In regard to the jewellery and cellular phones shown, once again he said that all three witnesses were lying.
- [180] There was no bad blood between him and Mabena. In fact, Mabena had asked him if he could stay at his home because Mabena was on the run from the police. In commenting on why Mabena would give the evidence he did, he said he was pressurised by the police.
- [181] In regard to the sale of the cellular phone to Iqbal, he said that he did not know him from before March 2010. He first saw him because he was in the same section in prison as the accused. He could not say why he noticed this particular person in the prison, which was very crowded. He stated that the only reason why he was implicated by Iqbal, and why he was identified at the identity parade was because Iqbal knew him from prison and therefore identified him. He, however, conceded that all of the persons on the identification parade were from that prison. He also said that at the identification parade he asked Shilajoe if he could change his trousers into long trousers but he was refused, and that the witness must have been told how to identify him.
- [182] The Court notes that accused 2 admitted all of the contents of the reports relating to the identification parade, including the fact that the persons who filled out the forms wrote exactly what was said to each person.
- [183] When he was booked out by Shilajoe and another investigating officer, the warders were told that he was being booked out because he had raped the paramedics. He admitted passing through the head of the prison's office, who asked him if he agreed to leave. He said no, he did not want to leave and he was scared of being assaulted. However, despite this, he was made to leave with the investigating officers.
- [184] He was then taken to the Roodepoort police station where he was handcuffed and his legs were shackled. He was then taken to Shilajoe's office and there were six other officers there. Shilajoe told them that he had raped the paramedics. He was assaulted by one of them and later taken to an upstairs office where he was "tubed". Shilajoe was present when this occurred. They kept telling him that they will end up getting the truth.
- [185] At this stage (15h30), the court adjourned because the witness appeared to be in some distress. It reconvened the following day. Accused 2 continued to give evidence of the way in which he was tubed by having a tyre tube placed over his face with pepper spray vapour. It was at this stage that Mr Lebea raised his objection to Accused 2's statement, stating that his statement, together with Mapopa's statement was used as the only basis to charge accused 2 with this offence. As this statement was obtained through assault, and without warning, it could not be used. Mr Lebea did not, however, request a trial-within-a-trial. He submitted that the accused's version was that what was in the statement was true but obtained through assault. He would argue against the statement's admission on the basis of the credibility of the witness, Shilajoe and Accused No. 2.

- [186] The accused stated that he was physically assaulted. When asked what they wanted of him, he replied it was for him to tell them the addresses of Mapopa, Mthimbane, Jafas and accused 1.
- [187] His evidence then became rather confusing. I will attempt to set out the way in which he explained the sequence of events. He testified that after he was tubed he was asked for the addresses and he then volunteered to go to his brother's house because his brother would know where accused 1 lived. He confirmed that they had the names of these people already, and only wanted to know where they lived. They asked him what he knew about the incident with the paramedics.
- [188] He stated that before they asked him about the addresses and asked what he knew, they did not warn him that he had the right to remain silent or the right to an attorney. He said they informed him when they got to Roodepoort police station, that he might be a suspect and they needed blood for DNA testing. He submitted to it because it would prove the truth. This was done on the same day at Randburg Discovery Clinic before the tubing took place.
- [189] He was told that he was a suspect in the matter about which him and Mapopa were arguing. According to him they were arguing about the bankcard and money, and he did not know what the police were talking about. How this links with his voluntarily submitting to DNA testing in regard to rape seems rather strange.
- [190] He denied the evidence of Bongiwe, Mabena and Thandi, that they had been at a tavern, that he had gone out to "uPhanda" and that he had returned later that evening with the proceeds.
- [191] His statement which was handed in by his counsel was then dealt with. He admitted making the statement on 04 November 2010 at 14:00, and at the time he confirmed the correctness of the statement. According to what was put to Sergeant Shilajoe the statement was true but obtained through assault. However, when testifying, Accused No. 2 refused to confirm that the statement was true.
- [192] In regard to passing through the head of prison's office, he stated that this happened when he was booked out but not when he returned. He did not tell anyone at the prison about the assaults because he said nobody would believe him. The injuries were invisible but painful. He said that after he arrived at the police station and was taken to Shilajoe's office, he was then placed in the cells. He was later taken to Shilajoe's office.
- [193] An inquiry was made from him about the addresses of certain persons whose names were given to him, as he entered Shilajoe's office. He was cuffed with his hands behind his back and his legs were shackled. The two investigating officers Shilajoe and Warrant Officer Maluleka were present with one Umbulani who was talking to the accused in Venda. He was then tubed, as he stated in his previous evidence, after which he gave a statement. He was told that Zuma was going to make him rot in jail if he did not give a statement.

- [194] After giving this statement the investigating officers then gave him the names and asked for the addresses. This is in conflict with what he previously stated, that what they wanted from him before the tubing were the addresses.
- [195] It was put to him that his counsel had stated that the contents of the statement were true but the problem was the way in which it was extracted from him. His answer was that the statement was written by Shilajoe and it is not what the accused said, he was just protecting himself. He then altered his version by stating that the statement is what he said but it is not the truth. He admitted certain aspects of the statement. He admitted that Mapopa had a car that was mentioned therein but he could not remember the registration number. He denied that he had driven the Golf and said he saw they had had Mthimbane's name on the list so he put his name in the statement.
- [196] He then testified that everything contained in paragraph 4, which related to him and Mapopa going to collect Mthimbane at the scene, was untrue. The parts stating that Mthimbane, Jafas and accused 1 came out from the veld with two females, one of whom was naked, and that they were assaulting them, was also not true.
- [197] He continued that when the statement was taken down, the police explained in sequence how the incident occurred and that was why he mentioned things such as the car, the railway line and the persons that he did. It was the police's words
- [198] It appears, therefore, that, at this stage, the accused has given three versions in regard to the statement, firstly that it was true but obtained through assault; secondly that it was not true; and now that the police in fact told him what to say.
- [199] He then changed that version as well by saying that they were asking questions and therefore he said whatever crossed his mind at the time. He said he was protecting himself and they were asking questions, not putting words into his mouth. This version also changed when he then said he does not remember anything about the statement. When questioned on other aspects that he had put into the statement about which he must have known, his answer was that he did not remember any aspect of the statement. He does not remember telling the police about the females or that they were black or anything else that appeared in the statement. He remembered what the police said but did not remember what he said. When asked about certain other aspects in the statement, again his answer was that he did not remember anything about the statement.
- [200] In regard to the identification parade he mentioned the fact that he was not allowed to change his clothes. It was put to him that he had not seen what was going on or heard anything. Therefore, how could he state, as he did in chief, that Shilajoe had told Iqbal to point at him. His answer was that he suspected that Shilajoe told Iqbal to point him out. He stated that he did not know Iqbal and Iqbal did not know him. This despite his previous evidence that he saw Iqbal at prison. In regard to the evidence of Mabena, Bongiwe and Thandi, he said that they were pressurised by the police into giving those statements.

I[201] t was asked of him what he thought the purpose of the assault was, in other words, what did they want from him. He was not a suspect and the assault did not achieve its purpose as the statement he gave implicates others and not him. He was asked whether he thought what they wanted him to do and why they assaulted him was to get him to confess to the rape and robbery. He said that that is exactly what they wanted.

[202] When he was questioned about his earlier evidence that they wanted the addresses of certain persons, he said that when they realised after the assault that they could not get anything out of him about the rape and robbery, and he would not confess, they gave him the list of names and wanted addresses. He said he believed he was a suspect because of what Mapopa had told the police. However, he did not dispute that Mapopa was only booked out some days later after he, accused 2, had been booked out.

[203] It was put to him that Mapopa had given evidence that the argument in prison was over the cellular phone and that Mapopa had told him that he would tell Zuma that he, accused 2, was the rapist. He denied this and said that Mapopa had told him not to pressure him about the money he owed or else he would make sure that he took him down with him when Mapopa went to trial.

[204] In re-examination he raised for the first time the fact that Shilajoe had said when he booked him out, that he was doing so because Mapopa had phoned the police to say that accused 2 was the rapist of the paramedics. The statement that he gave on day one of his booking out, does not implicate the accused in this crime. Despite his evidence that what they wanted from him and the reason for the assault was to get him to confess, they did not, over the next two days that he was in their custody, attempt to get him to make any further statements. He said that he had given the address of his brother because his brother knew where accused 1 stayed, and he went with the police to his brother's house and then to accused 1's house.

[205] Adv Lebea then made an application to recall Shilajoe in regard to a statement that Shilajoe had made in regard to the booking out of accused 2. According to the statement Shilajoe said

"On Tuesday 02 November 2010 I booked out the suspect Michael Khorombi, accused 2 from Roodepoort cells for blood samples to be drawn for DNA analysis, and I took him to Discovery Clinic and handed in the blood sample collection".

[206] Shilajoe was recalled. He was asked why he had called accused 2 a "suspect". Shilajoe said that "he was, in fact, a suspect in another case, but when I booked him out in regard to this case he was just a witness". He stated that taking the witness's blood sample would occur if, as in this case, the person volunteered to have his blood taken to show that he had nothing to do with the matter. This confirmed accused 2's own evidence that he had asked to be taken for blood tests.

[207] That concluded the evidence for the accused.

ANALYSIS OF THE EVIDENCE

- [208] The state argued that all of its witnesses were credible and did not lie, and corroborated each other in all material respects. They could not identify any of the accused. The witnesses, being the first and second complainants, Ms T and Ms R, gave very credible and heart wrenching evidence about what had happened to them. There can be no doubt that they were telling the truth. Similarly in regard to the passer-by Mr P. This type of evidence could not have been fabricated. His version was corroborated by the two females, both in regard to what he looked like and the fact that he spoke Tswana. In pretending that he was raping them, he never penetrated or ejaculated and this too was confirmed by the two victims.
- [209] His explanation as to why he gave two statements and only mentioned the forced rape incident in the second statement is fully acceptable. He was understandably traumatised and embarrassed by the incident, and only when he realised that the two victims had already given the statement and told of what had happened to him, did he tell the police the full story. The two victims did not know Mr P at all, and there would be no reason for them to lie on his behalf.
- [210] The evidence of Daphne Kozamela and Zachariah Muandi is also acceptable in regard to the fact that items were stolen from them and that the two female paramedics were dragged from the ambulance into the veld.
- [211] The three witnesses Mabena, Thandi and Bongiwe were all friends of the accused and Bongiwe was the girlfriend of accused 2. Both accused admitted that there was no bad blood between them and any of those witnesses. Other than saying that they were pressurised, there appears to be no reason why these three witnesses would come to court and lie about people with whom they were well acquainted. The three witnesses corroborated each other in regard to them being at the tavern when a call came from accused 1, who then arrived and left together with accused 2 and Mthimbane. They heard the plan about “uPhanda” and witnessed the accused leaving the tavern. They all corroborated the fact that accused 2 then came back towards midnight, with the proceeds of that evening's “uPhanda”.
- [212] Mapopa's evidence is based upon what accused 2 told him happened on the night in question. He appeared not to condone what the accused had done in raping the paramedics, and was clear about the dates on which the incident occurred and the times which were material. He stated that they were family friends and would not lie about what he had been told. It appears from his evidence that he had no trouble with accused No. 2 until the incident with the cellular phone voucher led to a dispute with accused No. 2. Although he threatened to disclose the rape, he stated that it was clear, when he was questioned by the police, that they knew about this and he was not the first person to inform them about this.

- [213] This was corroborated by Shilajoe who said he had received an anonymous phone call that there had been an argument between Mapopa and accused 2, in which one of them had accused the other of being involved in the incident. This led to Shilajoe booking both of them out at different times to interview them as witnesses in regard to what they knew.
- [214] Mapopa stated that accused 2 had described in detail what had happened. He also described the occasion when the rings had been left in the car and these were the rings that accused 2 had stated he had taken from the victims.
- [215] The evidence of Doctor Ngomo was clear and unexaggerated. He stated on several occasions that despite the fact that there were no serious injuries, he could not rule out sexual assault. He had concluded that there was an alleged sexual assault because of the evidence he had obtained from the two victims. In any event, it was never put to the paramedics that they were not raped or sexually assaulted. So this aspect of cross-examination of the doctor does not help the accused's case in any way.
- [216] Although the witnesses Mapopa and Mabena were self-confessed criminals who were either serving time or awaiting trial, this does not affect the fact that their evidence in this case was corroborated and consistent.
- [217] The evidence of Asif Iqbal has only one aspect which could be challenged by accused 2, and that is that Mr Iqbal said that the sale of the cellular phone to him took place in the first week of March. However, he testified that he could not remember the date. His other evidence in regard to knowing accused 2 and recognising him and then identifying him at the identification parade corroborates the fact that this phone was sold to him by accused 2 after the events of 05 March. There is also the evidence of Mapopa that accused 2 was attempting to "duck and dive", as he put it, so as to avoid Iqbal seeing him in prison. The same cellular phone that was identified by the first complainant was the cellular phone that was stolen and sold to Iqbal.
- [218] The evidence against accused 1 is overwhelming. There is the DNA evidence which is not disputed. In addition, there is the evidence of Mapopa as to what he was told by accused 1, and the evidence of Thandi, Bongiwe and Mabena, as to the fact that he had been present on the night of 05 March. They also testified as to what occurred the following day when he was given his share of the proceeds. His DNA was found inside the vaginal cavities of both victims, and on their underwear. His evidence that he was the passer-by was totally contradictory and fanciful. It also does not tie in with the forensic evidence; it accordingly can be rejected. The state has proved his guilt beyond reasonable doubt.
- [219] Accused 2's version is also one that is beset with contradictions and evasiveness. Other than the few statements that were put to several witnesses he elected to remain silent and denied that he was present at all. He, however, gave no evidence as to where he was on either the Friday or the Saturday that the incident occurred. His DNA was negative because, as he told Mapopa, he had used condoms in the rape of the victims.

[220] Whether or not accused 2's statement is admissible depends to a degree on whether or not he was a suspect or a witness. In this regard reference was made to the case of *S v Sebejan and Others* 1997 (1) SACR 626, in which her Ladyship Satchwell J dealt with a statement given by a person who at the time was considered a witness but later became an accused. A suspect, if making a statement, must do so freely and voluntarily. The judge's rules need to be utilised and

breaches of such rules may be of weight in determining whether a confession had been voluntarily made without undue influence. In *Sebejan supra*, Satchwell J, at 622G-H, held as follows:-

"In short, non-suspects may be questioned without any cautions or warnings whereas suspects, even in circumstances where answers

to questions may establish innocence, should receive the benefit of a caution or warning"

[221] Section 25(3) of the Constitution also refers to the right of an accused to a free trial, and there are certain other rights to which an accused is entitled. These rights, however, only affect persons who are arrested for the commission of an offence.

[222] A suspect would not have been taken into custody and would not have been notified formally of the cause of the arrest as opposed to an arrested person. Despite this, a suspect is entitled to certain rights.

[223] In deciding whether the accused in that case was a suspect, Satchwell J referred to the fact that she had made a statement in the morning at approximately 10:00, and she said the statement was written as she gave it. She was not informed that she was a suspect. The court concluded that the sergeant who took the statement did not consider accused 1 as a suspect at the time of taking the statement, which was some eight hours prior to taking the statement of a witness who then implicated the accused.

[224] It was held that the accused in that case was not a suspect at the time of making the statement and therefore she was not entitled to be warned of her rights, including the right to silence or to a lawyer. The statement was accordingly admissible for purposes of cross-examination.

[225] In the present matter, Shilajoe says that accused 2 was not a suspect. He denied that any assault took place and stated that accused 2, at the time, was a witness, and therefore he did not have to explain or give the accused any warning at that time.

[226] As appeared from the evidence of Sergeant Shilajoe, as well as the documents that were handed in, it was only as a result of the statements of the two witnesses who had been with the accused on that night that he was then arrested. It was not as a result of his statement or as a result of the statement of Mapopa. Mr Lebea referred, in this regard, to *S v Orri and Another* 2005 (1) SACR 63 (C), where Bozalek J held that a statement made to police by a suspect, prior to being apprised of the right to remain silent and without a warning that it

may be used against the maker, would taint the fairness of the subsequent trial. It was held, in that case, that a suspect has those rights which are similar to the rights held by an arrested person in terms of section 35(5) of the Constitution.

[227] The statement to which reference is made is not a statement in which admissions are made in regard to accused 2. He was not considered a suspect, in my view, at the time he made the statement. It was only some two weeks later, after other investigations, and only after other statements had been obtained from other witnesses that he was so considered and arrested. The argument that this statement led to Mapopa making a statement, which led to the accused's arrest, is not in accordance with the chronology of events.

[228] There were certain elements of Shilajoe's evidence that were in conflict, to a minor extent, with some of the affidavits that he had made in this case. However, such minor conflicts do not detract from the whole of his evidence. As was held in *S v Mbili* 2003 (1) SACR 97 at 105 I37:

"Even if Ramela had contradicted his earlier statement (which in my view he did not) it would not follow that the remainder of his evidence necessarily fell to be rejected. No doubt a Court will be cautious before accepting the remaining evidence of a witness who has made conflicting statements on oath, but whether he does so will depend upon the particular circumstances."

[229] According to Mr Lebea, accused No. 2 was tricked into making a statement which was used in obtaining Mapopo's statement, and Mapopo's statement led to the accused's arrest. This, according to Mr Lebea, rendered the entire chain of events unfair.

I[230] In dealing with the weight that one should place on the statement made by accused No. 2, the Court is met with four or five versions given by the accused as to the circumstances surrounding the making of the statement. These have been set out above.

[231] His evidence, in regard to the tubing and the assaults that followed, was never put to Shilajoe in cross-examination.

[232] The statement, according to what was put to Shilajoe, contained the truth and the problem was the way in which it was extracted, that is by assault. However, in evidence, accused 2 denied that the statement contained the truth and stated that it was what he said but it was not the truth. He later stated that, when the statement was taken, the police officer explained, in sequence, exactly how the incident occurred, and he then based his statement on what the police said.

[233] He then changed his version, stating that the police asked questions and he answered the questions but did not give true answers. When he was probed further in regard to the statement, his answers were that he could not remember what he had said, and finally his version was that he did not remember any aspect of the statement.

- [234] Accordingly, the Court is left with the accused's version and that of Shilajoe. Shilajoe stated that the accused was not a suspect but a witness at this point and did not need to be warned. He denied that any assault took place, and stated that the accused gave his statement voluntarily and without any duress. In my view, the evidence of the accused in this regard has to be rejected, and the statement made by him is admissible in evidence.
- [235] In any event, the statement that the accused gave is exculpatory, insofar as the accused is concerned, in that he distances himself from the events and places others at the scene. The only aspects that are relevant insofar as the accused's guilt is concerned are those which show that he had certain knowledge about the events which he could not have had unless he was there.
- [236] This statement did not, as the accused alleges, lead to the investigating officers interviewing Mapopo and then arresting accused No. 2. Prior to the statement being made, the police had stated that they were going to interview Mapopo as well. Even after Mapopo's statement was made, the accused was not arrested.
- [237] It was only after Mabena's statement was obtained that the police felt they had sufficient evidence to charge accused No.
2. The statement of Mabena would have been sufficient for the police to arrest accused No. 2. Even if accused No. 2's statement was not admissible, there is sufficient evidence obtained both prior to and after the accused's arrest. This evidence against the accused, being the statements of Mapopo, Mabena, Bongiwe and Thandi, as well as the evidence of Iqbal and the identification of the accused, is sufficient to prove the accused's guilt beyond a reasonable doubt.
- [238] The counsel for the accused also argued that common purpose had not been established. The evidence above establishes that the accused went together with a plan to commit certain crimes that night. From the evidence of the complainants and Mr P, it is quite clear that they acted in concert with each other in committing the crimes of which they are accused.
- [239] In *S v Thebus and Another* [2003] ZACC 12; 2003 (2) SACR 319 (CC), the Constitutional Court dealt with the doctrine of common purpose, held as follows in the judgment of Moseneke J
- [18] "The doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons, the commission of a crime."
- [240] Moseneke J referred to Burchell and Milton, *Criminal Law* 2ed at 393, in which they define the doctrine of common purpose as:

"Where two or more persons agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their "common purpose" to commit the crime."

[241] Common purpose can arise either from a prior agreement or from an "active association and participation in a common criminal design with the requisite blameworthy state of mind", see *S v Thebus* at 336.

[242] The Constitutional Court also referred to the case of *S v Mgedezi* 1989 (1) SA 687 (A) and the Court held in the *Thebus* case at paragraph 22 that:

"There remains no doubt that where the prosecution relies on common purpose as a basis for criminal liability in a consequence crime such as murder, a causal connection between the conduct of each participant in the crime and the unlawful consequence caused by one or more in a group is not a requirement."

[243] In the *Thebus* case, the counsel for the accused argued that in so finding in *Mgedezi*, the Supreme Court of Appeal had failed to develop the doctrine of common purpose in accordance with section 39(2) of the Constitution. The Court held at paragraph 40:

"Common purpose does not amount to an arbitrary deprivation of freedom. The doctrine is rationally connected to the legitimate objective of limiting and controlling joint criminal enterprise."

[244] Moseneke J stated as follows:

"The doctrine... serves a vital purpose in our criminal justice system. Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their unlawful and intentional participation in the commission of the crime. Such an outcome would not accord with the considerable societal distaste for crimes by common design. Group, organised or collaborative misdeeds strike more harshly at the fabric of society and the rights of victims, than crimes perpetrated by individuals. Effective prosecution of a crime is a legitimate, 'pressing social need'. The need for 'a strong deterrent to violent crime' is well acknowledged because 'widespread violent crime is deeply destructive of the fabric of our society'. There is a real and pressing social concern about the high levels of crime. In practice, joint criminal conduct often poses peculiar difficulties of proof of the result of the conduct of each accused, a problem which hardly arises in the case of an individual accused person. Thus there is no objection to this norm of culpability even though it bypasses the requirement of causation."

[245] The Court in *Thebus* also rejected the appellants' claim that their conviction under the doctrine of common purpose denied them the right to be presumed innocent.

[246] In assessing the evidence as a whole in this case, it is trite that the State bears the onus of establishing the guilt of the accused beyond a reasonable doubt and the converse is that they are entitled to be acquitted if there is a reasonable possibility that they might be innocent, see *S v Mbili* above, at paragraph 57.

[247] Nugent JA referred, in this regard, to the case of *S v Radebe and Others* 1998 (1) SACR 422 (SCA) at 426 where the following was stated:

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

fail to see the wood for the trees."

[248] Taking the evidence as a whole, that is, all of the state witnesses as opposed to the evidence of the accused, it my view that the guilt of the accused on all of the crimes but one has been proved beyond a reasonable doubt. The court finds that their versions are not reasonably possibly true and are rejected.

[249] The details of the counts upon which the accused are found guilty are set out above in paras [4] to [14]. In the result, the accused are found guilty on: -

249.1 count 1, robbery with aggravating circumstances;

249.2 count 2, the unlawful possession of a firearm;

249.3 counts 4, 5, 6 and 7, rape [Ms T].

249.4 count 8, compelled sexual assault [Mr P].

249.5 Count 9, lawfully and intentionally aiding, abetting, inducing, inciting, instigating, instructing, committing and counselling or procuring another person, that is one another or the co-accused, to commit a sexual offence by helping each other intimidate the complainants to succumb to their sexual acts [Ms T];

249.6 counts 10, 11, 12 and 13, rape, [Ms R];

249.7count 14, compelled sexual assault [Mr P];

249.8 count 15, of aiding and abetting, inducing, inciting, instigating, instructing, committing and counselling or procuring another person, that is one another or the co-accused, to commit sexual offences by helping each other intimidate the complainants to succumb to their sexual acts [Ms R];

[250] On count 3, possession of ammunition, the accused are found not guilty, no evidence being led in this regard.

[251] For clarity, the accused are found guilty of robbery; of the unlawful possession of a firearm; of eight counts of rape; of two counts of compelled sexual assault; of two counts of compelling another person to commit a sexual offence. They are found not guilty of possessing ammunition.

Weiner J

Dates of hearing: 17, 18, 19, 21, 24, 25, 26, 27, 31 October 2011, 30 November 2012, 2, 6 December 2011, 10 April 2012, 9, 10, 11, 12, 13 July 2012

Date of judgment: 17 July 2012

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