

SOUTH AFRICA / JUDGMENT

## S v Matyaleni (CC25/2020) [2021] ZAECHGC 14 (17 February 2021) [2021] ZAECHGC 14

COURT

Eastern Cape High Court, Grahamstown

BEFORE

NG Beshe

CASE / FILE NUMBER

CC25/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

Case

No: CC25/2020

Delivered:

17 February 2021

In

the matter between:

THE

STATE

And

ATHENKOSI

MATYALENI

**JUDGMENT**

BESHE J:

[1] The accused who is a male person whose age is given as 26 years in the indictment, is facing a total of 10 charges. The occurrences in respect of which he is charged took place during the period 9 December 2017 to 5 May 2019, all within the Molteno district.

[2] The following are the allegations against him:

Count 1: Rape

On the 9 December 2017 at or near the Molteno dam, he unlawfully and intentionally committed acts of sexual penetration with A[...]

N[...], an adult female person by having sexual intercourse with her per vaginum and per anum without her consent and against her will.

Count 2: Robbery

He thereafter unlawfully and intentionally and through the application of force and violence, namely by slapping Ms N[...] took a Mobicell cellular phone, being her property, from her possession.

Count 3: Rape

In that on the 28 December 2017 at or near Thembeni Street, Molteno, he unlawfully and intentionally committed an act of sexual penetration with Ms Bu[...] M[...], an adult female person, by having sexual intercourse with her per vaginum without her consent and against her will.

Count 4: Robbery

In that at or about the same time and at the place mentioned in Count 3 he unlawfully and intentionally and through the application of force and violence took Ms M[...]’s Mobicell cellular phone from her.

Count 5: Rape

On the 11 February 2018 t or near Vuyo Street, Molteno, he unlawfully and intentionally committed and act of sexual penetration with Ms X[...] A[...], an adult female, by having sexual intercourse with her per vaginum without her consent and against her will.

Count 5: Robbery with aggravating circumstances.

In that on the same date and place as in Count 5, he unlawfully and intentionally and through the application of force – namely wielding a dangerous broken top during the robbery, took from Ms A[...] her property comprising of a track suit top and a cellular phone.

Count 7: Assault with intent to cause grievous bodily harm.

At the time, date and place mentioned in Count 6, the accused unlawfully and with intent to cause grievous bodily harm, hit Ms S[...] P[...] with an empty bottle thereby inflicting an open wound / laceration to her forehead.

Count 8: Rape

In that on the 27 April 2018 near Paradise dam, he unlawfully and intentionally committed acts of sexual penetration with A B, an 11 year old girl by having sexual intercourse with her per vaginum and per anum without her consent and against her will.

Count 9: Rape.

On the 5 May 2019 at or near Vuyo Street, he unlawfully and intentionally committed an act of sexual penetration with Ms T[...] M[...], an adult female person by having sexual intercourse with her per vaginum without her consent and against her will.

Count 10: Robbery with aggravating circumstances.

On the same day and place mentioned in Count 9, he did unlawfully and intentionally and through the use of force and violence took Ms M[...]’s Mobicell cellular phone and R400 in cash at the time when he was wielding a dangerous weapon namely a screwdriver.

[3] The accused pleaded not guilty to all 10 counts. In a bid to prove the case against the accused, the state called ± 15 witnesses. The accused also testified in his defence but did not call any witness to testify on his behalf.

[4] The evidence adduced in respect of each of the counts or each of the complaints is the following; briefly stated:

Counts 1 and 2:

The complainant in these counts testified that she was on her way from a Pinkie’s Tavern that evening in the company of 4 people – two other ladies and two men. She was apparently walking next to the ladies in her company when someone appeared from behind and held her claiming she was his girlfriend. He referred to her by name saying “A[...] my girlfriend let’s go”. All she could see was that this man was dressed in black. She tried to resist and called one of the women who was in her company N[...] but the man who held her swore at her friend and told her to “voetsek”. N[...] left them alone. The attacker had a knife in his possession and threatened to stab Ms N[...] should she make noise. She was taken to a spot next to Molteno dam. There he told her to undress and cut one strap of her dungaree with the knife he had in his possession. She then complied with his instruction to undress. Her assailant also undressed and raped her having told her to lie on the ground,

thereafter instructed her to turn around and penetrated anally. Her attacker made certain that she does not identify him by covering his face with a balaclava. The fact that it was dark also did not help. When she shone her cellular phone on him in order for her to see who her attacker was, the

latter slapped her three times and took her phone away. During cross-examination, she confirmed that she was drunk and did not recall what time they left the tavern. But that she sobered up when her assailant would not let her go and therefore recall what happened thereafter. She denied that earlier that evening she had consensual sexual intercourse with the accused outside, behind the tavern building.

- [5] One of the women who was in Ms N[...]’s company Ms N[...] Y[...] testified that they left the tavern at ± 21h00. Whilst walking from the tavern, a male person appeared and called Ms N[...] (A[...]), held her and pulled her towards the woods. Ms N[...] called her, she responded by also proceeding towards her and this unknown man. The man drew out a knife and told her to “voetsek” and swore at her. She then left the two alone and proceeded on her way. She denied that Ms N[...] left them at the tavern at some stage earlier that evening. According to her, Ms N[...] was not heavily drunk.
- [6] Ms N[...] was examined by Dr Gerber at Molteno hospital. She did not observe any serious injuries on her genitalia, explaining that because she was sexually active, it could be expected that there would not be any serious injuries, but the injuries observed on her genitalia were bruising and swelling and tearing of the skin between the buttocks indicative of sexual penetration that occurred within 24 hours of the examination. She concluded that there was evidence of sexual intercourse both vaginally and anally.
- [7] It is common cause that accused’s DNA was found to be present in samples taken from Ms N[...]’s genitalia and panty. According to Lieutenant Colonel Otto of the Forensic Lab in Plattenkloof, Cape Town, no DNA belonging to a second person was found. Ms Otto however testified that it is only in the case of a second person having deposited his semen into the complainant that DNA belonging to that person could have been found.

Counts 3 and 4:

- [8] Ms B[...] M[...] testified that she had attended a birthday party which she left at about 23h00 on the 28 December 2017. She was in the company of one Sibongile whose boyfriend had come to pick her up. She asked them to leave her at her boyfriend’s place. But after parting with them she decided against visiting her boyfriend and walked to her house. As she was walking, she went past some people who were standing in the street. She then realised that there was someone who was running behind her. Instead of this person running past her, the person grabbed her and dragged her to a nearby yard / premises where he proceeded to rape her. She was also assaulted by this person and warned not to make noise otherwise he would kill her. At some point he placed her inside a toilet in the premises but pulled her out and raped her in a grass patch not far from the toilet. This person assaulted her again after raping her. He fled when the police appeared but this was not before he took her cellular phone which had fallen to the ground during her ordeal. Thereafter a woman by the name of Ntokozo Ndletyana assisted her. It turned out that she was inside the house in the premises where Ms M[...] was raped and was responsible for the police being summoned. Ms Ndletyana confirmed witnessing Ms M[...] being raped. On the following morning she

was examined by Dr Estopinan who observed a mild swelling on her right cheek as well as a bruise on her left knee. He did not find any evidence of forceful penetration. He testified that it is expected that no injuries would be observed in respect of adults but he could not rule out that there was sexual penetration. He also obtained / took samples from the complainant's genitalia which he handed over to the police after sealing same. After following the chain outlined by Lieutenant Colonel Otto, and analysis of the samples obtained from the complainant, accused's DNA matched the DNA found from the swabs taken from Ms M[...]s vagina. Accused's version in this regard, that as put to the complainant, was that he does not know the complainant, he was shocked at how his DNA got to be found in her genitalia as he did not have sexual intercourse with her.

Counts 5 and 6:

- [9] The incident concerning Ms X[...] A[...] (Counts 5, 6 and
- 7) took place during the evening of the 11 February 2018 at Vuyo Street also in Molteno. She was walking in the company of her cousin S[...] P[...] who is complainant in Count 7. Someone from the opposite direction appeared and walked past them. Soon thereafter electricity went off, causing the street lights to go off. Shocked by this, the two women screamed and held each other – according to Ms A[...]. At that stage someone appeared and swore at Ms P[...] telling her to go away. He took an empty cider bottle that Ms P[...]

had in her hand and struck her twice with it causing her an open wound on her forehead. As a result of which the bottle broke and Ms P[...] fled. The attacker who still had part of the neck of the broken bottle with him held Ms A[...] holding the bottle against her neck and dragged her to an abandoned shack that stood away from the houses with no house nearby. He pushed her into the shack and instructed her to take off her jacket. Both jackets she was wearing came off. He took the K-Way branded one and threw the other one back at her. He then pushed her, causing her to fall on her stomach. He forcefully removed her leggings and panty and penetrated her vagina from behind. Having instructed her to turn around, he again penetrated her this time whilst she was lying on her back. When she tried to scream, attacker would swear at her and threaten that he would kill her. Her phone rang twice, first time it did the attacker cut the caller off. After a while as the person was still raping her the phone rang again. They struggled over possession of the phone, its lid fell off so did the phone and the neck of bottle the attacker had. He took the phone, used its light to look for the bottle neck which he again placed on her neck threatening to kill her. When he

tried to get her turn around again so that she gave him her back, she struck him with her elbow causing him to fall and that way she managed to escape from him. The following day she took the police to the shack in question where they recovered her ring, back part of her phone and her key ring. Under cross-examination, she confirmed that she drank some cider earlier that evening but she said she was not drunk. Except from slight inconsistencies here and there, Ms A[...]s evidence confirmed by Ms P[...] as to what happened that led to the two women parting and how complainant ended up going with the unknown man who according to Ms P[...] was dragging her.

And how she was assaulted with a bottle which broke in the process. And later that evening when complainant came home. She did not have her jacket. Complainant testified that when accused was ultimately arrested in connection with this incident, she realised that she was related to him.

- [10] Ms A[...] was also examined by Dr Gerber who also collected specimen from Ms A[...], in which DNA matching that of the accused was found. Dr Gerber also confirmed that there was evidence of sexual penetration on examination of Ms A[...]. Dr Nongqele who examined Ms P[...] on the 12 February 2018 at 8h50 observed an open laceration on her forehead which was  $\pm$  6cm long and  $\pm$  3cm deep.
- [11] It was put to Ms A[...] during cross-examination that accused did not know her, they were not related. He confirmed that he met with complainant and Sivenathi. He then asked complainant (A[...]) to accompany him to Charles's house. She agreed. Once at Charles's he proposed love to her and suggested they have sexual intercourse to which Ms A[...] agreed. This was however denied by Ms A[...].
- [12] The complainant in Count 8 Ms A B who was 15 years when she testified, did so with the help of an intermediary and via a CCTV. An order to that effect was made after considering inter alia contents of a report that was prepared by a clinical psychologist Ms Sakasa, who was of the opinion that testifying in open court and facing the accused will cause Ms A B undue mental and emotional stress. Ms A B was 11 years old when the incident took place on the 27 April 2018 at or near Paradise Dam, Molteno. At around midday she together with two other girls were picking up what appears to have been wild berries. As they were picking up berries, a group of young boys appeared running being chased by a man who was clad in black and carrying a knife. They in turn also fled. She bumped or collided with one of the girls in her company, S[...], both fell to the ground. The man in black reached her and pulled her by her leg and dragged into nearby bushes where he undressed her, removed his clothes and had sexual intercourse with her repeatedly both vaginally and anally. At one point he placed A B's legs on his shoulder whilst she was lying down on her back and penetrated her. He threatened to kill her should she tell anyone about what happened. Back home, she reported the matter to her paternal aunt Ms M[...]. She first came across

her friend but refused to tell them what happened when they asked her. They accompanied her to her aunt's place where as I said she reported the matter. She denied that accused helped her up after she had fallen or that she told him that he was 13 years old when he asked her how old she was or that she undressed herself. It was also put to her that accused had sexual intercourse with her once. A B presented at the Molteno that very same day – 27 April 2018. Because she was bleeding vaginally and due to her age, Dr Gerber referred her to Frontier hospital to a Paediatric Doctor and probably also a gynaecologist. According to Dr Gerber, she was of the view that examining her would cause her pain and wanted her to be examined by a Paediatrician under anaesthetic. At Frontier Hospital on the same day she was examined by Dr Kashwantale who is awaiting results for Post-Graduate qualifications in Child Care, but has been practising as paediatrician. He observed a number of injuries in complainant's (A B's) genitalia and concluded that there was clear evidence of sexual contact / abuse in the past 6 hours prior to the

examination. He confirmed that there was penetration vaginally and anally. He also collected specimen from the complainant. DNA from those samples was analysed, it matched accused's DNA, in particular a sample found on complainant's T-shirt matched accused's DNA. One of the friends who was in complainant's company, P T, confirmed complainant's evidence about what happened as they were picking up wild berries next to the dam. And how complainant was trying to break free from the man in black. How later they saw the complainant crying, sad with her clothes dirty and covered in black jack bush / plant – according to her explanation. She however did not want to tell them what happened and proceeded to her aunt's place where she made a report. Complainant's aunt Ms M[...] also confirmed that.

[13] The complainant in respect of Counts 9 and 10 is Ms M[...]. The incident involving her occurred on the 5 May 2019. Also at Vuyo Street in Molteno at around midnight as she was walking home from attending a traditional ceremony at her sister's place in Marikana where they drank sorghum beer. At the gate of a house next to hers she observed a person bending on the gate as if fiddling with the lock. Having gone past this person, as she was about to enter into her gate, she felt someone holding her from behind – wrapping his hands around her body at the same time placing a screwdriver on her neck and instructing her not to look behind. He then demanded money and a cell phone. Complainant said she did not have any. The person placed his hand inside her bra from behind and removed her cellular phone and a sum of R400.00. He then pushed her towards an open field opposite her house. Once there, he pushed her to fall on her knees, lowered her pants and panty and inserted his penis into her vagina after which he pushed her into a ditch. He jumped over a ditch and left the scene. Complainant managed to get up from the ditch and followed her assailant who got into a house belonging to a member/s of her family. Because she wanted to see who he was. She confronted him about what he did to her after the man had switched the light on inside the said house. He pushed her out and offered to accompany her. Although she could not see his face earlier, she noticed that he was wearing a grey tracksuit with white dots and dark brown sneakers. Later after he had turned on the light, she saw his face. She proceeded to her boyfriend's place to whom he reported the matter. Her boyfriend Mr M[...] tried to follow the man's tracks but did not find him. The following morning, they managed to find one of complainant's sandals on the open veld where she alleged the rape took place. Ms M[...] was examined by Dr Gerber on the 5 May 2019, who observed or found evidence of sexual intercourse. After the incident she enquired from family members about the accused giving a description of him after realising that he must be a relative because after raping her he got into her grandparents' house when he switched a light on. Indeed, when the police arrived on the 9 May 2019, she took them to her aunt's place where they enquired about the accused. By this time, she knew that his name was Mvemve or he was known as such. Even though accused was not at the house, the aunt called his name and he came. As he was proceeding to the said house complainant saw him and pointed him to the police. He was still wearing the grey tracksuit with white dots. This is how the accused was arrested.

- [14] During cross-examination, it was pointed out that accused will deny having come across her, raping and robbing her. He will say he was at a tavern until ± 01h00 – 02h00 that morning thereafter fetched his girlfriend from Marikana.
- [15] Sergeant Mokheseng, the officer investigating all the dockets concerned in this matter who also arrested the accused confirmed that at the time of the arrest accused was wearing a grey tracksuit with white dots. That at the time of the arrest complainant's aunt remarked that the complainant was her sister. It was after the arrest of the accused that they got notification that DNA from accused's buccal swab matched the DNA found in samples obtained from the other 4 complainants in this matter. Sergeant Mokheseng explained that because accused had been arrested before, not in connection with these cases, his buccal sample was taken and results thereof kept in a data base in the Pretoria Lab. It was through that buccal sample – a confirmation specimen of which was requested in July 2018 that he was linked through the DNA samples collected from the 4 victims. It was however after accused's arrest in respect of Ms M[...]’s alleged rape that the results were obtained from the Forensic Laboratory in Cape Town that the DNA in his buccal sample matched that which was found in respect of the 4 complainants. I have already alluded to the fact that Lieutenant Colonel Otto painstakingly took us through the chain of steps the specimen followed having been obtained from the complainants by the respective doctors who also testified, as well as those of the accused through to the results after the analysis of the samples. Including evidence relating to the state of the machines used. That they were in good order. Properly calibrated. There was no challenge as to the trustworthiness or accuracy of the results. However, it became clear from the evidence of Lieutenant Colonel Otto that the only way a person's DNA can be read from samples taken from another person – as happened in this case is through that person having deposited his semen into the part where his DNA was found. That DNA from one person could be detected / found.
- [16] This then leads me to accused's evidence. In a nutshell, from his evidence, it transpires that he does not deny sexual intercourse with three of the complainants. In fact, he admits sexual intercourse with three of the complainants (Counts 1, 5 and 8)). In respect of two of the complainants Ms M[...] and Ms M[...] he does not rule out the possibility of having had sexual intercourse with them, saying he might have forgotten or was too drunk to remember. This only came during his evidence. It was not put to the witness.
- [17] Regarding those complainants in respect of whom sexual intercourse is admitted, the accused's version is that the complainants consented to sexual intercourse. Later in his testimony however, he admitted that the complainant who was 11 years old (13 years old according to him) did not consent to sexual intercourse. Before that he bit around the bush as to whether or not she consented to sexual intercourse. During cross-examination, it was put to her that accused asked to have sexual intercourse with her and she did not say anything in response. He asked her to undress and she did. In his evidence in chief he confirmed that, adding that he does not know what got to him. However, during cross-

examination he kept on saying after asking complainant to have sexual intercourse with him she was hesitant. He also suggested that he had sexual intercourse with the complainant once. Contrary to the witness's testimony and what was put to the witness during cross-examination. Asked to explain what he means by saying complainant was hesitant – he answered – she did not say she did not want to sleep with him.

- [18] Regarding the complainant in Count 1, accused confirmed the version that was put to the witness during cross-examination about meeting her at a tavern, proposing love and having sexual intercourse with her behind the tavern, whilst she was leaning against the wall facing him. It is not clear how he managed to penetrate her anally though. He could not provide any version in his evidence regarding Ms M[...]’s complaint save to say that he does not know her. That it is possible that he had sexual intercourse with her when he was drunk as he has a tendency of doing things when drunk and only learn about them later or the following day. Regarding to Ms A[...]
- To a large extent he confirmed what was put to Ms A[...] during cross-examination. Namely that he asked her to accompany him to Charles’s place, there he proposed love to her and they had sexual intercourse. He does not know why or how Ms P[...] left the scene. Denied having assaulted her or having seen empty brutal fruit bottle in their possession. Further that the shack depicted in the pictures as having been pointed out by complainant is not Charles’s place. Like Ms N[...], the implication according to the accused is that someone else, after he had consensual intercourse with them must have raped them or in the case of Ms A[...] also that someone planted her items in that abandoned shack to presumably frame him as to make it appear as if she was raped.
- [19] The problem with these versions however is that, in respect of Ms N[...], there is evidence that she was always in the company of her friends. At no stage did she go missing from the tavern. That as after leaving the tavern someone came and took her away forcefully. There is also the issue of accused’s DNA being from samples obtained from the complainant and only his DNA. Ms A[...] – what are the probabilities of her accompanying a stranger she could not see because the street lights had gone off, in the middle of the night. Then once proposed, she agrees to have sexual intercourse with the person. She does not even warn her cousin or tell her she was going off with her new found friend. We know she had a phone in her possession. In the middle of the night she decides to leave her new found love inside the place where they have just had consensual sexual intercourse and walk home unaccompanied. What are the chances of her then getting raped by someone else, and incidentally that person does not deposit his DNA in her. Or of the complainant going into the trouble of finding an abandoned shack and planting her items there to make it appear as if she was raped at night because these items were found the following morning.
- [20] In my view, this is highly improbable. In my view, accused realised that he cannot claim to have had sexual intercourse with his new found love in that filthy abandoned shack – that no self-respecting woman would agree to have sexual intercourse in that dump site.

[21] There really is not much that needs to be said about Ms M[...]’s and Ms M[...]’s complaints. Accused has not denied that he may have had sexual intercourse with them. It could not have been consensual in respect of both women. Both were assaulted, they both sustained injuries. Ms M[...] left her shoe behind. It was found on the following day where she alleged she was raped. A witness saw Ms M[...] being raped.

[22] It is a trite principle of our law that the state bears the onus of proving the case against an accused person beyond a reasonable doubt. This principle was restated in *S v Van der Meyden*[1] as follows:

*“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.”*

I do not have any reason to doubt the veracity of the evidence of the state witnesses. Nor do have any reason to doubt its reliability. No reason has been advanced or suggested why reliance cannot be placed on the evidence of the state. In my view, the evidence of the state witnesses was unshaken and in some cases corroborated – especially as regards what the attacker did to forcefully take the complainants away with him.

[23] The accused did not acquit himself as a good witness at all. Even apart from the manner in which he testified, the version/s proffered are demonstrably false and fall to be rejected. The evidence paints a clear picture of a person who preyed on vulnerable women, mostly walking at night after they had been drinking. A pattern or common thread also emerges in which the attacker will do everything to avoid being identified. He will swear at his victims, use violence during the attack threaten to kill them and on all but one rape incidents rob his victims of their cellular phones. This was the case with all the complainants except for A B and Ms P[...] who was not one of the rape complainants.

[24] I am satisfied that the state has succeeded in proving the guilt of the accused in respect of all the offences charged beyond a reasonable doubt.

[25] Accordingly, the accused is found guilty of having committed the following offences:

Count 1: Rape.

Count 2: Robbery.

Count 3: Rape.

Count 4: Robbery.

Count

5. Rape.

Count 6: Robbery with aggravating circumstances.

Count 7: Assault with intent to cause grievous bodily harm.

Count 8: Rape.

Count 9: Rape.

Count 10: Robbery with aggravating circumstances.

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NG BESHE

JUDGE OF THE HIGH COURT

For the State : Adv: Hendricks

For the Defence : Adv: Solani

[1] 1999 (1) SACR 447 WLD at 448 f – g.

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