

SOUTH AFRICA / JUDGMENT

S v Ndziyane and Others (Roelofse AJ) [2018] ZAMPMBHC 1; CC101/2017 (18 October 2018) [2018] ZAMPMBHC 1

COURT

Mbombela High Court, Mpumalanga

BEFORE

JH Roelofse

CASE / FILE NUMBER

CC101/2017

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REPUBLIC OF
SOUTH AFRICA
IN THE
HIGH COURT OF SOUTH AFRICA
(CIRCUIT
LOCAL DIVISION OF THE EASTERN CIRCUIT DISTRICT)
(GAUTENG
DIVISION, MPUMALANGA)

CASE NO: CC101/2017
In the matter

between: THE
STATE
and
BONGANI
NDZIYANE
Accused
1
CHARLES
NGWENYA
Accused 2

JUDGMENT

Roelofse AJ:

- [1] The State alleges that the accused went on a wild crime spree which lasted just over a week. The State alleges that the accused:

broke into a home where they stole a firearm and other items belonging to a member of the SAPS; shortly after the theft, broke

into another home, raped two women in the home, robbed one of them of her cell phone, compelled a man, who was also present in the home, to have intercourse with one of the woman and attempted to kill one of the woman as she escaped the ordeal; and, that, approximately one week later, robbed two persons, attempted to kill one of those persons during the robbery, kidnapped a woman who was present at the robbery, where after, one of the accused, raped the women.

- [2] The indictment consists of twelve counts. The counts relate to offences committed at three occasions and at three locations. The

counts include housebreaking, robbery, rape, compelled rape, attempted murder, kidnapping and the unlawful possession of a fire

arm.

- [3] The housebreaking charge in Count 1 was allegedly committed at Mganduzweni Trust on 24 April 2015.
- [4] The housebreaking (Count 2), rape (Counts 3 and 5), compelled rape (Count 4) and attempted murder (Count 6) were allegedly committed at Chochocho Trust on 25 April 2015 (hereinafter referred to as “the first incident”).
- [5] The robbery (Counts 7 and 8), attempted murder (Count 9), kidnapping (Count 10), rape (Count 11) and the unlawful possession of a fire arm were allegedly committed at Mganduzweni on 2 May 2015 (hereinafter referred to as “the second incident”).
- [6] There are two accused. Accused 1 is indicted on all the counts. Accused 2 is indicted on Counts 1, 2, 4, 5, 6 and 10.
- [7] I proceed to summarise the charges relating to the house breaking and the first and second incidents.

[8] The State alleges that on 24 April 2015, the accused unlawfully and intentionally and with intent to steal, break open and enter the house of Constable Thula Bethule Mlimi and stole his service pistol to wit a 9mm Parabellum Calibre Barretta model 92FS semi-automatic pistol with serial number P88687Z together with 15 rounds ammunition, two 2l cold drinks, two loaves of bread and half a braaipack together with an Alcatel Vodafone cellular telephone and a GPS.

[9] In respect of the first incident, the State alleges that: both accused unlawfully and intentionally broke open and entered a residence with the intent to commit robbery; they robbed Ms. Zanele [.....] of her Nokia Lumia 520 cell phone; Accused

1 raped Zanele; both the accused compelled Mr. Hendry Nighty [.....] to commit an act of sexual penetration with Zanele; both accused raped Ms. Prudence [.....]; and that both the accused attempted to kill Prudence by shooting in her direction with a fire arm. The State alleges that the offences were committed at the residence the accused allegedly broke into.

[10] The State alleges that, during the second incident: both accused robbed, Mr. Mr. Vusi Mnisi and Mr. Sydney Mpho Mashego of money, cigarettes and their cell phones at gun point; Accused 1 attempted to kill Mr. Mashego by firing at him with a firearm; both accused kidntapped Ms. Prudence M[.....]; Accused 1 raped Prudence M; and that Accused 1 was in unlawful possession of the firearm stolen from Constable Mlimi.

[11] The State relied upon the provisions of Section 51(1) of Act 105 of 1997 in respect of Counts 4, 5 and 11, and upon the provisions

of Section 51(2) of the same Act in respect of Counts 2, 3, 7 and 8.

[12] Both the accused were represented by counsel on Legal Aid briefs.

[13] The accused made certain admissions in terms of Section 220 of the Criminal Procedure Act 51 of 1977 ("the Act"). In

their combined Section 220 statement, the accused admitted the authenticity and correctness of the photo albums, sketch plans and

keys of the crime scenes relating to the first and second incidents. The accused also admitted the ballistic reports compiled by police experts.

[14] During the trial, the prosecutor presented evidence in terms of Section 212 of the Act relating to ballistic and DNA tests and chain evidence relating thereto. There was no objection from the defence to the ballistic and DNA evidence being admitted into evidence. Further concessions were also made by the accused. I shall return to these issues later in the judgment. The purpose of the forensic evidence was to link the accused to the housebreaking in Count 1 and the first and second incidents.

[15] I proceed to deal with the evidence.

Housebreaking and theft of the fire arm (Count 1)

[16] Constable Mlimi is stationed at the Flying Squad at the SAPS in White River. Constable Mlimi testified that he left his service pistol on a fridge in his home on 24 April 2015. He did so in order to take a bath. Constable Mlimi left his house for his parents'

residence but forgot his pistol on the fridge. Upon his return, he found that the security door as well as the door to his home were forced open. He found his house in disarray. His service pistol was removed from the top of the fridge and certain food items were also removed from the fridge. He testifies that his Nokia cellphone as well as a GPS was also removed from his home.

[17] On 2 May 2015, Constable Mlimi received a call from Constable Joseph Smanga Mnisi. Constable Mnisi informed him that he has information concerning people who was in possession of Mlimi's service pistol. Mnisi called on Mlimi at night and picked him up to follow up on the information Mnisi had received. They travelled in a police vehicle. Mlimi and Mnisi stopped at a house. The home consisted of two rooms. Mlimi and Mnisi stopped outside the gate of the house. Mlimi and Mnisi alighted from the police vehicle and walked to the home. Mnisi told Mlimi to guard a window that was at the back of the house. Mlimi went to the window and waited. He heard

noises in the house and knew that Mnisi had kicked open the door to the home. Mlimi heard Mnisi saying that Accused 1 must get up. Mnisi mentioned Accused 1 by his name. Mlimi went into the home through the door and found Mnisi, Accused 1 as well as a woman in the room. The woman was half naked. She was standing in a corner. When Mlimi saw the woman, he asked her what she was doing with this scum. He referred to Accused 1. Mlimi testifies that the woman told him and Mnisi that she was there by force. Mnisi and Mlimi took accused as well as the woman to the police station. Constable Mlimi's evidence also has a bearing on the second incident. As will appear from what is set out below, the woman that was found with Accused 1 is one of the victims of the second incident.

The first incident (Counts 2 to 6)

[18] Ms. Zanele [.....] is the complainant in the housebreaking, robbery, rape charges (Counts 2 to 4). Zanele testified that she was at Chochocho on 25 April 2015. She went to Ms. Zandile Maphaga's home together with Nighty (the complainant in

the compelled rape charge - Count 4). Zanele and Nighty are cousins. They went to Ms. Maphaga's home in order to study for the exams. When they arrived, Ms Prudence [.....] (the complainant in Count 5), one Lotacia and Ms. Maphaga were at home. Prudence, Lotacia and Ms. Maphaga left so that they would not disturb Zanele and Nighty while they were studying. They closed the front door of the house when they left. Zanele and Nighty proceeded to study at the kitchen table in Ms. Maphaga's kitchen. Zanele's Nokia cell phone was on the kitchen table.

[19] The front door of the house was kicked open by the accused. Accused 1 had a firearm and Accused 2 had a knife. Accused 1 pointed

the firearm at Zanele and Nighty. Accused 2 pointed a knife at them. The accused hurled insults at them. The accused wanted money and asked Zanele and Nighty to help search the home for money. Zanele and Nighty proclaimed that they do not live there and do not know where money could be. Nevertheless, the accused forced them to search for money.

[20] After the house was searched, Accused 1 sat on a couch and ordered Zanele to sit on her knees in front of him. Accused 1 pointed

the fire arm at Zanele. He ordered Zanele to kiss him. She did so. Accused 1 told her that it was not a good kiss and told her to kiss him as if he was her boyfriend. While this was happening, Nighty was kept at knife point by Accused 2. Accused 1 took Zanele and Nighty into a room in the house. The accused ordered Zanele and Nighty to undress. They did so until they were completely naked.

[21] The accused ordered Zanele to lie on the bed and instructed Nighty to have intercourse with her. Nighty refused to do so. He was

forced to have intercourse with Zanele by the accused. He mounted Zanele but did not succeed to have intercourse with her because he was unable to get an erection. Accused 2 was holding the knife on Nighty's buttocks while he attempted to have intercourse with Zanele. Accused 2 told Nighty that he will injure him if he did not have intercourse with Zanele. Accused 1 pulled Nighty off Zanele. Accused 1 opened his trousers, produced his penis and told Zanele that he would show her what good sex is. Accused 1 raped Zanele. Nighty was forced to watch.

[22] After raping Zanele, Accused 1 took Zanele and Nighty to another room. The accused once again forced Nighty to have intercourse with Zanele. The accused covered Zanele and Nighty with a blanket. They were still naked. Zanele lay on her back with her legs apart. Nighty lay on top of her. Zanele and Nighty were completely covered with the blanket, but they could still see through a small opening between the blanket and the bed. Zanele testified that Nighty had an erection and that he made thrusting movements on top of her. Zanele does not know if Nighty ejaculated.

[23] While Zanele and Nighty were still covered with the blanket, Zanele heard footsteps outside of the house. She also heard Lotacia

and Prudence's voices. She heard that Prudence had entered the house and heard her screaming. Next, Zanele heard what sounded like people running away from the house and a gunshot. After the gunshot, all went quiet. After a few minutes, Zanele and Nighty took the blanket of themselves and got dressed. They went outside. They found people outside of the house. The accused were no longer there. The police were called. Zanele, Nighty and Prudence were taken to the police station and the Temba hospital where they were examined.

[24] Zanele testified that Accused 1 took her cell phone during the incident. She was called by Constable Mnisi to identify the cell phone. She still has the packaging the cell phone came with. She gave the IMEI number on the packaging to Constable Mnisi.

- [25] The State called a professional nurse, Ms. Lindiwe Julia Ngobeni. She is stationed at the Temba Hospital. She conducted the examinations on Zanele and Prudence. She completed the J88 forms of Zanele and Prudence. The defence did not dispute the findings made by Ms Ngobeni as recorded upon J88 forms. Nothing turns on the J88 forms in respect of Zanele and Prudence. Ms Ngobeni was questioned over the DNA evidence that was collected from Zanele and Prudence. Her testimony accords with the serial numbers that was given in respect of Zanele and Prudence as indicated on their respective J88 forms. The samples taken were the usual samples in rape cases. This included swabs from Zanele and Prudence' genitals. The originals of forms called "Adult Sexual Assault Evidence Kit" in respect of the DNA samples that were collected from Zanele and Prudence' genitals were handed in as exhibits without any objection from the defence.
- [26] The State called Nighty to testify. Nighty testified that he went with Zanele to Zandile's house to study. Nighty's testimony over the events accords in most respects with Zanele's testimony. His testimony differs however in one respect. He testified that he did not have an erection on both occasions he was ordered to have intercourse with Zanele. He was adamant that he could not have an erection as, so he explained, for a man to have sex with a woman, his mind and body must be prepared. He was not "ready" because of the circumstances and because Zanele is his niece. He testified that while he was lying on top of Zanele during the first occasion he was ordered to have intercourse with her, Zanele was lying on her back and her legs were flat on the bed slightly spread out. Nighty testified that he saw Accused 2 taking Prudence to Zandile's bedroom. He testified that after some ten to twenty minutes under the blanket, he heard Lotocia's voice outside. She was calling out Nighty, Zanele and Prudence' names. While under the blanket he heard Prudence saying: "Sister come in, come in". He then heard footsteps in the home. After some time, the footsteps he had heard stopped. He heard a gunshot. According to Nighty, it felt to him as if the gun was fired in the house.
- [27] The State called Prudence. In her testimony, Prudence gave more detail to what transpired before she came across the accused at Zandile's house. She testified that she, Zandile and Lotacia left because Zanele and Nighty wanted to study. She, Zandile and Lotacia went to a tavern nearby. It was approximately at 18:00. She, Zandile and Lotacia went somewhere else. She noticed that Accused 1 was following them. Accused 1 proposed love to Prudence. She told Accused 1 that she was on her way to see her boyfriend. She did not know Accused 1 before then. It was the first time that she saw him. Prudence, Zandile and Lotacia returned to the first tavern and found the accused sitting under a tree where Prudence, Zandile and Lotacia were seated previously. Because the accused were sitting where they were seated before, Prudence, Zandile and Lotacia went to sit somewhere else. The accused followed them. The accused wanted to join them. They refused and went to sit at a different place at the tavern.
- [28] Prudence developed hiccups. She decided to go to Zandile's house to get some water. When she arrived at Zandile's house,

she found the door open and the house in disarray. She went into the house. Accused 2 appeared from the bathroom. He pointed her with a knife. Accused 2 took Prudence to a bedroom in the house. Accused 2 told Prudence to undress. She refused. Accused 2 slapped her in the face with his open hand. She fell down and kneeled. Zanele appeared with Accused 1. Zanele was pointed with a firearm by Accused 1. Zanele was naked. The accused instructed Zanele to get onto the bed in the room. Nighty was already lying on the bed. Zanele and Nighty were instructed to cover themselves with a blanket.

[29] Prudence was taken to another bedroom by the accused. Accused 1 pointed Prudence with a firearm. He again ordered her to undress.

She again refused whereupon Accused 1 hit her with the firearm on her head. She still refused. Accused 1 forcefully took off her pants. He opened her legs and he called Accused 2. Accused 2 unzipped his trousers and inserted his penis into her vagina. While Accused 2 was still busy having intercourse with her, Accused 1 removed Accused 2 from her. Accused 1 unzipped his trousers and inserted his penis into her vagina. When he was done, he requested a t-shirt to wipe himself. Prudence identified the red striped garment appearing on photograph 4 in Exhibit “B” as the t-shirt he took to wipe his penis.

[30] Lotacia entered the house with another lady. She called Prudence, Zanele and Nighty. Accused 1 told Prudence to respond. He said that she must say “Sister, come in”. She did so at gunpoint. Prudence saw Lotacia and the other lady running away. She also got a opportunity to run away. She heard a shot fired. She does not know who fired the shot, because she was running away. Prudence fell near the door of the house. She thought that the accused wanted to finish her. She got up and ran to the tavern where she cried out for help. She told people that people had raped them in the house. The people came but the accused had already left the scene. The SAPS arrived. Zanele, Prudence and Nighty were taken to the police station where statements were taken down from them.

[31] Prudence testified that it was still light when they left the house. Under cross-examination, Prudence confirmed that she made a

statement and the statement that she made was produced and shown to her. It was put to her that in her statement she said that only one accused had sexual intercourse with her. She confirmed that she said this. In her reply, she repeated that Accused 2 raped her and thereafter Accused 1. It was put to her that in her statement she described the one of the persons who had raped her as having scars. She denied that she said this to the police.

[32] Both accused’s version of a total denial of any presence at the scene or the rape was put to her. Prudence maintained that

both accused had raped her. The notes made by Ms Ngobeni on the J88, was put to Prudence. Ms. Ngobeni recorded under paragraph 5 of the J88 that Prudence had reported to her that:

“.....on the 25th of April 2015 at about to twelve midnight one of the two unknown men raped me - without using a condom.....”

It was put to Prudence that this constituted a discrepancy in her evidence because she testified that both accused had raped her. Prudence explains the discrepancy that the nurse might not have understood her well.

[33] With the court's leave Prudence was recalled. This was done after Accused 2's counsel indicated that has omitted to put Accused 2's version to Prudence. It was put to Prudence that Accused 2's version is that he had a relationship with

her, after they met at a tavern about three weeks before the first incident. She was confronted with Accused 2's version that he wanted to propose love to her but did do so because her boyfriend was related to him; that Prudence agreed to have a secret relationship with him; that he had slept with Prudence; and that she falsely implicated her because she was pregnant and Accused 2 told her that he does not take responsibility therefore. Prudence emphatically denied Accused 2's version. During her testimony it appeared that she became extremely emotional and showed sighs of total disgust over Accused 2's version.

[34] The State called Mr. Dumisani Masuku. He testified that he knows Accused 1. Accused 1 is a neighbour of his wife. They live in Chochocho. He has known Accused 1 for a long time. Mr. Masuku testified that on 25 April 2015, both accused came to his home at about 06:00 to 07:00. It was the first time he saw Accused 2. Mr. Masuku testified he had a hangover on that morning. He and the accused smoked cigarettes. He went to a tavern to buy beer. Mr. Masuku testified that the accused had two cell phones with them. It was a waterproof Sony phone and a cell phone which was blue in colour. They also had Nike bag in their possession. Accused 1 was in possession of the bag. The three of them drank beer and the accused told him that they wanted to sleep because they were tired. He left them at his house and came back that afternoon between 14h00 and 15h00. When he came back, they were sleeping. He opened the bag to see what was in it. He saw a firearm in the bag. They all went to a tavern at about 18h00 to 19:00. He had one beer and left for home. When he arrived at home he wanted to listen to music off his USB. He could not find it. He alleges that the accused stole the USB. The following morning Constable Mnisi paid him a visit to enquire over the whereabouts of the accused.

[35] The State called Zandile. She testified that she is the owner of the house at which the first incident took place. In her evidence,

she identified photo 1 in Exhibit “B” as her home. She testifies that the front door as well as the bedroom door of the house were found to be damaged after the incident. She confirms that when she arrived at the house on the night of the first incident, the house was ransacked. A table and two tea cups were broken. In addition, everything in the house was scattered around.

[36] The State called Mr. Boy Reanot Malethe. Mr. Malethe, during the time of the first incident, owned a shop in Mganduzweni. He testified that he knows the accused from Mganduzweni. On 27 April 2015, Accused 2 came to his shop. Accused 2 had Nokia cell phone with him. He wanted to sell the cell phone to Mr. Malethe. Mr Malethe agreed to give Accused 2 R100,00 as a deposit and keep the cell phone

for a week before he pays the remaining asking price of R500,00. Mr. Malethe asked Accused 2 to explain where the cell phone came from. Accused 2's explanation was that he had broken up with his girlfriend who he had bought this cell phone for and has, a result of their breakup, decided to take the cell phone back. Mr. Malethe kept the cell phone and gave Accused 2 R 100.00. Accused 2 left. When accused 2 left, there was another person with him. Mr. Malethe testified that on 2 May 2015, the police came to his shop. They asked him about the cell phone. The police told him that the cell phone was stolen. He gave the cell phone to the police. Under cross-examination, it was put to the witness that Accused 2 will say that he has not sold anything to him.

The second incident (Counts 7 to 12)

[37] The State called the complainant in Counts 10 and 11, Ms Prudence M[.....]. She testified that on 2 May 2015, she left her aunt's house to go to an area near a taxi rank in Mganduzweni where her boyfriend, Mr. Mpho Mashego, stays. Her boyfriend wanted her to hang out with him. It was past 18h00.

[38] Prudence M and Mr. Mashego went to a barbershop where they hanged out. They were chatting, dancing and having fun. At about 22h00, she realized that it was late. She called her brother, Mr. Vusi Mnisi, to come fetch her. Mr. Mnisi arrived. He decided to join

them. At about 24h00, the barbershop's owner said that he was closing down. Mr. Mashego and Mr. Mnisi decided to accompany Prudence M home. They walked along a tar road. They turned off the tar road next a school's fence. After walking about two minutes after they had turned off, Prudence heard a firearm being cocked. At that stage she and Mr. Mashego were walking in front with Mr. Mnisi closely behind them.

[39] After the firearm was cocked, Prudence M heard someone saying, "Piss off. Everyone must lie down". They looked around. It was Accused 1. Accused 1 asked what they were looking at and said that they must lie down. The three of them lay on the ground. Accused 1 instructed them not to look at him. Accused 1 was continuously hurling insults at them and wielding his firearm. While Prudence M was on the ground, she removed her cell phone and hid it in the grass next to her. Accused 1 started searching Mr. Mnisi. After he had searched Mr. Mnisi, Accused 1 searched her and Mr. Mashego. After searching them, Accused 1 went back to where Mr. Mnisi was and asked if he was "Vusi". Mr. Mnisi responded by saying that he was not "Vusi". Accused 1 asked Prudence M if it was not "Vusi". She said that it was not. Mr. Mnisi managed to escape. Accused 1 asked where Mr. Mnisi was and became angry. Accused 1 told Mr. Mashego to go. Mr. Mashego got up and stepped back. Prudence M heard a gunshot. She does not know where Mr. Mashego was when the gunshot was fired.

[40] Accused 1 said to her that they must go. She walked with Accused 1 for about ten metres. Accused 2 appeared at the fence of the school. Prudence M testified that she did not walk with the accused voluntarily but that she was forced by Accused 1 and Accused

2 who had an okapi knife. Accused 1 walked in the front, Prudence M was in the middle and Accused 2 walked behind her. She stopped near a graveyard because she was tired. Accused 2 slapped her with an open hand in her face.

[41] The accused discussed that they wanted alcohol. They referred to music that could be heard from a tavern known as "Spar". Both the accused decided to go there. However, they changed their minds and decided rather that Accused 2 go and buy liquor while Accused 1 would stay with Prudence M. Accused 1 nudged her along and they took a footpath to a big rock. There they waited for Accused 2 to return with the alcohol. At some point Accused 2 phoned Accused 1 to enquire where they were. Accused 1 gave Accused 2 directions. He joined them. Accused 1 told the witness that if she did not know them, they would keep her alive. Prudence M told the accused that she was not from the area therefore did not know them. They proceeded from the place where they waited for Accused 2.

[42] Along the way, accused 2 took an empty bottle and hit Prudence M on her forehead. She showed a scar above her right eye and testifies that it was bleeding. The accused told Prudence M to go. When she was about fifteen metres away from the accused, she told the accused that she was going to report the matter to the police. Prudence M started running away. The accused caught up with her. She stopped running because she was afraid of the firearm. The accused told her that she would have to go where the accused were going.

[43] The accused and Prudence M walked until they reached a two roomed house. Before they entered the house, they stood in front of the house. The accused finished their liquor.

Accused 2 opened the door to the house. After Accused 2 opened the door, Accused 1 said that he wanted to "start". Accused 2 said they should start together. Accused 1 said that he would be starting. Prudence M and Accused 1 entered the room. Accused 1 closed the door behind them and locked it. Accused 1 ordered Accused 2 to go next door and wait for them. Accused 1 ordered Prudence M to sit on the bed. There was an electric light on in the house. He told Prudence M to undress. She said that she would undress but that she was still cold. Accused 1 told her that they were not there for that. He placed the firearm on the bed at took of one of her sneakers. She looked at the firearm on the bed. Accused 1 asked her what she was looking at. Accused 1 slapped her again and ordered her to undress. She undressed everything.

[44] Accused 1 said they must not waste time. He opened her legs and penetrated her vagina with his penis. Prudence M asked Accused 1

if he was going to hurt her. Accused 1 said that she must piss off and open her legs. They were both on top of the bed. She was sitting on the edge of the bed, lying with her back on the bed. When she wanted to close her legs, Accused 1 hit her thighs with his hands. When he finished, Accused 1 said that Prudence M was now his wife and that he was no longer going to open the

door for Accused 2. Prudence M testified that Accused 1 did not use a condom. Prudence M testified that Accused 1 ejaculated. Accused 2 knocked on the door. Accused 1 did not open the door. Accused 2 called from behind the door and said “Nziane” “Nziane” you will regret. Accused 1 said he will regret nothing because they will be arrested together. Accused 1 said that he was going to sleep. Accused 1 told Prudence M that she must not report him. She said she would not report him if he could only arrange a taxi for her and that he would spare her life. After this, Accused 1 opened her legs. He had intercourse with her again. Accused 1 said that he thought of killing her as well as Accused 2 so that there would be no evidence.

[45] Accused 1 went to sleep. Prudence M lay next to him. She did not sleep because she was afraid. Accused 1 put the gun underneath the pillow under his head. The next moment Prudence M heard the door to the room being broken down. She jumped out of the bed. She saw that it was police officers. Prudence M told the police that she had been kidnapped. Prudence M was taken to the police station together with Accused 1. Prudence M testified said that she has never seen both the accused before.

[46] In cross-examination it was put to Prudence M that Accused 1 will say that they had consensual sex. Prudence M denied this version. The recordals in the J88 was also put to her. She was confronted with the fact that the nurse who examined her did not record the injury on her forehead. The explanation given by Prudence M was that she was wearing a hairpiece which may have covered the injury on her forehead. This would have made it difficult for the nurse to observe the injury. It was also put to Prudence M that the J88 report notes that she smelled of alcohol. The witness’s explanation was that she was forced to drink of the beer by the

accused. Prudence M also explained that she did not tell the nurse about the injury on her forehead because she was cold, wanted the examination to be completed and then wanted to go for a shower.

[47] Ms. Bonisile Lushaba was called by the State. She is a forensic nurse. Ms. Lushaba is also stationed at the Temba hospital. She conducted an examination on Prudence. She completed a J88 form. The J88 was handed in without objection by the defence. The defence

did not dispute Ms. Lushaba’s findings as recorded on the J88 form. Ms. Lushaba also took the usual DNA samples from this

complainant and submitted them to the South African Police Services. She completed the Adult Sexual Assault Evidence Collection Kit form, the original of which was handed in as an exhibit without any objection from the defence.

[48] The State called Mr. Mnisi. Mr. Mnisi’s evidence accords with that of Prudence M with regards to the events up to the time he had fled from the scene. Mr. Mnisi testified that Accused 1 took a cell phone, loose cigarettes and cash from him. He could not remember how much cash or how many cigarettes were taken. He described his cell phone as a blue Nokia 100. Mr. Mnisi identified his cell phone at the Masoi police when he was shown

different cell phones by Constable Mnisi. He testifies that he identified Accused 1 as the perpetrator of the acts because he knows him very well. They went to school together. Mr. Mnisi testified that he knows Accused 2 because he and Accused 2 stays in the same area. He knows Accused 1 by his nickname “Nengazi”.

[49] The State called Mr. Mashego. Mr. Mashego confirms Prudence M’s version of the events prior to her leaving with Accused 1.

Accused 1 took his blue and white Nokia 101. Mr. Mashego testified that accused 1 fired the shot while he and Accused 1 was facing each other. Mr. Mashego saw the flash from the gun’s muzzle to his left-hand side.

[50] Mr. Mashego testified that, after taking three steps back, he ran for about one hundred metres. When he looked back to where the

robbery took place, he saw a flashlight. He went there and saw a man with the flashlight. He reported the incident to the man with the flash light and looked for the money and Prudence M’s cell phone. He found it where they had left it in the grass. He found Mr. Mnisi at a night ritual where he also reported the matter. Mr. Mashego and Mr. Mnisi went to Prudence M’s aunt’s home. They told Mr. Mashego to go home. At 06h00 the following morning, he received a call on Prudence M’s cell phone from somebody that saw Prudence M standing next to a police vehicle.

[51] Mr. Mashego went to the Masoi Police Station. Mr. Mashego testifies that he went with Constable Mnisi to the scene of the robbery. Constable Mnisi found a spent cartridge at the scene. Mr. Mashego testifies that he does not know Accused 1 well. He knows him from seeing him before as they stay in the same area but in different sections. Mr. Mashego testified that where the robbery took place, there were lights emanating from the buildings and the church. Mr. Mashego testified that he also knows Accused 2 from seeing him at taverns. Accused 2’s nickname is “Ngiane”. He was shown a number of cell phones at the Masoi police station. He identified his cell phone as the one without the back cover and some of the digits on the buttons were rubbed off as well as the Nokia logo.

[52] Under cross-examination it was put to Mr. Mashego that Accused 1’s version is that Accused 1 and Prudence M had a relationship. Mr. Mashego denied this.

Constable Mnisi

[53] I proceed to deal with Constable Mnisi’s evidence. He is the investigating officer. His testimony relates to the first and

second incidents.

[54] Constable Minisi is stationed at the SAPS at Masoi. He has 16 years’ service with the SAPS. Constable Mnisi attended the scene of the first incident shortly after the incident occurred. He found the three complainants there. Constable Mnisi went back to the

scene of the first incident the next day because he was informed by the complainants that a shot was fired. Constable Mnisi retrieved a spent cartridge. He booked the spent cartridge in at the SAPS in Masoi and registered it in the SAP13. The cartridge was found just outside the door to Zandile's house.

[55] Constable Mnisi testified that he had received information and this information lead to the arrest of Accused 1 on the night of the

second incident. Constable Mnisi confirms that he was with Constable Mlimi when Accused 1 was arrested. He testified that he found Accused 1 and Prudence M next to each other on the bed when he kicked open the door to room. He ordered Accused 1 and Prudence M to get out of the bed and lie on the floor. Constable Mnisi confronted Accused 1 over the firearm. Accused 1 pointed to a pillow on the bed. Constable Mnisi found the firearm under the pillow. Constable Mlimi was also present in the room when firearm was found. Constable Mnisi testifies that Constable Mlimi identified the firearm as his weapon. Constable Mnisi testified that he searched the room and found 4 cell phones and a bag. Other items were also found in the house.

[56] Furthermore, Constable Mnisi's testimony confirms the sequence of events the night Accused 1's arrest and the discovery of Prudence M. It accords with Constable Mlimi's version. He testifies that Constable Mlimi identified the weapon from the serial number that was underneath the weapon. Constable Mnisi testifies that the cell phones that was recovered was later identified by Mr. Mashego and Mr. Mnisi as their property.

[57] Constable Mnisi testified that, when he returned to the police station the day following the second incident, he found Mr. Mnisi and Mr. Mashego there because they came to report Prudence M's disappearance. Mr. Mnisi and Mr. Mashego informed him that a shot was fired during the second incident. He went back to the scene of the robbery and retrieved a spent cartridge. The spent cartridge was handed into the SAP13 at Masoi police station. Under cross-examination, it was put to the witness that Accused 1 does not dispute that he was in possession of Constable Mlimi's firearm. A version was put to Constable Mnisi that Constable Mlimi gave his firearm to Accused 1 because Constable Mlimi was drunk. Accused 1's version that he had a relationship with Prudence M was also put to the witness. The witness denied this as improbable because Mr. Mnisi and Mr. Mashego alleged that they were robbed by Accused 1.

Further State witnesses

[58] Warrant Officer Macheru testified that he has conducted ballistic tests on three spent cartridges that was sent to him. He determined that the spent cartridges were fired by the same weapon. His evidence also related to a supplementary affidavit he deposed to regarding Warrant Officer Caroline Moshwane who fired the test shot with Constable Mlimi's fire arm and a typo error that was made with the reference number of the exhibit bag that contained Constable Mlimi's firearm.

[59] Sergeant Sifiso Lucky Nkosi was called as a further witness by the State. He is a detective with the SAPS for the last 11 years. Sergeant Nkosi received the cartridge relating to the first robbery from Constable Mnisi and transported same to the forensic

laboratory in Pretoria.

[60] As aforesaid, the ballistic reports pertaining to the spent cartridges that were found at the scenes of both incidents as well as

the comparison of the spent cartridges were admitted in terms of Section 220 of the Act. The ballistic reports as well as the evidence

of Warrant Officer Macheru established that the cartridges that were found on both scenes were fired by the same weapon.

[61] The State relied on an affidavit in terms of Section 212 of the Act, deposed to by Caroline Angel Mshwane who was a Warrant Officer in the SAPS. She fired test shots from Constable Mlimi's firearm and sent the cartridges for comparison. Her affidavit was

admitted into evidence without an objection by the defence.

[62] The end result of the ballistic evidence is that Constable Mlimi's firearm ejected the two cartridges that were found on the scene of the first and second incidents.

[63] The State further relied on affidavit in terms of Section 212 of the Act that was deposed to by Prince-Eddie Neo Mnushi. Warrant Officer Mnushi received the DNA samples that were taken from Zanele, Prudence and Prudence M. Warrant Officer Mnushi compared the

DNA samples with the DNA that was collected from the accused. The findings made by Warrant Officer Mnushi are that Accused 1's

DNA is linked to Prudence M and Accused 2's DNA is linked to Prudence M. The DNA collected from Prudence's vagina vault

compared to the DNA of Accused 1. The DNA collected from Prudence's perineum compared with the DNA of Accused 2.

[64] The chain evidence and findings pertaining to the ballistic reports and the DNA reports were not challenged or disputed by the accused.

[65] At the close of the State's case, both accused applied for their acquittal in terms of Section 174 of the Act. I considered

their applications and made an order that Accused 2 is acquitted in respect of Count 1 under the provisions of Section 174 of the Act. I dismissed the application of Accused 1 and Accused 2 in respect of the remaining counts they are facing. I am not going to dwell with the reasons for my order as it appears from the record.

The accused's case

[66] Accused 1 elected not to testify.

[67] Accused 2 testified in his own defence. In his testimony, Accused 2 denied any involvement in the crimes. He testified that he was not present when the crimes in incidents were committed. Accused 2 alleged in his testimony that he had a relationship for approximately three weeks with Prudence. He testified that he had sexual intercourse with her on two occasions. During the first occasion, he wore a condom and during the second occasion he did not do so. Accused 2 alleged that Prudence implicated him because he did not want to take responsibility for her alleged pregnancy.

Findings

[68] It was never disputed by the accused that the crimes relating to the first and second incidents were indeed committed. Their defence was at all times that they were not present. Therefore, the identity of the perpetrators was the only real dispute.

[69] I have applied the cautionary rules applicable to evidence regarding identification and in those instances where the evidence constitutes that of a single witness. The witness' testimony over the identity of the accused is corroborated by other evidence to which I shall refer below.

[70] I deal first with Count 12 - the unlawful possession of a firearm. Accused 1 alleges that Constable Mlimi gave the firearm to him to keep because Constable Mlimi was drunk. I reject this version outright. I do so because Accused 1 put it to the witnesses that

Constable Mlimi gave his weapon to Accused 1 on 1 May 2015. This would therefore mean that somebody else fired Constable Mlimi's

weapon at the scene of the first incident for the spent cartridge to be left there. This is so improbable that it is false. Moreover, even if Constable Mlimi gave his weapon to Accused 1, Accused 1, on his own version does not have a licence to possess that firearm.

[71] I now turn to the other counts.

[72] In my view, the State proved that Constable Mlimi's house was broken into. The housebreaking was not disputed by the accused. Accused 1 admitted that he was in possession of Constable Mlimi's firearm. I find that he broke into Constable Mlimi's

house and stole his forearm for there can be no other finding on the available evidence.

[73] Accused 1 is linked to the first incident not only by the direct evidence of Zanele, Nighty and Prudence but also with the spent cartridge that was found on the scene. The cartridge was fired by Constable Mlimi's firearm. Constable Mlimi's firearm

was found in Accused 1's possession. There can be no other finding that Accused 1 was on the scene of the first incident. The direct evidence of the three complainants in the first incident is therefore corroborated by the ballistic evidence and Accused 1's own version as put to Constables Mnisi and Mlimi. I therefore find that Accused 1 was present at the scene of the first incident.

[74] Accused 2 is linked to the first incident through the evidence of Zanele, Nighty, Prudence and Mr Malethe as well as the DNA evidence. I have no reason not to believe Mr Malethe's evidence that Accused 2 sold Zanele's cell phone to him. Zanele's

cell phone was with her on the night of the first incident. She testified that Accused 1 took her cell phone. The DNA evidence links Accused 2 to Prudence. Accused 2's DNA was extracted from Prudence's perineum which is the triangular area of the genitals.

[75] With the presence of both accused on the scene of the first incident, I have to consider whether or not the accused are guilty of

the offences house breaking, robbery, rape, compelled rape and attempted murder.

[76] With regards to the house breaking count (Count 2), Zanele and Nighty's version is corroborated by Zandile and Prudence's

versions. I therefore find that both accused broke into Zandile's property during the first incident. I also have no hesitation to find that Zanele was robbed of her cell phone by Accused 1. Having made this finding, there is also no other finding to make but that Accused 2 was a co-perpetrator in the robbery of Zanele's cell phone despite her evidence that it was Accused 1 that took her cell phone. Accused 2 sold the cell phone to Mr. Malete. Both the accused broke into Zandile's home and the accused were co-perpetrators in the robbery of Zanele's cell phone.

[77] In respect of count 3, I have no reason not to believe Zanele's evidence that Accused 1 had raped her. Zanele was a good witness and was able to clearly and concisely relate the events of the first incident.

[78] In respect of Count 4, in terms of which the State alleges that both accused compelled Henry to commit an act of sexual penetration with Zanele, I accept Zanele and Nighty's evidence that both accused compelled Henry to have intercourse with Zanele on two occasions. The accused were charged with compelled rape under Section 4 of the General Criminal Laws Amendment Act (Sexual Offences

and Related Matters) Act 32 of 2007 ("the Sexual Offences Act"). On this charge, the evidence of Zanele and Henry differ

in one important respect. Zanele testified that Nighty penetrated her on the second occasion. Nighty on the other hand, testified that he did not penetrate Zanele at all because he could not have an erection. I believe Nighty's evidence as he is the person who would be in the best position to confirm if he succeeded in penetrating Zanele.

[79] The circumstances of the two incidents of compelled rape as established through Zanele and Nighty's evidence prove that both accused attempted to compel Nighty to have intercourse with Zanele. In terms of the provisions of Section 55 of the Sexual Offences Act, an attempt to commit a sexual offence constitutes a crime. Compelled Rape is an offence under Chapter 2 of the Sexual Offences Act. In terms of Section 1 of the Sexual Offences Act, compelled rape is a sexual offence. I find that both accused attempted to commit compelled rape as contemplated in Section 4 read with Section 55 of the Sexual Offences Act. They forced Nighty to have sexual intercourse with Zanele. It would be inconceivable to make another finding just because Nighty, under the circumstances,

was not able or willing to perform sexual intercourse with Zanele.

[80] In respect of Count 5, the rape by both accused of Prudence, I have no reason to reject Prudence's evidence. She was an honest

witness who was able to relate her version clearly and concisely. Accused 2 was on the scene with Accused 1. I reject Accused 2's

version that he had a relationship with Prudence prior to the first incident as a lie. Accused 2's version was an afterthought when it dawned upon him that he would not be able to controvert the DNA evidence linking him to Prudence. Even if I had no choice but to reject Prudence's evidence that Accused 1 also raped her, it would not justify an acquittal of Accused 1 on Count

5. Accused 1 actively took part in Prudence's rape and in the first incident. He is a co-perpetrator and therefore liable for conviction with Accused 2.

[81] With regards to Count 6, the only evidence that was tendered by the State was that Prudence heard a shot fired from inside the house and the evidence of both Nighty and Zanele that they also heard a gunshot that was fired. On this evidence I am unable to find that

the accused attempted to kill Prudence with a firearm. The facts proven do not establish any competent verdict to murder.

[82] In respect of Counts 7 and 8, the robbery of Mr. Mnisi and Mr. Mashego, I have no reason not to believe their evidence. Accused 1 is connected to these crimes through Mr. Mnisi and Mr. Mashego's cell phones that was found in his possession the night he was arrested by Constable Mnisi and Constable Mlimi. As aforesaid, a cartridge fired by Constable Mlimi's firearm was found on the scene. I therefore find that Accused 1 robbed Mr. Mnisi and Mr. Mashego of their cell phones through the use of a firearm, therefore constituting aggravating circumstances as defined in Section 1 of the Act.

[83] In respect of the attempted murder count against Accused 1 (Count 9), the only evidence the State presented was the evidence of Mr. Mashego. Mr. Mashego testified that he saw a flash from the firearm to his left-hand side while he was facing Accused 1. In my view, this evidence does not establish that Accused 1 fired the firearm in Mr. Mashego's direction with the intention to kill him. I am therefore unable to find that Accused 1 intended to kill Mr.

Mashego by shooting in his direction with a firearm. Also, in this instance, the facts proven do not establish any competent verdict to murder.

[84] In respect of count 10, I accept the evidence of Prudence M that after she was ordered to lie down by accused 1, accused 2 appeared on the scene and that both accused forced her to go with them. I accept her evidence that the accused both had weapons in their possession. I also accept her evidence that she was forced to accompany the accused. I therefore find that both accused unlawfully

and intentionally deprived Prudence M of her freedom of movement by taking her by force at gun-and knife point to go with them against her will.

[85] In respect Count 11, I accept Prudence M's evidence that the accused had sexual intercourse without her consent on two occasions in the room she was taken to by the accused. I have no reason not to accept her evidence. I reject Accused 1's version (which was not confirmed under oath) that he and Prudence M had a relationship and that the intercourse between them was with her consent. How else would Accused 1 have explained his DNA in Prudence M's vaginal vault. I also find that Accused 1 raped Prudence twice during the second incident.

[86] Accused 1 is found guilty as charged in respect of Counts 1, 2, 3, 5, 7, 8, 10, 11 and 12. In respect of Count 4, Accused 1 is found guilty of attempted compelled rape as contemplated in Section 4 read with Section 55 of the Sexual Offence Act. In respect of Counts 6 and 9, Accused 1 is found not guilty.

[87] Accused 2 is found guilty as charged on Counts 2, 5 and 10. In respect of Count 4, Accused 2 is found guilty of attempted compelled rape as contemplated in Section 4 read with Section 55 of the Sexual Offence Act. In respect of Count 6, Accused 2 is found not guilty.

JH Roelofse

Acting Judge of the High Court

APPEARANCES:

FOR THE STATE: Mr. Mashele

FOR ACCUSED 1: Mr. Mabilane

FOR ACCUSED 2: Mr. Mashego

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12 November 2018 to 16 November 2018

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