

SOUTH AFRICA / JUDGMENT

S v Ntombana (54/2022) [2022] ZAECELLC 36 (29 December 2022)

[2022] ZAECELLC 36

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Govindjee

CASE / FILE NUMBER

54/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION

(CIRCUIT

COURT HELD AT KOMANI)

NOT

REPORTABLE

Case

no: 54/2022

In

the matter between:

THE
STATE
and
AKHONA
NTOMBANA
Accused

JUDGMENT

Govindjee J

Background

- [1] Mr Ntombana pleaded not guilty to four counts of rape, two counts of attempted rape, a count of theft and a count of assault with intent to do grievous bodily harm.
- [2] His identification as the perpetrator of many of these offences rests on the clothing and headgear allegedly worn during the commission of the offences. The clothing consisted, in particular, of a khaki pants, black short-sleeve top and dirty All-Star takkies ('the clothing'). The perpetrator also usually wore a homemade balaclava, consisting of a pantyhose with cut-outs for the eyes ('the balaclava'), when attacking his victims. It is alleged that Mr Ntombana was arrested wearing the clothing and that when a beanie was removed, the balaclava was discovered underneath. In certain instances, it is alleged that the perpetrator used a knife to subdue his victims, and that the knife was discovered in Mr Ntombana's possession at the time of his arrest.

The evidence

- [3] Ms ML says that she noticed a person alone at a bus stop a month or two after she had been raped, when she was driving with her boyfriend ('Mr L [...]'). That person was wearing the clothing, which she recognised, and had the tall, slender build of her attacker. She and her boyfriend decided to telephone the investigating officer, Detective Warrant Officer Mokheseng ('DWO Mokheseng'), and inform him. They also approached the person at the bus stop and told him he looked familiar. DWO Mokheseng advised them to park their vehicle at a place he would meet them, and to drive with him in his vehicle. The man who had been seated at the bus stop was no longer present by time they returned to that spot with DWO Mokheseng. They searched for him and eventually spotted the man, who was still wearing the same clothing. The man denied having been at the bus stop. Ms ML and her boyfriend pointed out the person to DWO Mokheseng as the person who had been seated at the bus stop. When the beanie he was wearing was removed, the balaclava was visible on his head. Mr L [...] searched the pockets of the man and removed a knife. Ms ML recognised the balaclava and the knife as having been used at the time she had been raped, and confirmed this with reference to a photograph submitted into evidence.
- [4] The rape occurred on 3 December 2021, before 11h00 close to Eggili High School, Hilton, Aliwal North. A man carrying a knife and stick, wearing the balaclava and the clothing, grabbed Ms ML on her neck and dragged her towards nearby bushes. Her face was covered with a jersey she was wearing and she was made to lie on her back. Ms ML removed the jersey after her dress had been lifted and panty removed, while the man was wearing a condom and kneeling on top of her. He had lifted the balaclava off his face and placed it on top of his head. Ms ML managed to see the perpetrator's face through the jersey, and noticed

his big eyes, his hairstyle and that he was dark skinned. Having instructed her to cover her face with the jersey again, the man proceeded to rape her, also performing fellatio on her after having penetrated her with his penis. While he did so, Ms ML pleaded with him, fearing for her life. The man had used the balaclava to cover his face by time he had removed the jersey from her face, and they parted ways.

- [5] Ms ML reported her rape to Ms M [...] M [...] 1 immediately thereafter, before borrowing a telephone to call her boyfriend, as confirmed by Ms M [...] 1. She later identified Mr Ntombana as her rapist during an identification parade, and pointed him out in court. She explained that she had taken a minute to do so at the parade in order to be deliberate and make doubly sure that the

correct person was pointed out. She disputed that Mr L [...] had produced the knife and had lied by saying he had found it on Mr Ntombana, or that Mr Ntombana had been wearing a 'mouth and nose' mask ('the mask') underneath his beanie. Mr Ntombana's version of what he had been wearing at the time of his arrest was also disputed.

- [6] Ms ML was an excellent witness who had no difficulty in conceding that she was uncertain whether the black T-shirt she identified in the photograph was the same as that worn on the day of her rape. It was the khaki pants and identical shoes that had caused her to stop the vehicle driven by Mr L [...] when they saw Mr Ntombana at the bus stop. Any doubts had been removed when they discovered the balaclava and knife on him. Ms ML had confirmed that the clothing worn by Mr Ntombana on the night of his arrest as being that worn by her rapist the following day, when she had been called to the police station to view the clothing, as confirmed by photographs accepted into evidence.

- [7] Mr L [...] and DWO Mokheseng corroborated Ms ML's testimony. They were both strong witnesses who testified with apparent honesty and credibility, providing crisp, reliable accounts of what they had observed at the time of the arrest. When Ms ML had spotted the familiar-looking person at the bus stop, Mr L [...] had turned his vehicle so that the lights shone on the person. Ms ML had then been convinced that this was her rapist based on his attire. Approximately five minutes later, when travelling with DWO Mokheseng, they had come across the same man who had been at the bus stop, who was now walking towards Joe Gqabi Location. He was wearing the same attire and Ms ML had again recognised him while DWO Mokheseng had grabbed hold of him. Mr L [...] had been asked to assist in apprehending the person. DWO Mokheseng had removed the hat and the balaclava had then been visible. Mr L [...] had searched the person and discovered the knife, which Ms ML recognised as that produced during the time of her rape. According to Mr L [...], that person was Mr Ntombana, whom he pointed out in court, and the item found on top of his head was the

balaclava, not a different mask. Mr L [...], while readily conceding that the pants he had observed that night might be described as brown, rather than khaki, confirmed the items depicted in a photograph as those worn by Mr Ntombana at the time of his arrest,

including the balaclava. The knife he had found on Mr Ntombana was also identified in this manner.

[8] DWO Mokheseng, stationed at Aliwal North's Family Violence, Child Protection and Sexual Offences Unit, is a detective with 20 years' experience, and the officer assigned the investigation of a number of rape cases that occurred between 2021 and

2022. He largely confirmed Ms ML's and Mr L [...]’s version of events on the evening Mr Ntombana was arrested. He explained that the bus stop that had been referred to was close to Eggili High School. Both Ms ML and Mr L [...] had pointed out a person walking on a path. This turned out to be Mr Ntombana, who was wearing the clothing. As DWO Mokheseng was conversing with Mr Ntombana, Ms ML had exclaimed 'This is the person', prompting him to grab Mr Ntombana tightly on his waist, instinctively

using his other hand to remove the beanie on his head. He called Mr L [...] to assist him and had observed the balaclava on Mr Ntombana's head. Mr L [...] had conducted a search and found a knife with a black handle, which was subsequently recognised by Ms ML as the knife her rapist had held.

[9] DWO Mokheseng had taken Mr Ntombana to his home to fetch spare clothing and said he had been given another knife by Mr Ntombana while there. He had requested Mr Ntombana to change clothing when they had returned to the police station, and bagged the clothing he had been wearing. That clothing had subsequently been shown to various rape complainants, who had positively identified the items.

[10] The clothing and beanie had also been shown to Ms Rehatile Mokwane. She has been Mr Ntombana's girlfriend since at least 2021. When the clothing had been shown to her, she had recognised the pants, T-shirt and shoes and confirmed that these items belonged to him. She testified that the two knives that had been shown to her were used in their home, the second knife being plastic and the property of their child. She had confirmed to DWO Mokheseng that she recognised those items of clothing and that they belonged to Mr Ntombana. During cross-examination the witness testified that she may have been mistaken in believing that those items of clothing belonged to Mr Ntombana. She clarified this to explain that she believed it was possible that somebody else had possessed identical pants, T-shirt and knife. She said she had discarded the shoes herself in December 2021.

[11] Ms NM ('NM') had been walking on a path behind Eggili High School on 17 January 2022 at 14h00. She was 12 years old at the time. A male person wearing brown pants, a black T-shirt, old-looking, torn All-Star takkies, a black object, seemingly a pantyhose, on his forehead, above his eyebrows and wearing a hat, had appeared. She had run away but was caught by the man. The man had taken out a black knife and threatened her if she did not accompany him 'up the mountain' to a gravesite area. He then raped her four times, causing her to bleed, and had also slapped her.[1]

- [12] NM clarified that the perpetrator's face had not been covered when she had been accosted, when she had been chased and taken to the gravesite area. He had subsequently dropped the pantyhose to cover his face, barring his eyes. She identified him as being slender, with coffee-coloured skin and thick eyebrows, and had pointed him out, following a two-minute period, during an identification parade.
- [13] Ms SS ('SS'), 16 years of age at the time, had been walking close to a gravesite area when a male person appeared. He had called her, she had run away, slipped and been caught. She was dragged to nearby bushes and told to undress. Having refused, the perpetrator removed her clothing and then raped her once without a condom.[2] He then suggested that she accompany him to another secluded area and wanted her to add his telephone number to her mobile phone. She gave him the phone. He returned it to her when the number did not save and took it back to try again. SS managed to flee while he was tying his shoes, and while he was in possession of the phone.
- [14] SS described her attacker's dress. Her description matched that of the clothing. The perpetrator had also worn the balaclava and carried two sticks. SS was able to confirm her description of the clothing and balaclava with reference to a photograph accepted into evidence. She had also done so when called to the police station to view the clothing. The complainant added that the perpetrator had been neither tall nor short, and had been slender and dark in complexion. The cell phone she had been carrying was never recovered. Ms K Kahlu testified that the incident had been reported to her by SS, who was her cousin.
- [15] Ms AS ('AS'), fourteen-years of age at the time, had needed the toilet during the early evening of 21 November 2021. She asked her cousin, Ms AY S ('AY S') to accompany her. While relieving herself she heard footsteps, followed by the sound of her cousin crying. She saw a male person holding her cousin, who managed to free herself. The girls ran away. AY S was caught and the man threatened to kill her if AS did not return. They were taken to a secluded spot and he covered the girls with a blanket so that they could not see him. They undressed after being told to do so. Both girls were then raped, she said. AS was subsequently raped for a second time. The man left them covered by the blanket and, when they eventually departed the scene, AS left her panty behind.
- [16] AS described the rapist as a slender person of average height. His clothing matched the clothing that had been recovered and photographed. The person had also been wearing the balaclava, without any beanie. AS had been able to see the face of the perpetrator just prior to being raped, as the balaclava had been folded up his forehead at that time. She explained that there had still been sufficient sunlight at the time for her to do so, even though she had been looking through the blanket. At some point she suggested that the blanket had dropped for a few seconds allowing her to see his face. AY S had been close by, approximately a metre away, and they had been jointly covered by the same blanket.

- [17] The person carried a knife and had threatened to stab the girls. AS had subsequently pointed out Mr Ntombana during an identification parade, following a period of a minute and a half, and again in court, as the person who had raped her. Photographs of the clothing were confirmed as being photographs of what the attacker had worn at the time she had been raped.
- [18] AY S, who had been fifteen at the time, confirmed much of her cousin's testimony. The perpetrator, whose face was covered with the balaclava at the time, had placed a knife on her forehead. She had heard AS crying after AS had been taken to a nearby stone. Thereafter, and having covered AS with the blanket, the perpetrator had made AY S lie on her back. He had tried to insert his penis into her vagina but was unable to do so as he was not erect. She had been crying and scared and had begged him to leave her alone. She was again covered by the blanket and heard AS crying again thereafter.
- [19] The attacker was described as being of average built, slender with big eyes. He had been wearing the clothing and the balaclava and those were recognisable to AY S from the photographs of the clothing shown to her. As with AS, she had been photographed in a room with that clothing. She also indicated that one of the knives that had been recovered had been placed on her forehead.
- [20] Eventually they were left covered by the blanket and they left the scene, reporting the incident to AS's mother, Ms BS, who confirmed this when she testified. She also said that AS had been full of blood on her dress when the incident was reported.[3]
- [21] Ms KM ('KM') had been 13-years old when she had asked her boyfriend, Mr AN S ('AN S') to accompany her to relieve herself. A male person had appeared and pulled her towards him, trying to lower her panty while she lay on her back, and pulling her legs towards him. She had tried to fight him off and called AN S to assist. He managed to remove the assailant from her body and KM ran away. When she next saw him, he was bleeding from the head. KM said that the attacker had covered his face but was able to match what he had worn to the clothing, beanie and balaclava later shown to her, which she had recognised, as confirmed by photographs accepted into evidence. She described the person as tall and slender.
- [22] AN S confirmed much of KM's testimony. He had noticed a man, whose face was uncovered, walking past him while he waited for KM to relieve herself. When he was later summoned by KM, that man had been kneeling on top of her, wearing the clothing and the balaclava, without any beanie. They had fought once he had removed the man from on top of KM. The slightly tall man, slender built and dark skinned, attempted to stab him when he slipped and then repeatedly hit his head with a stone, causing open injuries. AN S did, however, manage to prevent the man from stabbing him by holding the man's hand which was holding the knife, sustaining only a slight cut. He eventually managed to escape and ran away.

[23] AN S identified the clothes worn by his assailant when they were shown to him, but had not seen the person's face. He had specifically noticed the All-Stars, having owned a pair of those shoes, when fighting with the man.

[24] DWO Mokheseng had explained, during his testimony, that he was properly trained to collect buccal samples and certified to do so during 2014. He explained the process he had followed in collecting these samples. The pack would have been opened in the presence of Mr Ntombana. The inventory form would then be completed and signed, with Mr Ntombana's thumbprint affixed. Due process had been followed and a witness had been present. The samples, which had been sealed in Mr Ntombana's presence, had been registered in the SAP 13 register and packed in a sealed bag before being dispatched to the laboratory in Gqeberha. He insisted

that, in the absence of any other trained individual being present, he was permitted to take the samples even though he was the

investigating officer of the case.

[25] Mr Ntombana repeatedly indicated that he had no knowledge of the various incidents in question. His defence rested on the version that he barely left his home and, therefore, could not have been at the places the crimes had been committed. He acknowledged having been pointed out at various identification parades but denied knowledge of any of the associated crimes.

[26] He provided various details about what had occurred at the time of his arrest. DWO Mokheseng had grabbed him roughly and he had been taken inside their motor vehicle. He had noticed Ms ML crying in the back seat of that vehicle. When his navy hat had been removed by DWO Mokheseng, the mask was visible and had been removed. It had been Mr L [...] who had planted the knife in his pocket while they were seated in the backseat of the vehicle, before removing it and showing it to the others.

[27] Mr Ntombana said that he was wearing a 'Dickies' brown trouser, black short-sleeve T-shirt, 'navy-white', new All-Star takkies and the mask. When shown the picture of the clothing accepted into evidence, Mr Ntombana denied that the pants depicted belonged to him. The T-shirt depicted was, he said, unclear so that he denied owning that item. He denied wearing the balaclava or having it in his possession and also denied owning the shoes depicted in the photograph. As for the hat depicted, he denied ownership on the basis that his hat was navy in colour. He had no knowledge of the knives in the photograph shown to him, had not given DWO Mokheseng the second knife and had not been tested for saliva. He also disputed his signature on the inventory document pertaining to the buccal sample, stating that if what was depicted was 'NA' then it would be his signature, but because the signed lettering appeared to read 'ND' he required further clarification. In any event, he said he had been made to sign a document without any explanation being provided to him.

- [28] Mr Ntombana had little to add during cross-examination. He seemed to agree that it appeared as if the same person had committed the various crimes, which had all occurred in the vicinity of Eggili High School towards the mountain. He was indeed slender in build, and tall, but that was not unusual. He could not dispute the description of the clothing worn by the perpetrator and agreed that he had been pointed out at various identification parades. He could not comment on the size of his eyes and testified that he could also not comment on the skin colour of his face, as he was only able to see his hands, which were dark brown in colour. He nevertheless denied that he fitted the description provided by the various complainants.
- [29] As to the clothing that had been linked to him, he denied ever possessing a khaki trouser. He only had a brown Dickies trouser and these trousers had paint on the side. While he possessed All-Star takkies, his were navy-white and new, unlike those depicted in the photographs. His girlfriend had been mistaken when she identified the clothes in the photograph as belonging to him and recognised the two knives depicted. He could not offer any reason why she would have lied about this.
- [30] Mr Ntombana said that a photograph had been taken at the police station during the early morning hours following his arrest. He could not explain why this had not been put to any of the witnesses who had testified about his attire at that time. The complainants who had seen the face of the person who had attacked them had all been mistaken. This, he said, was because he had a gap in his teeth that should have been identifiable to anybody who saw his face. He also denied the DNA results on the basis that no blood had been drawn from him.
- [31] He also disputed the evidence of Ms ML, DWO Mokheseng and Mr L [...] in respect of the discovery of the balaclava under his hat on the night of his arrest, even though he could not explain why they would have all accused him falsely. He recalled being made to sign four pieces of paper, and affixing his thumbprint on a document, but claimed that no buccal swab had been taken.
- [32] As to his movements, Mr Ntombana claimed to be at home for each and every day unless somebody called on him to do some work. He was self-employed he said, and could not recall when he had left home to perform any work. On the day of his arrest, he was on his way to visit a person named Vuyani. He added that this was the first occasion he had exited his home for this reason. He had been wearing his brown Dickies pants, with red paint on the side or front, a navy hat, the mask, a short-sleeve black T-shirt and new navy-white takkies at that time, and not the clothing depicted in the various photographs.

Analysis

- [33] An accused person may only be convicted if, after proper consideration of all the evidence presented, his guilt has been established beyond reasonable doubt. It follows that an accused person must be acquitted if it is reasonably possible that he might be innocent.[4]

Before rejecting an accused's version on the probabilities, the court must be able to find, as a matter of probability, that the accused's version is simply not reasonably possibly true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version.[5]

[34] Where there is a conflict of fact between the evidence of the state witnesses and that of the accused, the court is required to consider the merits and demerits of the state and defence witnesses, as well as the probabilities of the case, before concluding whether the guilt of an accused has been established beyond reasonable doubt.[6]

[35] It is necessary to adopt a holistic approach to analysing the available evidence in this matter. [7] In *S v Chabalala*,[8] the SCA explained this as follows:

‘The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper count of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.’

[36] The Court's conclusion must account for all the evidence, whether it is found to be false, unreliable or only possibly false or unreliable, and the appropriate process of reasoning depends on the nature of the evidence before the Court.[9] While it is necessary to critically analyse each component in the body of evidence presented, it is also necessary to consider the picture as a whole.[10]

[37] As the SCA confirmed in *Kotze v S*[11] where a trial court is faced with two mutually destructive accounts, logic dictates that both cannot be true. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and, in the process, measured against the probabilities. In the final analysis the court must determine whether the state has mustered the required threshold proof beyond reasonable doubt.

[38] Given that the state's case rests on the identification of Mr Ntombana as the perpetrator of the various crimes, which depends on disputed human observation, also as to the clothing worn by Mr Ntombana on the night of his arrest, this court is obliged to carefully consider all the surrounding circumstances before deciding whether the state has proved beyond reasonable doubt that he is indeed the perpetrator.

[39] As the SCA held in *S v Mthetwa*: [12]

‘Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene;

corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities ...'

- [40] As indicated, Ms ML, Mr L [...] and DWO Mokheseng were particularly impressive witnesses. They corroborated one another's evidence in material respects as to the events leading to the arrest of Mr Ntombana. That corroboration came naturally as they all testified in a manner that conveyed the clear impression of witnesses speaking the truth. That impression is enhanced when considering the slight differences in their versions of what occurred. Crucially, their evidence, taken together, confirms unequivocally that Mr Ntombana was wearing the balaclava underneath his navy beanie at the time he was arrested. The explanation that he was in fact wearing the mask, and not the balaclava, is contrived, particularly when considering the plethora of other evidence available. The balaclava was an item that had been modified to serve a particular purpose and it is unsurprising that each of the complainants recalled it and recognised it when given the opportunity to do so, given that this either covered the face of the person who was accosting them, or was placed on his forehead.
- [41] It must also be accepted that Mr Ntombana was wearing the clothing and beanie at the time of his arrest. That clothing was taken from him after he had been taken to his home to fetch other attire. The clothing was photographed and various items were recognised by Ms Mokwane as belonging to Mr Ntombana when they were shown to her at the time by DWO Mokheseng. Her plain attempt to distance herself from this, by suggesting during cross-examination that she may have been mistaken, and during re-examination that she had thrown away the All-Star takkies herself, does not alter the position. She clarified her about-turn by explaining that her 'mistake' was based on the possibility that somebody else might have possessed identical clothing to Mr Ntombana. Given the dirty state of the pants and tattered footwear, that possibility is remote. It is apparent that Mr Ntombana was wearing the clothing, which belonged to him, at the time of the arrest. Ms Mokwane's testimony, taken in its entirety, supports that conclusion, which has as its foundation the strong testimony of Ms ML, Mr L [...] and DWO Mokheseng. That clothing was the reason he was recognised by Ms ML prior to his arrest, leading to the discovery of the balaclava, which itself was a particularly recognisable and memorable item. It is the same clothing that was recognised when shown to the various other complainants. Mr Ntombana's explanation that he was wearing similar, but different, clothing at the time of his arrest, must be rejected as a fabrication. He claimed that a photograph had been taken of him in the clothing in the hours following his arrest. Yet this was never put to DWO Mokheseng and appears to have been an afterthought.

- [42] In addition, Mr L [...]’s explanation as to his discovery of the knife must be accepted. He had assisted DWO Mokheseng with the arrest and, considering his suspicions and that he would be seated in the back of the vehicle with him, had searched Mr Ntombana. DWO Mokheseng had placed the knife on the dashboard, where Ms ML had recognised it. That knife was also identified by Ms Mokwane as a utensil that was familiar to her and was used in their home. Any suggestion that Mr L [...] would have conspired with DWO Mokheseng by carrying a knife, which happened to be of the kind used by Mr Ntombana and Ms Mokwane, and using it to falsely implicate Mr Ntombana, must be rejected.
- [43] Given those findings, and as argued by Mr Mgenge for the state, the circumstantial evidence connecting Mr Ntombana to the various counts is overwhelming. This despite the fact that some of the charges are based on the testimony of single witnesses, most of whom are children, so that the necessary caution must be applied in evaluating the evidence in respect of those counts. As will be apparent, their evidence is consistent with all the proved facts that he was the person who preyed on vulnerable victims in the area close to Eggili High School. While I accept that there may have been some suggestibility regarding the pointing out of the clothing by the complainants, the proved facts are such that they exclude every reasonable inference save this outcome, so that there can be no doubt that his guilt has been established.[13]
- [44] The state has proved, on this basis, that it was Mr Ntombana who raped Ms ML, also by performing fellatio on her without her consent and against her will, on 3 December 2021. Even when applying the necessary caution to her testimony, given that she was a single witness to her rape, her description of the person who raped her was reliable when considering the various factors listed in Mthetwa, particularly the recollection of the dress and the close proximity of the person to her. I accept Mr Geldenhuys’ submission that the outcome of the identification parade must carry less weight in the case of Ms ML, given that she had identified Mr Ntombana based on the clothing he was wearing just prior to the identification parade.
- [45] It has similarly been proved that Mr Ntombana repeatedly raped NM on 17 January 2022. In addition to the compelling circumstantial evidence related to his clothing, she recognised his face and was able to point him out at an identification parade. I accept that she had seen his face only briefly before having done so. But this was at close quarters at a time of the day when it would have been light, and with some opportunity for her to have observed his face and build prior to the time he covered his face with the balaclava, so that her evidence is accepted as reliable and consistent with the probabilities.
- [46] Importantly, Mr Ntombana’s guilt in respect of count 8 is further supported by the available DNA evidence. DWO Mokheseng’s detailed explanation of the process he followed prior to obtaining the buccal sample, including how Mr Ntombana’s signature and fingerprint would have come to be on the inventory document, must be accepted. Even though he was the only witness to testify regarding the administration of this procedure, his testimony was convincing. He had been fully trained and certified to obtain the sample and was a

seasoned, experienced officer. While I am alive to the fact that he was also the investigating officer, it was readily apparent that he made no attempt to embellish the manner in which he would have explained the checklist of information to Mr Ntombana in summarised fashion. The suggestion that Mr Ntombana, who by then was facing a host of serious offences, would have signed the document confirming this, and affixed his thumbprint, without any indication of the reasons for this, must be rejected as not reasonably possibly true. The accepted evidence links the sample, taken from Mr Ntombana's saliva and sent for analysis, to NM's vaginal swab and panty stain.[14] For all these reasons, and notwithstanding application of the necessary caution considering that she was a single child witness to her ordeal, it has been proved beyond reasonable doubt that Mr Ntombana is guilty as charged in respect of count eight.

- [47] The DNA evidence links Mr Ntombana directly to count three in the same way, with a similar chain of evidence, which has been accepted. That link is supported by SS's recollection of the clothing worn by her rapist, her description of his build, the modus operandi of the attack and its location. Despite applying the necessary caution in respect of her evidence as a single child complainant, the state has proved beyond reasonable doubt that Mr Ntombana is guilty of this count, based on the accepted DNA evidence as supported by the other factors mentioned. Mr Mgenge conceded, however, that the charge of theft, in count four, had not been proved, given the absence of proof of intention to appropriate the property.
- [48] AS was also able to identify the clothing and balaclava that has been linked to Mr Ntombana. She was an intelligent witness who spoke with a clear recollection. Her description of her rapist's build is consistent with his build. She had managed to see his face briefly, either through the blanket or when it dropped from covering her, and pointed him out at an identification parade. Much of her evidence as to the clothing, balaclava and build of the attacker was supported by that of AY S. Given the findings in that respect, this is sufficient circumstantial evidence on its own to link Mr Ntombana to count one beyond reasonable doubt. It might be added that in respect of her facial recognition, her evidence must be treated with the necessary caution, given that she was a single child witness in that regard. I nevertheless consider her identification to be reliable, particularly when considering her close proximity to Mr Ntombana at the time, the lack of mobility of the scene and her ability to point him out at the identification parade. In coming to this conclusion, I accept that the lighting and visibility may have been somewhat compromised, and that there was some suggestibility in the clothing identification process. Nevertheless, in all the circumstances the state has proved beyond reasonable doubt that Mr Ntombana is guilty of the charge in count one.
- [49] It must also be accepted that Mr Ntombana was the person who attempted to rape AY S before raping AS for a second time. Her description and identification of his clothing, the balaclava and knife confirm this, and is corroborated by the testimony of AS, who was mistaken in believing that AY S had actually been raped. Their evidence was slightly different in respect of the way in which the blanket had been used to cover them, but this is

not material to the evaluation of their evidence and consistent with the type of contradiction to be expected of children testifying about a traumatic event. As to the attempt itself, I am satisfied that Mr Ntombana's conduct went beyond preparation. On the facts he tried to insert his penis into her vagina unsuccessfully, thereby performing an act of consummation, and is guilty of attempted rape, as charged in count two.[15]

[50] KM and AN S corroborate one another in respect of the clothing and balaclava they had observed, as well as in respect of the alleged attempted rape and assault with intent to do grievous bodily harm charges. Both were good, cogent witnesses, who testified honestly and without any hint of exaggeration. It has been proved beyond reasonable doubt that the clothing and balaclava belonged to Mr Ntombana. The modus operandi is also consistent with that of the other incidents, as is the location of the crimes. I am satisfied that it has been proved beyond reasonable doubt that Mr Ntombana was the perpetrator of these offences too, and that he attempted to rape KM. That attempt was prevented by AN S, who was repeatedly assaulted with a stone on the head, with the intent to cause grievous bodily harm, by Mr Ntombana.

[51] This judgment has found that the state has proved beyond reasonable doubt that Mr Ntombana is guilty of all charges, barring one. It is, in addition, appropriate to make some additional remarks about Mr Ntombana's denials and testimony, which support this outcome. The demerits of his evidence are sizeable. He is 23 years of age and had written grade 11 examinations, suggesting some level of school education and intelligence. His testimony lacked candour and he appeared to be determined to repeat stock answers whenever possible. He refused to concede basic matters, such as his own signature, and could not provide an address for his place of residence. At times his testimony beggared belief, for example when he claimed not to have ever seen his own face, or to leave his home only very rarely. This affected the assessment of his credibility negatively. While he consistently made reference to wearing a navy beanie at the time of his arrest, he refused to concede that the beanie depicted in various photographs was the same item, even though it was clearly navy in colour, without providing any real reason for this. He offered half-truths on occasion, admitting to wearing a mask underneath his beanie, but not the balaclava, and suggesting that his clothing had been only subtly

different from the items he has been found to have worn. He belatedly claimed to have been photographed wearing his 'real'

clothing.

[52] Importantly, there is no explanation as to why his own girlfriend, who appeared to try to bend the truth to support him, would have lied when accepting that the clothing was his. There is also no plausible basis for accepting that the key state witnesses had concocted a conspiracy of epic proportions to blame an innocent person for the crimes. The suggestion seemed to be that they had done so despite obtaining the actual clothing worn by the perpetrator. That man had been protected through the arrest of an innocent person who had

coincidentally been wearing very similar, but subtly different clothing. He had been photographed in his actual clothing, but the police had never produced that clothing, instead producing the clothing worn by the real perpetrator and contriving to have his girlfriend falsely identify that clothing, also in court. Accepting that version implies that a buccal sample had been drawn from the actual perpetrator, only for all the paperwork to be tampered with so that that sample was fraudulently linked to Mr Ntombana. It also suggests that each of the witnesses who had seen his face and pointed him out at the various identification parades mistook him for the real perpetrator, who has been allowed to walk free. That version is not reasonably possibly true in substance and must be rejected.

Order

[53] The following order will issue:

1. The accused, is found guilty on counts one, two, three, five, six, seven and eight, as charged.
2. The accused is found not guilty on count four.

A GOVINDJEE

JUDGE OF THE HIGH COURT

Heard:21-28 November 2022

Delivered:29 November 2022

Appearances:

For the State:

Adv S Mgenge

Director of Public Prosecutions

Makhanda

046 602 3000

For the defence: Adv D Geldenhuys

Legal Aid South Africa

046 636 9350

- [1] A J88 medico-legal report was accepted into evidence, confirming that NM had been raped.
- [2] A J88 medico-legal report was accepted into evidence, supporting the conclusion that SS had been raped.
- [3] A J88 medico-legal report was also accepted into evidence, confirming that AS had been raped.

- [4] S v Van Aswegen 2001
- (2) SACR 97 (SCA), with reference to S v Van der Meyden 1999 (2) SA 79 (W).
- [5] S v Shackell 2001
- (2) SACR (SCA) at 194g-i.
- [6] S v Guess [1976] 4 All SA 534 (A) at 537-538; S v Singh 1975 (1) SA 227 (N) at 228.
- [7] Van Aswegen op cit fn 9. For an application of Stellenbosch Farmers' Winery Group and Another v Martell et Cie and Others to resolving two conflicting versions between the State and the accused in criminal proceedings, see Kuhlana v S [2020] ZAECEGHC 124 para 10 and following.
- [8] S v Chabalala 2003
- (1) SACR 134 (SCA) para 15. Also see S v Dlamini 2019
- (1) SACR 467 (KZP) para 25.
- [9] Van der Meyden op cit fn 9 at 81I - 82E.
- [10] S v Mbuli 2003
- (1) SACR 97 (SCA) para 57.
- [11] Kotze v S [2017] ZASCA 27 para 17.
- [12] S v Mthetwa [1972] 3 All SA 568 (A) at 570; 1972 (3) SA 766 (A) at 768A – C.
- [13] See R v Blom 1939 AD 188 at 201-202.
- [14] Various affidavits in terms of s 212(8)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977) were accepted into evidence uncontested, confirming the proper handling of the DNA Reference Sample Collection Kit in respect of the complainants for count three and eight.
- [15] See S v Schoombie 1945 AD 541.
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