

HIGH COURT

(BISHO)

CASE NO.: CC16/2000

In the matter between:

**THE STATE**

versus

1. SIPHELO BEJA
2. SIYABULELA MONI
3. THULANI MAZALENI

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J U D G M E N T

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**EBRAHIM J:** The indictment sets out two charges against the accused. Accused no. 1 is SIPHELO BEJA, accused no. 2 SIYABULELA MONI and accused no. 3 THULANI MAZALENI. The first charge is that of rape in that upon or about 11 September 1998 and at or near Zwelitsha Township in the district of Zwelitsha the accused did unlawfully and intentionally assault NTOMBOVUYO BOBI a female adult and by means of force and violence had sexual intercourse with her against her will. The second charge is that on or about 11 September 1998 and at or near Zwelitsha Township in the district of Zwelitsha the accused did unlawfully and intentionally kill NTOMBOVUYO BOBI a female adult.

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All three accused pleaded not guilty to these charges. In terms of section 115 of the **CRIMINAL PROCEDURE ACT**, 51 of 1977 accused no. 1 elected not to disclose the basis of his defence/ ...

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defence to either of the charges. Accused no. 2 elected to disclose the basis of his defence and this was that he was not present when the offences were being committed. Accused no. 3 elected not to disclose the basis of his defence.

Various admissions were made by all three of the accused. These admissions were set out in writing and was signed by the legal representatives of the accused and the accused 10 themselves. These were handed in as **EXHIBIT "A", "B" and "C"**.

**EXHIBIT "A"** reads as follows:

"I SIPHELO BEJA make the following admissions in terms of the Provisions of Act 51 of 1977:

1. That the deceased was NTOMBOVUYO BOBI, a black female aged about 22 years during her life time.
2. That the cause of death of the deceased was 20 a stab wound of the chest.
3. That the deceased received no further injuries from 11 September 1998 until the district surgeon conducted a post-mortem examination on the body of the deceased on 16 September 1998.
4. That the deceased died on 11 September 1998 as a result of the abovementioned injury.

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5. I accept the findings of the post-mortem report of Dr BASIL WINGREEN dated 16 September 1998."

This is dated at Bisho on 22 May 2000 and it reflects that it was signed by the advocate for the accused as well as the accused himself.

**EXHIBIT "B"** contains similar admissions and is dated 23 May 2000 at Bisho. It is signed by the attorney representing the accused as well as the accused himself. That is obviously on behalf of accused no. 2. **EXHIBIT "C"** contains the admissions by accused no. 3. These are similar to the admissions in **EXHIBITS "A"** and **"B"** and was signed at Bisho on 22 May 2000 by the advocate acting for the accused as well as the accused himself. The admissions contained in these exhibits were duly recorded as admissions in terms of section 220 of the **CRIMINAL PROCEDURE ACT**, 51 of 1977. 10

The State also tendered a post-mortem report in evidence as **EXHIBIT "D"**. The doctor's findings and conclusions were accepted by the accused and their conclusion was to the effect that death had occurred as a result of a stab wound of the chest. 20

The State also tendered as **EXHIBIT "E"** an album of three photographs. These were admitted without any opposition from the accused. Two of these photographs indicate the body/ ...

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body of the deceased where it is lying in an open area of ground and the third photograph reflects a shoe or as it is popularly called a tackie. I need to add there is also a fourth photograph which shows the face of the deceased.

The State case in summary is that on 11 September 1998 and at a shebeen in Zone 1, Zwelitsha the deceased met THEMBISILE THOMAS and accused no. 3, THULANI MAZALENI. Shortly thereafter the deceased and accused no. 3 as well as THEMBISILE THOMAS left the shebeen. At some stage thereafter they were joined by accused nos. 1 and 2. The three accused and THEMBISILE THOMAS then dragged the deceased to some bushes near Zwelethemba Technical College and there they raped her. After they had raped the deceased they then killed her by stabbing her with a knife. 10

The State has tendered the evidence of two witnesses in proof of the allegations in the charges. The first witness was THEMBISILE THOMAS who the Court was informed was an accomplice in the commission of these offences. The State requested that the Court warned THEMBISILE THOMAS in terms of section 204 of the **CRIMINAL PROCEDURE ACT**. The provisions of this section was duly conveyed to the witness and he was informed of the implications thereof. In short he was expected to answer questions frankly and honestly relating to the commission of these offences, even if such answers might incriminate him. 20

The/ ...

The evidence of this witness in broad terms is the following:

On the evening of 11 September 1998 he was at a shebeen in Zone 1, Zwelitsha. He saw accused no. 3 entering the shebeen, but prior to him entering the shebeen the deceased NTOMBOVUYO BOBI had entered. He says that shortly thereafter the deceased called him and told him that she was looking for her sister and also wanted him to accompany her. 10  
After he had finished drinking liquor he and the deceased left the shebeen and he says that accused no. 3 followed them. At some stage they were joined by accused nos. 1 and 2. This occurred in a road close to the shebeen. He says the accused then drew knives and accused no. 3 grabbed hold of the deceased, while accused nos. 1 and 2 grabbed hold of him. During the course of this they swore at him. He and the deceased were then taken to some bushes or a forest as he describes it. On their arrival there accused no. 3 ordered the deceased to undress. The area that they were 20  
according to him was close to the Zwelethemba School. The deceased was forced to remove her trousers right to her ankle and also her panties. He says that he was then forced to rape the deceased by the three accused who had drawn their knives. He did as he was told and raped the deceased. While he was having intercourse with her he was manhandled and pulled away from the deceased. Accused no. 3 then raped the deceased, followed by accused no. 2 and lastly accused no. 1/ ...

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no. 1. He says that all three of the accused then raped the deceased a second time. At this stage the deceased was crying. The first accused to have intercourse with her the second time was accused no. 2, thereafter accused no. 1, and finally accused no. 3. While accused no. 3 was raping the deceased for the second time, she cried out word to the effect: "Pumlani my private part is paining." THEMBISILE says that, although she had called out PUMLANI she was in fact referring to accused no. 3 whose first name is THULANI. 10

He says that as a consequence of this accused no. 3 said that they should kill her as she had recognised them. Accused no. 3 feared that she would go to the police the next day to report what had happened. Accused no. 3 drew his knife and stabbed her in the stomach. He then handed the knife to accused no. 1 who also stabbed her, and the knife was then handed to accused no. 2 who he says finished her off. He describes the knife as a fish knife. He says further that they also wanted him to stab the deceased, but he refused to do this. He says further that the three 20

accused then threatened him to the effect that if he mentioned the incident to anyone or the police that they would kill him, or say that he had taken part in the rape and the killing. He was then told to get lost as he says, and they chased him away. He left and went home to bed, but noticed that the accused were following him. He describes his state of sobriety as being moderately drunk and that the deceased's condition was similar to his.

According/ ...

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According to him the accused were very drunk, but nevertheless knew what they were doing. He also states that the accused waited to ensure that the deceased was dead before they left.

He was shown one of the photographs in **EXHIBIT "E"** namely photograph no. 2 in particular and asked to explain why it was that the deceased's pants was still around her hips and had been buttoned. If I may just explain, it appears from 10 this photograph that her trousers had not been removed at all. He was unable to indicate what had happened in this respect. He was submitted to extensive cross-examination by both Mr Miso who appears for accused nos. 1 and 3 as well as Mr Manjezi who appears for accused no. 2.

The main aspects to arise out of the cross-examination are the following:

1. He had been forced by the three accused to rape the deceased since they had drawn their knives and had 20 threatened him.
2. In his view the reason for them acquiring him to do this was so that he could be implicated and not report the rape to the police.
3. He was confronted by the statement that he had made to the police on 7 January 2000, this is **EXHIBIT "F"** and it runs into four handwritten pages. His immediate reaction to this document was that he had told lies to  
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the police. A number of statements that he had made in this statement to the police were put to him during cross-examination and it appears from the answers that he provided that most of what he had said in the statement amounted to lies.

4. Thus he had lied that accused no. 3 had suggested in the shebeen that the two of them should rape the deceased.
5. It was also a lie that accused no. 3 had forced him to 10  
rape the deceased, this in fact had occurred by all three accused threatening him.
6. Later he contradicted this by saying that accused no. 3 had said that he and accused no. 3 should rape the deceased.
7. There is no indication in the statement that he had conveyed to the police that the accused had threatened to kill him if he told the police of these events.
8. It was not so that he had assisted in dragging the deceased, it was only the three accused who had done 20  
so. The fact that he consistently referred in his statement to "we" meaning himself and the accused, was incorrect.
9. What he had said in his statement had been suggested to him by the accused and was an untrue version.
10. He conceded that there was no mention in the statement at all that the accused had drawn knives against him.
11. He insisted that the deceased had referred to accused  
no. 3/ ...



no. 3 as "PUMLANI" and not THULANI. He says that she had made this mistake as she was drunk.

12. Notwithstanding the threats against him by accused nos. 1, 2 and 3 he had told ANELE DAVASHE that accused no. 3 killed the deceased. He had told ANELE of this as he wanted ANELE to convey this to the police. In fact he had actually told ANELE to go and tell the police about this.

13. Although the statement reflected that he had raped the deceased, this was incorrect, as he had been forced to do so. 10

14. He was also confronted by the statement he had made immediately after his arrest, and this statement is dated 2 March 1999. However, the contents of this statement, according to him, was untrue.

15. He had forgotten to mention even in this statement that the accused had threatened to kill him.

16. The reason for him lying in this statement was because of the threats that the accused had made against him. 20

17. Inside prison he had been told that accused no. 3 would be released and would kill him if they discovered that he had told the police that they were involved in the rape and killing of the deceased.

18. In reply to questions from the Court he said that the reason for him testifying against the accused was that he wanted to be released from custody. The police had in fact told him that he would be released if he

testified/ ...

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testified.

19. He admitted that there was bad blood between himself and each of the accused.

20. The deceased had seen the three accused threatening him, however, she had not said anything to him when he was raping her. She had only asked him to intervene when she was being stabbed. He was unable to indicate whether he had seen anyone pulling up the trousers of the deceased after she had been raped.

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The other witness to testify was ANELE DAVASHR. He says he met accused no. 3 at the shebeen. When he arrived he saw that accused no. 3 was there with THEMBISILE THOMAS, the previous witness. The deceased had arrived afterwards and accused no. 3 had then met her at the door and spoken to her. He had heard no. 3 say that he was going to accompany the deceased. THEMBISILE had also said that he was going and he followed them a little while later. The following day THEMBISILE told him that accused no. 3 had killed the deceased.

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Cross-examination of this witness revealed the following:

1. He had not seen accused no. 1 that evening.
2. The following day THEMBISILE told him that he had taken the deceased to his shack and slept with her. Accused no. 3 had then arrived, kicked open the door, and was armed with a knife and had then taken the deceased away

with/ ...

with him.

3. THEMBISILE had informed him of this when they were at a flat of someone else. However, he the witness was not particularly interested in what THEMBISILE was saying.
4. He and THEMBISILE had been arrested and when they were questioned by the police THEMBISILE had at first said he had stabbed the deceased, but then later said that he had not. 10
5. THEMBISILE had also told the police that he had raped her, but was forced to do so. Since accused no. 3 had threatened to stab him.
6. When THEMBISILE told him of what had happened he had not asked him to convey this information to the police.
7. THEMBISILE had also at first denied to the police that he had raped the deceased but then admitted he had done so.
8. Later he said that THEMBISILE had told him of the rape and killing when they met at the shebeen the following 20 morning. His statement however indicated that their conversation had taken place the afternoon.

An evaluation of the evidence presented by the State establishes that THEMBISILE THOMAS was an accomplice to the rape and killing of the deceased, was by no means honest in his evidence in regard to his own role in the crimes. He was a most unsatisfactory witness, to put it mildly. It is so,

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as Mr Manjezi has said, that his demeanour in the witness box did not inspire confidence. It is so that whenever he experience difficulty in answering questions that he dropped the level of his voice to such an extent that it is by no means easy to hear his replies. On a number of occasions throughout his testimony and cross-examination the Court had to call upon him to raise the level of his voice. There was clearly nothing wrong with his voice, he was able to speak loudly when he became agitated and in my view his demeanour in regards to this aspect indicated a sign of not being honest in his replies. He virtually spoke above a whisper and on those occasions his replies were far from satisfactory in terms of the content of those replies. In a number of instances also he was also evasive with his replies, or provided answers which did not make sense at all. His evidence was riddled with contradictions, inconsistencies, improbabilities and downright lies. He contradicted both statements that he had made to the police and in addition contradicted his own evidence during his testimony. 10 20

Throughout his statement he, and I am talking about the statement that he made on 7 January 2000, he describes the collective conduct of the three accused and himself. When he was taxed on why there was no mention in either of the statements that he had made of the threat to kill him by the three accused, he evaded providing an answer. On numerous occasions/ ...

occasions counsel was called upon to repeat questions to him, not because he had not heard the questions, but purely because he was either not providing an answer to those questions or his reply was incomprehensible. In many instances he did everything he could except to provide a direct answer to a question. When he was asked by the Court for example how it was possible for him to sustain an erection in order to rape the deceased when he was threatened with his life, his only reply to this was that he 10 was forced to rape the deceased. In short he was not able to explain how he could be sexually aroused in those circumstances when his life was being threatened. Manifestly the only reason he was aroused was because he was a willing participant in raping the deceased and what he had disclosed in his statement was the truth that he and other individuals had raped the deceased.

He was also asked to explain why the deceased had called accused no. 3 PUMLANI, and as I have indicated his reply was 20 that she was drunk and that therefore she had made a mistake. He is clearly lying in this regard, since it appears from his statement of 7 January 2000 that the deceased had in fact said THULANI and there is no mention of the word PUMLANI.

As I have indicated previously he had a reason to testify against someone else and to implicate others in the commission/ ...

commission of these offences. He wanted to be released from custody. When he testified it was not a question of his conscience dictating that he should tell the truth. Quite the contrary, he persisted with lies and in fact tried to exculpate himself. On the version that he furnished to this Court he in fact was not an accomplice under the threat of death he had been forced to have intercourse with the deceased and had also not participated in the stabbing of the deceased. Even in this regard he was untruthful to 10 Court, if he had been threatened with death by the accused then if they had managed to compel him to rape the deceased it is extremely improbable that they would not have succeeded in getting him at least to inflict some stab wound on the deceased when she was being stabbed by the others. While he has said in his statement to the police that he did not participate in the killing of the deceased, this was manifestly an attempt on his part to distance himself from the murder and only accepting responsibility for the rape of the deceased. The improbability of his version is exposed 20 also by the fact that he says all three accused were armed with knives. Yet, when it came to stabbing the deceased he only speaks about a knife that accused no. 3 drew and that this knife, accused no. 3 handed to the other accused to stab the deceased. It seems quite improbable that this would have taken place since they had knives of their own and could easily have stabbed her and since they were acting in concert all three could have stabbed her virtually simultaneously/ ...

simultaneously. Moreover, if they truly wanted to implicate him then surely the accused would have seen to it that they implicated him in murder as well as the rape of the deceased. He is clearly lying when he says he did not stab the deceased.

The problem that arises as a result of the evidence of the accomplice is that if he is untruthful on so many aspects then the question arises whether he should be believed that it is the three accused who are his accomplices or not. They may very well have participated in these crimes, but the quality of his evidence and his demeanour in the witness box results in such doubts in the Court's mind that it would be dangerous in the extreme to rely on his evidence that the three accused are involved in the rape and murder of the deceased. The danger of accepting his evidence in the absence of any corroboration was recognised by the Appellate Division, as it then was, in the case of **S v HLAPEZULA AND OTHERS** 1965(4) SA 439 at 440D following:

"It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been/ ...

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been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description his only fiction being the substitution of the accused for the culprit. Accordingly, even where sec. 257 of the Code has been satisfied, there has grown up a cautionary rule of practice requiring (a) recognition by the trial Court of the foregoing dangers, and (b) the safeguard of some factor 10 reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him; see in particular **R v NCANANA**, 1948(4) SA 399 (AD) at pp 405-6; **R v GUMEDE**, 1949(3) SA 749 (AD) at 758; and **R v NQAMTWENI AND ANOTHER**, 1959(1) SA 894 (AD) at pp 897G-898D. Satisfaction of the cautionary rule 20 does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends on an appraisal of all the evidence and the degree of the safeguard aforementioned."

Now the State has presented the evidence of ANELE DAVASHE  
and/ ...



and this was intended hopefully to provide some kind of substantiation for the truthfulness of what had been said by THEMBISILE THOMAS or for corroboration in one way or another of the involvement of one or more of the accused in the commission of these offences. Regrettably he proved to be an equally unsatisfactory witness. It is clear from his evidence that much of what he conveyed to Court is in fact hearsay. But even those aspects of his evidence which may fall outside the hearsay rule, does not in fact implicate 10 the accused. On the contrary what it shows is that THEMBISILE THOMAS in fact admitted to him that he raped the deceased. There is reference to the fact that accused no. 3 removed the deceased from the shack of THEMBISILE THOMAS, but this evidence is clearly hearsay. In any event all that is shown is that she was removed against her will and that it may be the indication of a kidnapping on the part of accused no. 3, that that in any event is not a charge being preferred against accused no. 3. I want it to be clearly understood, however, that that evidence is clearly hearsay 20 and its probative value is virtually nil.

Moreover the evidence of ANELE DAVASHE contradicts the evidence of THEMBISILE THOMAS in many respects. He contradicts THEMBISILE in respect of the events at the shebeen, he also contradicts him in regard to the conversation they supposedly had in respect of the rape and killing of the deceased. THEMBISILE says he told ANELE to report/ ...

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report this to the police, ANELE says there was no such request on the part of THEMBISILE. The version of the rape provided by THEMBISILE in his evidence is manifestly different to that which he conveyed to ANELE. In addition the evidence of ANELE was of an extremely poor quality. Apart from him contradicting THEMBISILE he contradicted himself. The cross-examination also revealed numerous inconsistencies and improbabilities in his evidence. Ultimately his evidence weakened the State case even 10 further.

The quality of the evidence was such that quite correctly the defence saw no need to call any of the accused to testify in their defence. There is no onus on them to prove their innocence. It is for the State to prove their guilt beyond a reasonable doubt. They are fortunate that because of the poor quality of the evidence presented by the State that it did not call for a reply from them. It is extremely 20 unfortunate that the truth of the events of that night has not been conveyed to this Court. I have only heard the evidence of THEMBISILE THOMAS in regard to those events and accordingly he must shoulder the full blame for the truth not emerging in this Court. He resorted to lying and deception and whatever the consequences are of the quality of his evidence he will have to face that.

It must be clear from what I have said that the State has  
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failed to discharge the onus which rests upon it to prove the guilt of the accused beyond a reasonable doubt.

In the result the accused are found not guilty and discharged on both counts 1 and 2.

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Y EBRAHIM

JUDGE : BISHO HIGH COURT

25 MAY 2000