

**IN THE HIGH COURT OF SOUTH AFRICA
BISHO**

CASE NO. CC79/2006

In the matter between:

THE STATE

and

MBULELO GUNYA

1ST ACCUSED

NGENISILE SPARES GUNYA

2ND ACCUSED

BONGANI DAMESE

3RD ACCUSED

TANDO KHABANE

4TH ACCUSED

JUDGMENT

DHLODHLO ADJP:

1. Three accused persons are before a Judge sitting alone. They are accused No. 1 MBULELO GUNYA, Accused No. 2 NGENISILE SPARES GUNYA, Accused No. 4 THANDO KHABANE. The trial of Bongani Damese who was the third accused was separated.

2. The three accused are charged with one Count of rape. It is alleged that on 27 August 2005 at or near X. Area, Chalumna in the district of Mdantsane they, acting with a common purpose, did unlawfully and intentionally have sexual intercourse with M.S., a 20 – year – old female person without her consent.
3. The charge is accompanied by a warning in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 relating to minimum sentences, to the effect that the provisions of the section will be applicable if they are convicted, as the victim was raped by more than one person acting in the execution of furtherance of a common purpose or conspiracy.
4. The three accused pleaded not guilty to the charge. Accused one and two raised the defence of alibi. The fourth accused also raised the defence of alibi and added that he would deny that he had sexual intercourse with the complainant.
5. The evidence of the complainant M.S. is briefly as follows:
 - 5.1 She is 21 years old and lives at X. Area.
 - 5.2 She knows accused one and two. She knows the second accused as Spares. She does not know the fourth accused and had not seen him prior to August 2005.
 - 5.3 On 27 August 2005 in the evening she was with her sister L. and her friend Nontini who was accompanied by her own friend.

- 5.4 They consumed four quarts of beer. They stood outside the local community hall where a beauty contest was held.
- 5.5 M. said that she was not drunk.
- 5.6 She later realised that her sister L. and Nontini were no longer with her. She decided to go and look for them. She walked from the hall to the home they had been to earlier on that evening.
- 5.7 On her arrival at that house she noticed that its gates were locked. She called out L.'s name thinking that she was inside the house.
- 5.8 She realised that there were unknown people behind her. One of those people asked her who she was looking for. That person said that L. was not there. Those people suddenly dragged her to a certain house which was not far from the one they were in front of.
- 5.9 When they got to that house owned by the father of the second accused, lights were switched off and she was raped after they undressed her of her panty and jean.
- 5.10 One of those people called out the name of Spares. She said that there was one man on top of her. Others remained standing and laughing. She said that the men took turns in raping her. It was dark inside the room and she could not see her assailants. She did not know how many people were inside the room where she was

raped. She is unable to say how many people raped her. She would not deny that only one person raped her.

5.11 She did not consent to sexual intercourse with that man or those men. She tried to free herself but they closed the door. When she was screaming saying that they must let her go, one of them said that he was Mabhuti.

5.12 Her assailants did not hit her. She therefore sustained no physical injuries. She had had sexual intercourse with consent with a man before.

5.13 When the men finished doing what they were doing to her they opened the door of the room and she managed to run away. One of the assailants handed her her jean and panty.

5.14 She went to her home and found her grandmother present there. She was crying. Her grandmother asked her why she was crying. She did not tell her what had happened to her.

5.15 She went to make a report at the police station after which she accompanied the police to the house where she was allegedly sexually assaulted.

5.16 She later was taken to a hospital where she was examined by a medical doctor.

6. Under cross-examination she said that:

- 6.1 Before she was raped she did see accused one. She did not see the second accused at all on that day;
 - 6.2 In the house where she was raped she did not see her assailants;
 - 6.3 She told the police that she was not Bongani Damese's girlfriend.
7. O.M. is a boy of fifteen years of age. He told the court the following:
- 7.1 During August 2005 he was living at X. in Chalumna.
 - 7.2 He lived in a house where the first and the second accused lived.
 - 7.3 On the night in question he was sleeping in a room in which two girls namely Lindiwe and Zimkita were sleeping.
 - 7.4 He knew the complainant and the fourth accused Thando Khabane.
 - 7.5 On that night three men arrived at that house with the complainant. Those men were the first accused, Maribo and the fourth accused. The complainant was being dragged by Maribo into the room.
 - 7.6 The three men ordered him and the two girls to move out of the room in which they were sleeping. O. and the two girls moved out of that room and went to

another room in the house.

7.7 While they were inside that other room the second accused arrived and slept in the room in which they were.

7.8 O. did not see what was happening inside the room where the complainant and the three men were.

7.9 He later heard that the second accused (Spares) was being called into the room where the complainant and the three men were. The voice said that he (Spares) "must come and enjoy the party".

7.10 Spares went to the other room. O. did not know what was happening inside the other room. He did not hear the complainant scream.

7.11 The complainant and the men remained in the room until the following morning.

7.12 On the following morning O. saw accused one and four because they entered the room in which they were sleeping.

7.13 The complainant was drunk. She had been to a disco. The men were not drunk. O. said that, had M. screamed during the night, he would have heard her voice.

7.14 O. is related to the first accused. His grandfather is the father of accused number one.

- 7.15 He saw the fourth accused when the complainant was going home in the morning.
8. Dr Alex Ting examined the complainant on 28 August 2005. He found that her vagina was red and bruised. These suggested dry penetration. He took samples from the complainant and handed them to Inspector Sandile Tongo.
 9. Tongo received four kits from Nursing Sister Njilo which contained samples from the four accused. He handed these to Albert Sampi.
 10. Albert Sampi was an administrator at the Serious Violent Crimes Unit in East London until 10 July 2006. He made an affidavit – exhibit C. He checked the numbers of the kits referred to in the affidavit and found them to be correct. He forwarded the kits to the forensic laboratories.
 11. Nursing Sister Njilo in her affidavit states that on 17 November 2005 at 11h03 she drew blood from Mbulelo Gunya, Ngenisile Gunya, Bongani Damesi and Thando Khabane and sealed the kits and handed them to police Inspector Tongo.
 12. According to the DNA analysis report exhibit D the second accused Ngenisile Spares Gunya is positively linked to the specimens taken from the complainant.
 - 12.1 The first accused denied that he had sexual intercourse with the complainant against her will. He said that on Friday 26 August 2005 he and his wife went to his wife's

home and returned on Sunday morning on 28 August 2005.

12.2 On his return to his home he found his bed in disorder and the room was dirty. He said that what O. told the court was not true.

12.3 He said that his wife did not tell the police that he was away from home on 27 August 2005.

12.4 He told his Counsel on the previous day that his wife and he had gone to his in-laws on 26 August 2005.

13. Nosiphelele Nomawetu Jikiti said that she is the wife of the first accused. Her evidence was briefly as follows.

13.1 She resides at Nyosi in Kiddsbeach near East London.

13.2 On 27 August 2005 she and her husband (accused number one) were at her parental home at Nyosi.

13.3 The first accused returned to his home on the morning of Sunday 28 August 2005.

14. Under cross examination, Jikiti said that:

14.1 She could not remember what she was doing on 01 August 2005.

14.2 She did not go to the police to tell them that her husband was at her parental home on 27 August 2005 because she was at work.

15. Under re-examination by the Court, Jikiti said that she did not remember other dates when she and her husband went to her parental home.
- 16.1 The second accused Ngenisile spares Gunya testified and said that he lives at X..
- 16.2 During the night of 27 August 2005 he was drunk and was sleeping at his home.
- 16.3 He said that Zimkita and Lindiwe arrived at night and slept with him. He slept until the following morning.
- 16.4 He said that he did not know at what time he woke up during the course of the night and that he was wearing his clothes on that night.
- 16.5 He said that he knows O.M. and that he is related to him.
- 16.6 He did not see the complainant arrive at his home. He said that he was never called "to enjoy the feast".
- 16.7 He admitted that blood was drawn from him. He has been told that DNA results link him to the commission of the crime. He said that he does not know how this happened because he did not sleep with the complainant.
- 16.8 He said that he had taken liquor beer, wine and brandy. He was able to walk home. He remembers when Lindiwe and Zimkita arrived

- 17.1 The fourth accused Thando Khabane said that during August 2005 he was resident at X. in Chalumna.
- 17.2 He further said that on 27 August 2005 there was a function at the community hall and that he went to the function.
- 17.3 He said that he returned home after 24h00.
- 17.4 He denied that he visited the home of his co-accused. He said that he first saw the first accused after they had been arrested and that he sees the second accused Spares when he goes to school.
- 17.5 He said that he did not rape the complainant.
18. There is no doubt that the complainant was drunk and that she was raped on the night in question. She was unable to identify her assailants.
- 19.1 O.M. is the only person who allegedly saw the three men who arrived with the complainant and got into the room in which he, Lindiwe and Zimkita were on that night.
- 19.2 He heard a voice calling Spares (accused number two) to join "the party".
- 19.3 That the second accused did join "the party" is confirmed by the DNA results.
- 19.4 O. is related to the first and the second accused and he was living with them at the time of the incident.

- 19.5 No suggestion has been made that there was bad blood between him and the first and the second accused at that time.
- 19.6 He re-iterated that he did not know what happened in the room in which the complainant and the men were during the night in question.
- 19.7 Concerning the fourth accused, O. said that he saw him at the house on the following morning and he does not associate him with the sexual assault.
- 20.1 The defence of the first accused is an alibi. He and his wife Nosiphile Nomawethu said that on the night in question they were at her parental home near Kidd's beach.
- 20.2 They however do not remember other dates when they both visited her parental home.
- 20.3 The question is: Why did they remember the date of this visit and not other dates? They do not say that there was a special occasion at her home during that weekend.
21. The Court gained the impression that O. is an intelligent young man. He is a single eye witness in as far as the dragging of the complainant, the calling of Spares "to join the party", the presence of three men are concerned and the order that they move to the other room. He said that the first accused told him and the two girls to go to the other room.
22. The Court gains the impression that O. is a satisfactory and credible witness. There is no reason to doubt his testimony.

23. The versions of the first and the second accused are not reasonably possibly true. They are, beyond reasonable doubt, false. The Court rejects them.
24. Whether or not the fourth accused was at the house in question during the morning of the following day is neither here nor there. His mere presence there would not suggest that he was involved in any criminal activity there.
25. There is no evidence that the first accused had sexual intercourse with the complainant. There is evidence that he was one of the three men who arrived at the house with the complainant on that night. He ordered O., Lindiwe and Zimkita to move out of the room on that night. They left the room and moved to another room. Later the second accused was called into the room where the complainant was "to enjoy the party". The first accused unlawfully and intentionally furthered the crime of rape which was committed by another or other persons.
- 26.1 The Court finds the second accused Ngenisile Spares Gunya guilty of rape.
- 26.2 The first accused Mbulelo Gunya is not guilty of rape but is guilty as an accomplice to rape.
- 26.3 The fourth accused Thando Khabane is found not guilty of rape or of a lesser offence.
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**A E B DHLODHLO
ACTING DEPUTY JUDGE PRESIDENT
27 NOVEMBER 2006**

HEARD ON: 07, 13, 14, 15, 20 NOVEMBER 2006

FOR THE STATE: MR J G KRISTAFOR

FOR THE 1ST AND 2ND ACCUSED: MR C Z MBANJWA

FOR THE 4TH ACCUSED: MR V MAGQABI