

**IN THE HIGH COURT OF SOUTH AFRICA**

**BISHO**

**CASE NO. CC60/2006**

In the matter between:

**THE STATE**

**and**

**BULELANI PAWO**

**1<sup>ST</sup> ACCUSED**

**SAZI NTONTANA**

**2<sup>ND</sup> ACCUSED**

**A.M.**

**3<sup>RD</sup> ACCUSED**

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**JUDGMENT**

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**DHLODHLO ADJP:**

1. The two accused, namely accused two and three aged 21 and 20 respectively, are before a Judge sitting alone. The first accused Bulelani Pawo is not before this Court. They are charged with one count of rape, it being alleged that on or about the 9<sup>th</sup> day of July 2005 at or near M... Village in

the magisterial district of Peddie they unlawfully and intentionally had sexual intercourse with N.N., an adult female person, without her consent.

2. The charge is accompanied by a warning to the effect that, if they are convicted as charged, the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997, relating to minimum sentences, will be applicable, as the offence was committed by more than one person where such persons acted in the execution or furtherance of a common purpose or conspiracy and the offence involved the infliction of grievous bodily harm.
3. Both accused pleaded not guilty, each electing not to disclose the basis of his defence. The second accused said that he would disclose the basis of his defence during the trial.
4. The complainant who is 43 years old resides at Mankone area in the magisterial district of Peddie. Her evidence is briefly as follows:
  - 4.1 She knows the two accused before Court and Bulelani Pawo very well. All three live at Mankone.

- 4.2 She remembers 09 July 2005 in connection with this case.
- 4.3 She was from buying cigarettes at about 18h00. Because it was winter time it was getting dark.
- 4.4 On her return from buying cigarettes she met the two accused and Pawo.
- 4.5 The second accused and Pawo grabbed hold of her, closed her mouth and dragged her to bushes where each of them had sexual intercourse with her after the second accused had caused her to fall.
- 4.6 Accused No. 3 did not grab her but merely walked behind them.
- 4.7 The second accused was first to have sexual intercourse with her and Pawo was next. The second accused said that she should be killed.
- 4.8 The third accused did not do anything to her at that stage, but after the two had had sexual intercourse with her against her will, he (the third accused) took her to

his home which is not far from where they were.

4.9 When she and the third accused arrived at his home they entered a rondavel, he lit the rondavel, applied Vaseline to his penis and had sexual intercourse with her against her will.

4.10 As the third accused was having sexual intercourse with her someone knocked on the door from outside and said: **"Open up A.."**

4.11 The third accused opened the door and Zipho Gxasheka, also known as Jiza entered the rondavel.

4.12 She remembered Gxasheka asking: **"A., what is Sis Nothembile doing here at this time?"** The complainant is also known as Nothembile.

4.13 Gxasheka said to her: **"Get up Sis Nothembile, I will take you home."**

4.14 She was exhausted because **"... these children slept with me a lot. My mind was not working properly."** She added that she was powerless. The Court observed that she is

of slender build.

- 4.15 Gxasheka and another young man accompanied her and walked towards her home.
- 4.16 On their way towards her home stones were thrown in their direction by unknown persons. She ran away to a certain house where she found people.
- 4.17 She told Gxasheka and another young man that the two accused and Pawo had slept with her.
- 4.18 She takes liquor. On the day in question (Saturday) she had taken liquor but she knew what was happening. She had taken traditional beer and brandy at a certain traditional ceremony.
- 4.19 She reported the alleged rape incidents to the police who advised her not to take a bath.
- 4.20 No medical doctor was available to examine her on that day. She was examined by Dr A K Mugerwa on 20 July 2005.

4.21 The two accused and Pawo had consumed liquor. They were drunk but not to such an extent that they did not know what they were doing.

5.1 Under cross-examination, the complainant re-iterated that the two accused and Pawo had sexual intercourse with her without her consent.

5.2 She said that she reported to her husband that the third accused dragged her to his home after the second accused and Pawo had raped her.

5.3 She told the police officer who obtained his statement that the third accused raped her in his rondavel. She denied that she told the police officer that the third accused also raped her in the bushes. Her statement was not read back to her. She went to school up to standard five.

5.4 When the two accused had sexual intercourse with her she could not scream because they closed her mouth. Moreover she had lost her voice because when they were working at the traditional ceremony they were singing.

5.5 She said that her panty was left in the bushes where she was raped and that her apron was left at the third accused's place.

6. Zipho Gxasheka lives at Mankone. His evidence is briefly as follows.

6.1 On 09 July 2005 he was with one Mpumezi. They went to the homestead of Sithunda where a traditional ceremony was held.

6.2 They found the second accused and Gxasheka asked him to offer him some tobacco. The second accused said that he did not have any. The time was about 19h30 – 20h00.

6.3 Gxasheka, Mpumezi, accused No. 2 and two young men proceeded to the home of the third accused to ask for tobacco from him.

6.4 On their arrival at the home of the third accused Gxasheka observed that it was dark inside the rondavel. He heard that someone was talking to the third accused

and he asked him who it was who was talking to him. The third accused said that it was Sis Nothembile (the complainant) who was sleeping on the other bed.

6.5 The complainant held Gxasheka when he was about to sit on the bed she was sleeping on.

6.6 He asked the third accused why he had not accompanied the complainant to her home because he (the third accused) was the only male person who slept in that house. Gxasheka said that members of the community would take it otherwise (would question how the third accused, being a male person, would sleep in that rondavel with the complainant who was a married female person).

6.7 Gxasheka offered to accompany the complainant to her home. He walked away with the complainant and Mpumezi.

6.8 Gxasheka told the complainant that he had earlier met her husband known as Mzalazala who walked in the direction of the house where a traditional ceremony was held.



6.9 The complainant then told them that she had been raped by accused No. 2 and Pawo in the presence of the third accused in the bushes. She said that one of the two rapists suggested that she be killed and that the third accused stopped them from doing so.

6.10 While the complainant was narrating her ordeal to Gxasheka and others some stones dropped in front of them and others behind them. The complainant ran away.

6.11 Shortly after the complainant had run away accused two and accused three appeared.

6.12 The complainant did not tell Gxasheka what happened at the third accused's place.

6.13 Gxasheka had taken liquor during the day but was not drunk.

6.14 The complainant was drunk and staggering but she talked sense.

7. Under cross-examination, Gxasheka said, among others, that:

7.1 Before he entered the rondavel in which the complainant and the third accused were, the two were talking softly. He however did not hear what they were taking about.

7.2 The complainant was wearing clothes.

6.1 On the following day the complainant told Gxasheka that the third accused raped her at his home.

9. The second accused denied that he raped the complainant.  
His evidence is briefly as follows:

9.1 On 09 July 2005 he was at the Sithunda home where a traditional ceremony was held. He arrived there at about 12h00.

9.2 He drank liquor there, did not become drunk but became slightly under the influence of liquor.

9.3 Gxasheka arrived at Sithunda's place on the day in question and asked for tobacco from him.

9.4 Later he, Gxasheka and Mpumezi proceeded to the

home of the third accused.

9.5 What happened when they arrived at the third accused's home is, to a certain extent, what was said by Gxasheka.

10. Under cross-examination, the second accused said that:

10.1 His relationship with the third accused revolves around sport they play together, otherwise he is not his close friend.

10.2 He told his counsel that:

10.2.1 he accompanied the complainant when she was on her way home from the third accused's home.

10.3 The third accused was walking all by himself.

10.4 After accompanying the complainant to her home he went to Nomist's tavern. He cannot recall whether he went there alone and also cannot remember whether Gxasheka and others accompanied him.

- 10.5        Asked why he could not remember, her faced down for a long time and did not answer the question.
- 10.6        Asked whether or not he knew of a reason why the complainant could falsely implicate him, he said that at some stage during 2004 he went to her house to identify goods which had been stolen from a school and sold to her, and that thereafter the complainant could not greet him when he greeted her.
- 10.7        He said that he thought that the complainant could frame him for this reason.
- 10.8        He however did not tell his Counsel about this incident. He said that he did not consider the incident related to this case.
- 10.9        He further said that he did not tell his counsel about the goods stolen from a school **“because I am not aware that when a witness is testifying he may communicate with Counsel”**

10.10 He was reminded that, before his Counsel cross-examined the complainant, he went to him to take instructions. His response was that he thought that he would mention it when he would be testifying.

10.11 Asked why he had not mentioned this fact when he testified, he responded: "I mentioned it because I was asked."

11. He was reminded several times that he should speak audibly because the Court could not hear what he was saying.

12. Jongilizwe Komsana is a police-officer in the South African Police Service. His evidence is briefly as follows:

12.1 He obtained a statement from the complainant and reduced it to writing.

12.2 He read the statement back to the complainant who said that she had been raped by a number of men at separate places.

12.3 The complainant said that at the first place (at the bushes) she was raped by three men and that later in a certain house she was raped by one man.

12.4 The statement was read back to the complainant who confirmed it and that he had signed it.

13. Under cross-examination, Komsana said that his home language is isiXhosa and that English is his second language. He admitted that he summarised the complainant's statement.

14. The complainant said that she did not say to Komsana that three men raped her at the bushes and that she signed the statement although it was not read back to her.

15. The third accused's testimony is briefly the following:

15.1 He met the complainant at Nomist's tavern on the night in question.

15.2 He bought two quarts of beer. When he left the tavern the complainant said that she would accompany him

because she was interested in the beers.

15.3 He later bought a third quart of beer.

15.4 Phumlani Mdyogolo served him when he bought the quarts of beer at the tavern.

15.5 He did not deny that the complainant was inside his rondavel when Gxasheka came there on that night.

15.6 He, however, denied that he raped her.

16. Phumlani Mdyogolo said that he knows accused 2 and accused 3 very well. He said that during July 2005 he was in Mdantsane and denied that the third accused bought beer from him. He said that his mother normally serves patrons there and that he serves them on rare occasions. Had he served the third accused he would have remembered because he knows him very well.

17. Dr A K Mugerwa examined the complainant on 20 July 2005. Dr Mugerwa observed that the complainant was of small build and weighed 45 kilogrammes. There were healing abrasions over the right lumbar area and on the

inner right thigh. The complainant still felt pain on multiple soft tissue all over the body allegedly caused by a blunt object, namely kicks and fists. No injuries to the genitalia could be detected as the alleged rape had occurred on 09 July 2005.

18. The complainant is a single witness in as far as the rape is concerned.
19. I found her to be very consistent and she knew the two accused before Court and Pawo very well.
20. She had consumed liquor but knew what was happening.
21. Mr Dukada who represents the third accused criticised her evidence in that to police officer Komsana she said that three men raped her in the bushes but in her testimony she said that they were two.
22. She said that her statement was not read back to her. Komsana said that he summarised what she said when he reduced it to writing and that English is his second language.



23. The possibility that Komsana made a mistake cannot be ruled out.
24. What the complainant reported to Gxasheka concerning the alleged rape is what she told the Court.
25. The second accused's allegation that the complainant framed him because he identified goods stolen from a school at her house, cannot be believed. As Mr Jonas who appears for the State said, if such an incident had taken place he would have told his Counsel.
26. Both accused two and accused three were not good witnesses. This fact was conceded by their Counsel.
27. I do not believe that the third accused bought three quarts of beer at Nomist's tavern and that Phumlani Mdyogolo served him.
28. The second accused did not answer some questions by Counsel for the State. He did not face the Court on several occasions. He was reminded that he had to speak up. His demeanour in the witness box does not suggest that he was telling the truth.

29. No injuries could be detected from the complainant's genitalia probably because she was medically examined a number of days after the alleged rape incident.
30. Concerning the third accused, the evidence of Gxasheka does not suggest that the complainant was raped by the third accused in the rondavel. According to Gxasheka who, the Court found to be a satisfactory witness, the third accused and the complainant were sleeping on different beds and were conversing softly inside the rondavel when he arrived there.
31. The complainant did not report to Gxasheka at the first available opportunity that she had been raped by the third accused.
32. The complainant was found sleeping in the rondavel of the third accused at night. Surely her husband could not have understood why she did this.
33. It is possible that she made the rape allegation against the third accused in order to have a reason for her presence in the rondavel at night with the third accused.

34. The third accused's version concerning buying liquor at Nomist's tavern is probably to protect the second accused and Pawo. I do not believe it.
35. Having considered all the evidence I am of the view that the version of the second accused is not reasonably possibly true.
36. It is reasonably possibly true that the third accused merely offered the complainant accommodation and that he did not rape her.
37. The guilt of the third accused A.M. has not been proved beyond reasonable doubt.
38. In my view the guilt of the second accused has been proved beyond reasonable doubt.
39. Accordingly the Court's verdict is as follows:
- 39.1 The third accused A.M. is found not guilty of rape or a lesser offence.

39.2 The second accused Sazi Ntongana is found guilty as charged.

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**A E B DHLODHLO  
ACTING DEPUTY JUDGE PRESIDENT**

**06 SEPTEMBER 2006**

**HEARD ON: 07, 14,15,16 AUGUST 2006**

**FOR THE STATE: MR X JONAS**

**FOR THE 2<sup>ND</sup> ACCUSED: MR L R NDUNYANA**

**FOR THE 3<sup>RD</sup> ACCUSED: MR P DUKADA**