

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO: CC 57/2013

In the matter between:

THE STATE

vs

SONWABO NGCETE	Accused 1
KHUSELO MANTA	Accused 2
SIYAMTHANDA NDIZA	Accused 3
SIYABONGA MHLANGA	Accused 4

JUDGMENT

MAKAULA AJ:

[1] The four accused are charged with count 1 - Robbery; Accused 1 and 2 further face a charge of rape and accused 3 and 4 attempted rape.

[2] The state alleges that these offences were committed on or about 29 January 2012 at or near **Nosidima Street, Kwandokwenza, KwaZakhele**. At the time of the commission of the offences all the accused acted in common purpose, so contends the state.

[3] The complainant in respect of all these offences is **N[...] M[...]** who is an adult female. She testified that she has been a lesbian for the rest of her life. She never at any stage had a love relationship with a man. On 28 January 2012 she went to enjoy herself with her friends at **Graham Tavern**. She arrived at about 22h00 and remained there until the small hours of 29 January 2012 after which she ran to her home. She had consumed liquor but was not too drunk hence she was able to run. As she was still running, she noticed few young men approaching her from the front. She reduced her pace and eventually stopped when she met them. One stood in front of her and the other three stood behind her. She heard one of those behind saying *“Ek se Yasto mfowethu yeka lomtana iibras zakhe sinamasimba”* meaning *“Ek se Yasto leave this child alone because her bothers are full of shit.”*

[4] The one in front of her responded by saying *“Msiyana mfowethu andizokumyeka ndizakubona uba mandithini ngalo mntana”* literally meaning *“Msiyana my brother I am not going to leave her I shall see what to do with this girl.”* He further stated that he shall deal with the brothers later. She

became agitated on hearing them discussing about her brothers and pushed the one who was in front of her out of her way and ran. They chased and caught up with her. In fact as she was running, she looked back and saw one of them carrying a stone with which he hit her. She fell and lost consciousness. She did not know what happened thereafter. She only came back to her senses after about 3 weeks while at her home.

[5] She testified that it was dark where the incident took place. She could not identify her assailants. I need to mention at this stage that I do not believe her when she later said she recognised accused 3 as they were approaching her. I say so because in her evidence in chief she testified that she could not identify her assailants because it was dark. However, under cross examination she changed to say she saw accused 3 as they were still approaching her and confirmed it was him when his name **Siya** was called out by the person in front of her. She further disputed that she had a love relationship with accused 2 and had consensual sex with him in the early evening of 28 January 2012.

[6] The state called the evidence of two witnesses who, according to them, were walked side by side with the accused from Graham tavern to where the incident occurred i.e. **Ludwe Beya** (*Ludwe*) and **Thabizolo Nodada** (*Nodada*). Their evidence is almost identical but for some insignificant differences.

[7] **Ludwe** and **Nodada** testified that they were coming from **Graham Tavern** at about 1am on 29 January 2012 having arrived there in the evening of 28 January 2012. They were going to their respective homes which are neighbouring each other. As they came out of the tavern, they met with the accused persons who were proceeding to the same direction as them. As they were afraid to be robbed, they decided to walk along with the accused presuming that they would not be robbed as the accused were known to be **Tsotsis** in the area. They walked about 2 paces behind them. They did not chat nor talk to the accused. As they were walking whilst at **Nosidima Street**, a person approached from behind. The accused stopped. The accused turned and approached that person. On getting to her, they grabbed and started to assault her. She broke loose and ran towards them. The accused again caught up with her, tripped her and repeatedly kicked her while she was lying on the ground. They all kicked her all over the body and face.

[8] Accused 1 uttered words to the effect that they will “*show this tomboy*” meaning a lesbian or a girl who pretends or behaves like a man. Accused 1 and 2 had an argument as to who shall have sex with her first. Accused 2 took off complainant’s trousers and accused 1 having taken off his trousers got on top of her and performed sexual movements. He did that (*according to Ludwe*) for a period of 15-16 minutes after which accused 2 took his turn. Accused 2 lay on top of the complainant. Both **Ludwe** and **Nodada** could not make out what he was doing on top of her. He remained on top of her for a period of about 7 minutes. He got up after a certain lady, who turned out to be **Pumla Bel** (*Pumla*), opened a window from a nearby house and called out.

At the time, according to **Ludwe**, accused 3 had his pants below his knees and accused 4 was holding complainant's pants and takkies. On hearing Pumla, the accused ran away leaving the complainant lying on the street. **Pumla** called **Ludwe** and **Nodada** and enquired who that person was. They approached the complainant and asked in vain who she was. At that juncture the complainant was crying. They told Pumla that they did not know her and they thereafter left for their respective homes.

[9] Both witnesses testified that they knew complainant from their area as a girl who behaved like a man (*calling her tomboy*). They were able to recognise her when she was caught up by the accused on the second occasion.

[10] They managed to see and identify the accused because they walked next to them for a considerable period. At the time the accused were walking 2-3 paces in front or at times next to them as alluded to. They knew accused 1, 3 and 4 well as they lived in the same area. They also knew accused 2 from the area as well though not as much as they knew accused 1, 3 and 4 very well. They testified that there were no street lights at the spot. It was dark though the weather was clear. They could see about 10 metres away. They were able to identify accused under those conditions because they were close to them (*2 to 3 metres as indicated by Ludwe*) and the complainant. They could even see that the complainant sustained injuries including swollen eyes (*the picture of the complainant i.e. Exhibit A confirms that the eyes of the complainant were swollen*).

[11] Both testified further that they had consumed liquor but insisted that they were not drunk because they knew what was happening around them. They said they were shocked, stressed and frightened about what they saw happening. They insisted further that even though they were under those circumstances they were not making a mistake they were able to identify all the accused persons and the roles they played in the commission of all the offences. **Nodada** estimated the time taken by the accused assaulting and raping the complainant to have been \pm 45 minutes having walked with them for about 10-15 minutes.

[12] Both conceded that they could have missed some of the things that took place because of the effects of alcohol but they were certain about these things which they saw happening and testified about because the incident took place about 2-3 paces from them and were able to see in a distance of about 10 metres as stated above. They further ascribed their non-recollection of what the accused were wearing due to the fact that the incident occurred 3 years ago.

[13] They testified further that they did not report the matter to the police or anyone for that matter because they were still shocked and were afraid of the accused. They were both taken from their homes the following morning i.e. Monday by the police and questioned about the incident. They told the police what had happened and confirmed to them that the accused were the perpetrators of the offence. They, however, denied that they were the people

who pointed and gave out information to the police about the involvement of the accused. When the police approached them, they had already arrested some of the accused. I should mention at this stage that this aspect of their evidence was denied by **Constable Anele Mrhamba** (*Mrhamba*) who stated that they got to arrest the accused because of being led to them by the two state witnesses and the complainant's brother.

[14] Both witnesses denied that they belonged to rival **Amakhosi** groups and were falsely implicating the accused. **Nodada** testified that he grew up with accused 3 and admitted that at some stage he was assaulted by accused 3 but denied it was as a result of that that he was implicating accused 3. This aspect of a quarrel was confirmed by accused 3 when he testified. Accused 3 even stated that the matter was resolved amicably thereafter. He would not falsely implicate him for that and did not bear a grudge against accused 3 as a consequence of the quarrel they had more especially that that occurred a long time before the incident.

[15] **Pumla** lives at a corner house in front of which this incident took place in **Nosidima Street**. She was alerted to a noise outside in front of her house and heard a person saying "*don't cry*". She opened her window and checked what was happening. She saw 5 young men and a person lying on the ground. The young men were busy trampling on the person lying on the ground. One was busy taking off his/her shoes. The young men ran away. She noticed that they were now 6. Immediately thereafter two young men appeared and she enquired from them who that person was. They

approached him/her and said they did not know her. They left and she closed her window. After sometime, she again looked through her window and saw a young man who was wearing a white trouser dragging away that person towards the dumping place. Through the white trouser she was able to deduce that that person was amongst the 6 young men who ran away.

[16] The complainant was found at about 6am on 29 January 2012 by **Siphokazi Tshawula** at an open veld in a dumping area. She could not talk, had a swollen face and was naked on her lower body.

[17] The investigating officer **Riaan Krouse** testified that he obtained warning statements from the accused. None was legally represented at that stage. None of the accused complained of injuries except accused 3 who alleged to have shoulder and back pains which were as a result of assault on him. He did not say who had assaulted him. He was recalled by accused 3 to confirm that he read the statement back to complainant who confirmed it to be true and signed it under oath. The complainant's statement was handed up as exhibit.

[18] **Mrhamba** testified that he got information from complainant's brother about the commission of these offences. He went to **Ludwe** and **Nodada** who led him to arrest the accused. He found and arrested accused 1, 3 and 4 in the streets of the township. Accused 3 on seeing the police ran away and he arrested him at his home.

[19] They took the accused to the charge office. At a certain secluded spot which was next to the road, they stopped the motor vehicle, interrogated the accused one at a time enquiring about the items that were taken from the complainant. He denied that the accused were tortured in the manner described. After they were questioned, they proceeded to the police station where they charged them. He insisted that the people who led them to the accused are **Ludwe**, **Nodada** and complainant's brother in contrast to what **Ludwe** and **Nodada** said.

[20] Accused 1 testified that on 28 January 2012 he went to **Graham's Tavern** between 10pm and 11pm to enjoy himself. He was in the company of **Thulani Nkosana**. He left at about 3am on 20 January 2012 with **Thulani** and proceeded to his home in **Kwa-Ndokwenza**. He denied having met **Ludwe** and **Nodada** that evening. He knows both of them as they stay in the same area. He did not know the complainant. He only saw her for the first time in court. He denied the allegations against him.

[21] He testified that **Ludwe** and **Nodada** belonged to a rival **Amakhosi** group which normally clashed with his over superiority. He further knew his co-accused well as they stay in the same area.

[22] Accused 2 testified that he had a secret love relationship with the complainant. It was kept a secret at the behest of the complainant because she was known to be a lesbian and did not want people to know that she was bisexual. He never exchanged phone numbers with the complainant and

therefore they always met after 5pm either in the street, next to her home or next to **KwaZakhele** by chance. They never had formal appointments.

[23] On 28 January 2012 he went with the complainant between 6pm to 7pm. They went to his home and had sex. Thereafter complainant left because she was in a hurry to meet up with her friends. He remained at his home watching TV until the following morning. He was arrested outside his home the following day. He was cutting grass at his house. He was taken to **Nkamponi** by the police who assaulted him. He was detained thereafter. He therefore testified that the **DNA** results linked him because he had consensual sexual intercourse with the complainant.

[24] Accused 2 did not know **Ludwe** and **Nodada** but he is surprised why they implicated him more especially that he was never at the scene of crime nor with accused 1, 3 and 4 when the complainant was allegedly raped.

[25] Accused 3 testified that on the day in question he met Unathi and his girlfriend at **Tshawe's** tavern. They remained at the tavern until 11pm when he went to his home. At his place he found his brother present. They share the same room and bed. They slept until the following day. He was arrested while walking in the street by the police.

[26] He testified that he knew accused 1 and 4 from his area. He did not know accused 2. He denied that they were together when the incident occurred. He did not rape nor rob the complainant.

[27] **Unathi Mbula** confirmed the evidence of accused 3 insofar as he was together with him at the tavern until 23h00 on the evening of the incident. However, they parted ways at that time. The evidence of **Unathi** does not take the matter further because they were not together at the time the incident took place.

[28] Accused 4's evidence was relatively short in that on the evening in question he left Graham's tavern at 1H30am and went to his home to sleep. He was not part of the group that robbed and raped the complainant. He knew accused 1 by sight and accused 3 since 2008. He did not know accused 2.

[29] **Mr Skepe**, on behalf of accused 1 argued that the state failed to prove his identification conclusively relying heavily on the decision of **S v Mthethwa 1972 (3) SA at page 766**. If I understood his argument well, he submits that it was improbable that **Ludwe** and **Nodada** would seek protection from the accused by walking closely to them for such a considerable period of time. I shall deal with the rest of his argument *infra*.

[30] **Mr Crompton** correctly in my view submitted that he could not argue that accused 2 was a good witness and correctly concluded that he may be convicted of rape. He argued that accused 2 should be acquitted of robbery because it was clear that the removal of items was for purposes of raping the complainant.

[31] **Ms Jansen Van Vuuren** for accused 3 argued that in the event of a conviction, accused 3 could only be convicted of **assault GBH**.

[32] **Mr Schoonraad** on behalf of accused 4 argued in a nutshell that the evidence of **Ludwe** and **Nodada** should be put on the same footing as that of accomplice witnesses. He based his argument on the fact that both had inside knowledge of the crime and could easily have substituted the real culprits including themselves for the accused. He compared that with the fact that even though they knew about the offences they did not breathe that to any soul even their own parents.

[33] He further argued that the merits of the matter do not support a conviction in respect of these offences.

[34] It is common cause that the complainant was raped and she lost the items mentioned in the indictment in the process. She further does not know who perpetrated these offences against her.

[35] The witnesses who threw light as to who committed these offences are **Ludwe** and **Nodada** (*the two state witnesses*). They both testified that they knew all the accused well but for accused 2. The same applies with accused 1, 3 and 4 who confirm that they know the two state witnesses. On the evening in question the two state witnesses testified that they walked side by side (*about 2 paces*) with the accused for a considerable distance. Though it was dark they could see and recognise or identify a person who was 10

metres away. That evidence has not been gainsaid. It was confirmed by the evidence of **Mrs Bel** who could see what was happening in the street while standing at a window inside her house. She could see that there were five people who had been assaulting a person lying on the street. She could see that when they ran away they were now six and one of them was wearing a white trouser.

[36] It is not in dispute that the visibility was good that evening though it was at night, it was not raining or misty. As alluded to, the accused and the two witnesses know each other well but for accused 2. It is therefore abundantly clear that the likelihood of a mistaken identity is minimal if not there at all. I am unable to find that the two witnesses were unable to observe the identity of the accused under such circumstances and conditions. They gave a straight forward account of how they identified the accused. The evidence of the two witnesses finds corroboration from the complainant. The complainant saw four men approaching her. The two witnesses testified that the 4 accused approached the complainant and grabbed her. Both two state witnesses testified that the complainant broke loose and ran towards them. The complainant confirms this aspect of the evidence.

[37] The two witnesses' account of events is further corroborated by **Mrs Bel**. She saw people assaulting a person who was lying down. They all ran away when she shouted from her window. Thereafter she saw two young men who she asked as to the identity of the person lying on the street. Those

young men responded by saying they do not know her. This version is identical to that of the two witnesses.

[38] The evidence of the two witnesses is further corroborated by the medical report which reflects that the complainant sustained serious injuries to her face resulting to swollen eyes. **Mr Schoonraad** takes issue with the fact that the complainant did not sustain injuries to her body. That to me cannot be ascribed to the two witnesses being unable to see or identify the accused. It is clear at the time that the scene was mobile because they all were kicking her while lying down. That she did not sustain injuries cannot be attributed to the fact that the two witnesses were lying and should not be believed. It is the evidence of the two witnesses, which to me indicates that they are not biased and want to falsely implicate the accused, that there are things which they could not recall due to lapse of time or did not see because the accused had surrounded the complainant.

[39] The other interesting feature in this case is that accused 2 and the two witnesses are not known to each other. The relationship between the complainant and accused 2, according to the latter, was a secret and was not known by people. It was kept a closed secret. I shall ask a rhetorical question if at all it is, how did it occur that the two witnesses' identity accused 2 who was a stranger to them and it turned out that he had sex with the complainant the previous day according to him? It is too good to be a coincidence. The fact that accused is linked by the **DNA** strengthens the evidence of the two witnesses that he was at the scene of crime and did not

make a mistake about the identity of accused 2 and accused 1, 3 and 4 for that matter who were unlike accused 2 well known to them.

[40] The accused's defence in a nutshell is an alibi. However, I do not accept it for the reasons adumbrated above. The evidence of the two witnesses cannot be faulted. There were no material contradictions between them. There is no difference, if there is at all, is accepted because they cannot testify in identical terms about what they observed.

[41] **Mr Schoonraad's** submission that the evidence of the two witnesses should be treated with caution because they are no different to accomplices is with respect, without basis. There were never suspects in this matter. They are witnesses whose evidence in part was corroborated by the complainant, **Mrs Bel** and the **DNA** results in respect of accused 2. I have no reason to reject their evidence.

[42] There is no proof that the accused robbed the complainant. The evidence does not support that. All the evidence establishes is that the complainant was stripped of her shoes/takkies, jeans and panties. That surely was followed by accused 1 lying on top of complainant and performing sexual acts. At the time the items were with accused 4. It therefore, cannot be said she was robbed or force was used in order to cause her to succumb to the taking of the items.

[43] The evidence further establishes that the complainant was kicked first while on the ground, followed by the sexual acts by accused 1 and 2 who lay on top of her. While accused 4 was in possession of the items, **Mrs Bel** called out and they ran away. The only assumption therefore is that they were taken by accused 4 with the intention of depriving the complainant permanently. I see no reason why he held on to the items during the ordeal complainant was going through instead of putting them on the ground. Furthermore, these items were never recovered.

[44] It is undoubtedly so, that the complainant was raped after accused 1 said they shall show this **Tomboy**. Having uttered those words complainant was assaulted, stripped of her pants and panties, accused 1 took off his pants, lay on the complainant performing sexual acts for 15-20 minutes thereafter accused 2 did likewise. However, there is no evidence that accused 3 and 4 were at any stage on top of the complainant.

[45] There is clearly evidence which establishes that the accused acted with common purpose when they assaulted the complainant. They all approached and surrounded her when she managed to get loose, they all chased her and when she was on the ground, they all kicked her. How she got on the ground is not clear. The complainant alleges that she was struck with a stone and the two witnesses allege that she was tripped to a fall. That however, is immaterial because she was assaulted whilst on the ground and the medical certificate or J88 and the photographs bear that out.

I, therefore, make the following findings.

The accused are found guilty as follows:

- (a) Accused 1, 2, 3 and 4 guilty of assault with intent to do grievous bodily harm;**
- (b) Accused 1 and 2 are found guilty of rape;**
- (c) Accused 4 is found guilty of theft; and**
- (d) Accused 3 and 4 are found not guilty on count 3 i.e. attempted rape.**

M MAKAULA

JUDGE OF THE HIGH COURT

Counsel for the State: Advocate Canary

Counsel for Accused 1: Advocate Skepe (Accused 1)
Advocate Cropmton (Accused 2)
Ms Jansen Van Vuuren (Accused 3)
Mr Schoonraad (Accused 4)

Heard on: 27, 28, 29 & 30 January 2015

Delivered on: 05 March 2015