IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MTHATHA]

CASE NO. CC22/2025

In the matter between:

THE STATE

Vs

THOBILIZWI MAQAM **Accused**

JUDGMENT

JOLWANA J

[1] The accused has been arraigned in this Court on six counts being housebreaking with intent commit offences, kidnapping and the raping of three young women in certain localities in Mount Ayliff between 2013 and 2014. The accused, who was legally represented, pleaded not guilty to all the charges and elected not to disclose the basis on which he pleaded not guilty. In two of the three rape charges, the State invoked the provisions of section 51 read with Part 1, Schedule 2 of the Criminal Law Amendment Act 105 of 1997. In in doing so, it indicated its intention to ask the court for the imposition of the applicable minimum sentences in the event of a conviction. This was on the basis that the victim was under the age of sixteen years when she

was raped and in the other matter, the rape was accompanied by the infliction of grievous bodily harm.

[2] The summary of substantial facts which was provided to the accused in terms of section 144(3)(a) of the Criminal Procedure Act 51 of 1977 (the CPA) was the following. Between 2013 and 2014, the accused committed a range of offences of rape around the district of Mount Ayliff in which he targeted female persons who would be walking alone or who were staying with children in their homes. The accused would attack them in their homesteads and or on their way home using the same modus operandi. This was to break and enter their homesteads at night, kidnapping and forcing them to have sexual intercourse with him against their will. The accused was unknown to the victims until forensic DNA profiling was done linking the accused to the swabs obtained from the victims. The DNA of the accused matched the DNA found on the swabs obtained from the victims. The accused was always wearing a balaclava or covered his face with a balaclava.

[3] The first complainant to testify was Siphokazi Mabede. Her evidence was that on 13 March 2013, she was fifteen years old. She was born on 19 February 1998. At the time of the offence, she stayed with her great grandmother. However, she sadly passed on in 2023. On 13 March 2013 she was at her homestead with her great grandmother. She was asleep in her home in a bedroom she shared with her great grandmother. They slept in separate beds. Her great grandmother would wake up at 12:00 midnight and pray. On this day, at about 12:00 midnight, her great grandmother said that there was a bad odour and requested her to check if she had switched off the stove in which she had cooked tripe.

[4] She went to the kitchen to check and found that the stove was switched off. She also checked the kitchen door and found it still secured with the pliers they used to lock the door. She returned to the bedroom and reported to her great grandmother that everything was in order. They both went back to sleep. Because it was very hot on that day, she slept wearing a top and an underwear only.

[5] She was still asleep when she felt someone waking her up by patting her on her left arm. It was dark in the room as they always switched off the lights because mosquitos were common during March. When she woke up, she saw a person standing next to her. This person was wearing a balaclava and was carrying a sword. There was an electric light outside their bedroom. This electric light was on and it provided some light inside the room. This person told her to keep quiet and wake up. Apparently, her great grandmother also woke up. When the intruder realized that her great grandmother was awake, he told her to keep quiet or he would kill her.

[6] This person said that he had not come to do anything to her. He just wanted her to knock at the neighbouring homestead where he wanted to break in. He then dragged her. She told this person that she was not dressed. This person took a bed spread she had covered herself with when she slept and told her to cover herself with it. Her great grandmother pleaded with him not to harm her. This person continued dragging her. She then started fighting this person. In the process she managed to switch on the electric light inside the kitchen whose switch was next to the kitchen door. This person overpowered her and dragged her out of the kitchen. When they got to the veranda, she saw another young man who was also wearing a balaclava. This young man said to her assailant that he did not tell him that they were coming to Lholho's homestead and then ran away.

[7] He continued dragging her and at some point, he instructed her to take off the bed spread she had covered herself with. He tripped her and she fell down. He forcibly took off her panty. He also took off his pants and raped her by forcefully inserting his penis into her vagina. While he was copulating, she could hear her great grandmother calling her aunt over the phone. When he finished raping her, he took the bed spread and wiped his penis with it. He then took his sword, put it on her neck and said that if she told anyone about the rape, he would kill her. He ordered her to put her panty back on and told her to go back into the house. When he was on the veranda, he told her to take his back pack near the table in the kitchen and give it to him. She did that and he then told her to lock the door. She locked the door after which she just sat there in the kitchen.

[8] As she was sitting in the kitchen her great grandmother came into the kitchen. She told her what the assailant had done to her. Her aunt and his boyfriend arrived. At some point police and an ambulance arrived and she was taken to hospital. She was told that a rape kit would utilized and an HIV test was done. She was asked if she was aware that she was pregnant and she told the hospital staff that she was aware. Thereafter the police took a statement from her.

[9] The next witness was Siyolise Mjoji, one of the complainants. Her evidence was that on 20 August 2014, she stayed at Lubaleko Locality in Mount Ayliff where she rented a room as she was schooling there. She was 18 years old at the time and was doing grade twelve. She shared her room with her friend Zimasa. In their premises there was an old lady and the owner of the premises but both stayed on the other side. On 20 August 2014 at about 03:00 in the morning, she was sleeping alone in her room because Zimasa had gone home. She felt a sword hitting her at her back as if she was being woken up. The electric light in the room was on because she is unable to sleep

when it is dark. She saw that this person was carrying a sword and his face was covered with a balaclava. This person had a red backpack on his shoulder. This person told her to get up. He told her that if she screamed he would kill her.

[10] She tried to fight him and in the process, this person cut her below her left eyebrow. As she tried to hold the knife which he was also carrying, she also sustained a cut in her hand. He ordered her to take off her clothes and squat or bend. He then took out his penis and tried to insert it into her vagina as she was bending in a squatting position. He was trying to penetrate her vagina from the back. He then asked her if she was still a virgin. She told him that she was not a virgin because at that time, young men had an obsession with girls who were still virgins. However, she was still a virgin when she was raped by this person. She told this person that she was not a virgin hoping that he would stop raping her. He ultimately succeeded in forcefully inserting his penis into her vagina. When her was done raping her, he told her not to scream. Thereafter he went to the door and asked her to open it and left. She testified that she had locked the door before she slept. She had also closed the windows but one window had a loose handle. When he was leaving he told her to open the door for him and she did so and the door was still locked. She therefore assumed that he had gained entry into her room through the window.

[11] After this person had left she screamed thus raising the alarm. The people who also stayed in those premises came and she told them what happened. She testified that she did not know the person who raped her and she had never seen him before. Ultimately her grandmother arrived and took her to hospital by public transport. Specimen was taken from her and she was given some treatment.

[12] The next complainant was Aphelele Mpakumpaku. Her evidence was that on 31 August 2014 at about 09:00 in the morning, she was walking in an open veld on the way to see her boyfriend. She saw a person approaching and she proceeded walking without paying any attention. As she continued walking and when she was walking towards a certain school, she heard a noise that sounded like the noise of an okapi knife. When she turned, a person placed a knife in her neck. She immediately told this person to take the phone but he said he did not want it. He then told her to walk and led her to a secluded area down the slope past an ant hill. All along, he had placed a knife on her and when they reached a certain area he told her lie down. He placed a knife close to her neck and told her not to look at him. This person was covering his face with a balaclava.

[13] This person lifted up her dress and pulled down her panty. He then inserted his penis into her vagina and thrusted in and out. This person then asked her if she was not Milo. She then wondered how this person knew her as her nickname is Milo. He continued thrusting in and out. He then said that when he was done, he would take a rock and crush her with it after which he would throw her into a river and no one would know where she was. She then begged her not to kill her. When he finished raping her, she begged her not to harm her. This person then walked away quickly towards a side path. She continued walking and met her then boyfriend who is now her husband. Her husband who was with his sisters and other people asked her what happened. She told them that she had been raped in the mealie fields by a person she did not know. She was taken to hospital where she was examined and some specimen was taken from her vagina and she was also given some tablets. Police were called and took a statement from her. She testified that she was 19 years old when she was raped. Under cross-examination, it was put to her that the accused denied raping her.

It was further put to her that he would say that she was a local girl far younger than him and he would never think of having a sexual relationship with her.

[14]After the all the complainants had finished testifying, the State called a number of witnesses whose evidence was mainly on the handling of the chain evidence. This evidence related to the specimens that were taken or vaginal swabs that were taken on all the three victims; their safe keeping; how there were handled and ultimately taken to the forensic laboratory in Gqeberha; as well as their safe receipt at the forensic laboratory. Much of their evidence is either common cause or was not seriously contested. I do not consider it necessary to detail it in this judgment as that will not serve any purpose. Suffice it to mention that the accused was linked to all the rape offences through DNA analysis subsequent to another matter which was dealt with in Kokstad which indicated that the DNA in that matter was from the same person as in these matters.

[15] Formal admissions in terms of section 220 of the CPA[1] were entered into the record. In those admissions, the medico-legal examination reports of all three victims were admitted as well as the clinical findings and conclusions of the doctors who examined the complainants. Furthermore, the DNA results in respect of each complainant were admitted. In respect of all three complainants, the conclusions of the forensic analysts who conducted the DNA analysis of the vaginal swabs of the complainants and the reference sample obtained from the accused matched. That was also admitted. After these admissions, the State closed its case.

[1] Section 220 of the Criminal Procedure Act reads thus: an accused or his or her legal adviser or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact.

[16] The accused testified in his defence. With regard to Siphokazi and Siyolise, the evidence of the accused was just a bare denial which in effect was that it was not him who raped the two complainants. In respect of Aphelele, the accused confirmed that she knew her from Sipolweni Locality. It is common cause that Aphelele is also from that locality. He testified that he once had consensual sexual intercourse with her in 2014 but he could not remember the date in relation to the 31 August 2014, the date on which Aphelele was raped. He, however, testified that he knew Aphelele's nickname as Milo but he testified that on 31 August 2014 he never met anyone or asked anyone if she was Milo. He further testified that he thought that the DNA that linked him to the alleged rape of Aphelele was from the sexual intercourse she had with her previously. Under cross-examination, he testified that the consensual sexual intercourse he had with Aphelele was on 16 June 2014 as there was a June 16 youth celebration on that day in their locality. When they met on the road in the locality, they ended up going to another homestead where they had consensual sexual intercourse after which they left that homestead and parted ways. All this evidence of the accused was never put to Aphelele and he also never gave some of it during his evidence in chief. Other than its incoherence and nonsensical nature, it is all clearly lies that did not even make sense. I do not think that I need to spend much time on it as the accused himself was just making a bare denial, like he did in respect of his other victims, Siphokazi and Siyolise.

[17] The evidence of the State that the complainants were raped was not disputed. The evidence of the State was not seriously contested and some of it was incontrovertible. For instance, the evidence of the complainants, though it was evidence of single witnesses, was, even considered with the necessary caution, highly credible and without any internal contradictions. The chain evidence as well as the

biology reports were very detailed and could not be challenged, at least not cogently. All that the accused said was that in respect of Siphokazi and Siyolise, he was not the person who raped them. As for Aphelele, his evidence was that he had sexual intercourse by consent with her on 16 June 2014. Therefore, his DNA that was found on her would have come from that consensual sexual intercourse, so he testified. This evidence of the accused was clearly false and illogical, to put it mildly, as was his bare denials in much the same way as in respect of Siphokazi and Siyolise.

[18] Most, if not all the evidence against the accused is common cause or was not seriously disputed. It could, in any event, not be disputed with any cogency. The less said about the accused's evidence the better as, if anything, it also served to show that he raped the three complainants. In *Van der Meyden*[2] the court stated the legal position with regard to evidence in a criminal trial as follows:

> "The onus of proof in a criminal case is discharged by the state if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent. These are not separate and independent tests but the expression of the same test viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In which ever form the test is expressed, it must be satisfied upon consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt and so too does it look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true."

[19] Not only was the DNA of the accused found in the vaginal swabs that were taken from the complainants on the date on which each one of them was raped. But, also,

[2] S v Van der Meyden 1999 (2) SA 79 (WLD)

his own evidence was that the three localities in which the complainants were raped are within a walking distance from his own residential areas both in Kokstad and his locality of Sipolweni. On all the evidence that was tendered by the State, the admissions made and the accused's own evidence, I am satisfied that the State has proved the guilt of the accused beyond reasonable doubt.

[20] With that being said, there are two issues that this Court must deal with relating to the two counts of rape in respect of which section 51(1) of the Act was invoked. In respect of the complainant in count 4, the rape of Siphokazi, it is common cause that she was 15 years old at the time she was raped. Therefore, nothing further needs to be said about her age as her age was within the purview of the age specifically referred to in section 51(1) read with Part 1 of Schedule 2 of the Act.

[21] Similarly with count 5, the rape of Siyolise, section 51(1) of the Act has been invoked. However, in respect of this count, this section has been raised on the basis that the rape of the complainant involved the infliction of grievous bodily harm. The evidence of Siyolise was that she sustained a cut on her hand and below the left eyebrow. She testified that the scar that was caused that resulted from the wound she sustained on that day is still visible. This evidence finds corroboration from the medico-legal report of Dr Mohomu who examined her and compiled her medico-legal examination report. This begs the question, what does the infliction of grievous bodily harm mean. There is no closed list of the injuries that must be sustained which applies for all cases in all situations. Therefore, this, in my view, can only be answered on a case by case basis.

[22] In *Rabako*[3], Musi J (as he then was), writing for the majority, expressed himself as follows:

"There is nothing in the Act of Schedule that indicates that the words should be interpreted restrictively or widely. In my judgment the words should be given their ordinary, natural meaning. I agree with the words of Viscount Kilmuir L.C. that they only mean really serious. The words "really serious" should be illuminated lest it leads to confusion or overemphasis. The **New Shorter Oxford English Dictionary: Lesley Brown (Ed)** 1993 defines the word "*really"* as "*In a real manner; actually. Used to emphasise the truth or correctness of an epithet or statement: positively, decidedly, assuredly."* The word therefore does not indicate degree of seriousness. In this context it only serves to emphasise that the harm inflicted must actually be serious in essence then if the injury inflicted by the accused on the body of the rape survivor is serious then it involves the infliction of grievous bodily harm. A serious injury on one extreme may may mean an injury so serious as to endanger life, necessitate hospitalisation or to result in permanent loss of bodily or mental faculty at the other; it may include a wound that heals rapidly. It should not be a trivial or insignificant injury. A serious injury therefore need not necessarily be an injury that is permanent, life threatening, dangerous, or disabling. Whether injuries are life-threatening, necessitated hospitalisation or immediate medical attention will generally be relevant to determine the degree of seriousness but not necessarily the seriousness itself. Whether an injury is serious will depend on the facts and circumstances of every case.

In S v Fereira 1961 (3) SA 724 (E) at 725 F – G Cloete AJ albeit in another context opined that:

[3] Rabako v S 2010 (1) SACR 310 (O) paras 7 to 10.

> ‘ One must assess the question of whether the injuries are serious or not directly with reference to the particular victim who has suffered them and not some arbitrarily defined average human being.’ I agree.

In R v Jacobs *supra* Van Winsen AJA, as he then was, stated, at 485 B – D:

> ‘In deciding whether the Crown has proved the infliction of grievous bodily harm by the accused, the injury would, in my opinion, be entitled to have regard to the whole complex of objective factors involved in the appellant’s assault upon the deceased. It could take into consideration the shock which would inevitably result from the stabs in the face, their number, nature and seriousness, as well as to the blows directed to the accused’s (sic) stomach, their severity and the results which flowed from their infliction.’

It seems to me that in order to determine whether the injuries in a particular case are serious one has to have regard to the actual injuries sustained, the instrument or object used, the number of the wounds -if any – inflicted, their nature, their position on the body, their seriousness and the results which flowed from their infliction. It must be remembered that an injury can be serious without there, necessarily, being an open wound. In order to determine this, the judicial officer will be guided by medical evidence. It is therefore advisable that in all such cases - where a finding in relation to infliction of grievous bodily harm is considered – medical evidence should be presented. The absence of medical evidence however is not fatal. In this matter we have the benefit of the undisputed evidence of the complainant in relation to the injuries that she sustained as well as medical report (J88) the contents of which was admitted by the defence. Although the J88 form that was completed by the medical practitioner who examined the complainant was not before us, it was before the magistrate. She read the doctor’s relevant findings into the record. From those

findings, the doctor does not make mention of a wound on the complainant's neck. The complainant pertinently testified that she sustained an open wound at the back of her neck which was sutured. The doctor did not testify. The correctness of what he recorded was not tested. Her evidence in this regard ought to be accepted."

[23] I would only add that in the case of sexual assault, it would be dangerous to assess the grievousness of the injury sustained by the sexual assault victim based on how deep and/or how wide the wound is. In this case, the victim was an 18 year old young woman who was sleeping peacefully in her rented modest place of abode by being hit with a sword by an assailant who was also carrying a knife. He used the sword or the knife resulting in the wounds she described. This was done to subdue her and force her into a kneeling or squatting position from which she was raped while wounded both on her hand and below the eyebrow.

[24] She described the scar of the wound that was inflicted below her left eyebrow as being still visible. This will forever be a constant reminder of what was done to her in the early hours of the 20 August 2014. On the consideration of the entire circumstance of the injuries sustained; why they were inflicted; the weapon used in inflicting them; the vulnerability of the complainant in relation to her attacker; the fact that she was unarmed and having been woken in her sleep by being hit with the sword which she clearly saw as she had the electric light on in her room, I have come to the conclusion that the rape involved the infliction of grievous bodily harm.

[25] I turn now to consider counsel for the accused's submission that the accused should be acquitted on the charge of housebreaking with intent to commit an offence and kidnapping in respect of the victim in count 1. With regard to housebreaking, the argument was that there is no evidence proffered by the State about the condition of the door before and after the alleged housebreaking. As I understood counsel's argument in this regard, there was no evidence of how the assailant gained entry into the house as the door was still intact after the break in. There is no merit in counsel's argument in this regard. The evidence of Siphokazi was clear. She had checked the door before she went to bed after being woken up by her great grandmother to check the bad odour in the kitchen. She testified that she also checked the door and found it still secured with a pliers that was used to lock it. To expect victims of crime to rise to the level of the skill of the criminals and their ingenuity in their criminal activities is to raise the bar so high that whenever there is no damage to the door, the criminal should get away with his criminal activity of breaking in unlawfully and entering somebody else's home. The bottom line is, in my view, that nobody should get inside somebody else's home uninvited. Whether the door was properly locked or not is neither here nor there.

[26] In respect of the kidnapping charge, counsel's argument was that the evidence of the complainant was that she was not taken very far as she

was taken outside and raped within the same premises. The evidence of Siphokazi was very clear. She was asleep when she felt being patted with a sword on her arm. She was then dragged half naked from her bedroom, through to the kitchen and out of the kitchen to a spot near a widow where she was raped by her assailant. What then, is the definition of kidnapping. The issue of kidnapping can easily be put to rest with reference to the unreported judgment of the full bench of this Court in *Salman*[4] in which Rugunanan J defined it as follows:

"Kidnapping consists in the unlawful and intentional deprivation of the liberty of movement of a person. The essential elements of the offence are (a) unlawfulness; (b) deprivation of liberty or of custody; (c) of a person; and (d) intention."

[26] The evidence of Siphokazi was that she was woken in her sleep and dragged at knife or sword point from her bed to a spot outside the house. This brings what happened to her within the parameters of kidnapping, the elements of this offence being all satisfied. I might add that there is no requirement that a person must have been taken to a place that is some distance away from where she or he was for him or her to have been kidnapped as long as there was unlawful deprivation of freedom.

[4] S v Salman and Another (CA & R 69/2021) [2023] ZAECMHC 61 (14 November 2023) at para 19.

[20] In the result, the accused is found guilty of all the charges preferred against the accused in respect of all the counts preferred against him beyond reasonable doubt. Therefore, the accused is found guilty as follows:

1. Count 1, housebreaking with intent to commit an offence.

2. Count 2, housebreaking with intent to commit an offence.

3. Count 3, the kidnapping of Siphokazi Mabede.

4. Count 4, the rape of Siphokazi Mabede.

5. Count 5, the rape of Siyolise Mjoli.

6. Count 6, the rape of Aphelele Mpakumpaku.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the State : C Mkentane

Instructed by : NDPP

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Counsel for the accused: S.T. Kekana

Instructed by : Legal Aid South Africa

Mthatha

Date heard : 05 August 2025

Date Delivered : 06 August 2025