IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION: GRAHAMSTOWN]

CASE NO. CC69/2017

THE STATE

Vs

LINDANI VAMVA **ACCUSED NO. 1**

UNATHI NGANDI **ACCUSED NO. 2**

SIPHAMANDLA FUTHUFUTHU **ACCUSED NO.3**

JUDGMENT

JOLWANA J

[1] The accused are all charged with rape in contravention section 3 read with sections 1, 56 (1), 57, 58, 59, 60 and 68 (2) of the Criminal Law Amendment Act 32 of 2007 (Sexual Offences Act) and the murder of D. N., a 22 year old female person. It is alleged that between the 3 and 4 December 2016 and at or near [...] N. S., J. location, in the district of Albany, the accused unlawfully and intentionally committed acts of sexual penetration with D. N. by having intercourse with her per *varginam* without her consent and against her will. It is

further alleged that the accused unlawfully and intentionally killed the said D. N. (the deceased).

[2] The summary of substantial facts in terms of section 144(3) of the Criminal Procedure Act 51 of 1977 (the CPA) states the following:

> (i) On the night of the incident, accused numbers 1 and 2 met the deceased in unknown circumstances and took her to the house of accused number 1;
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> (ii) At the house both accused raped and brutally assaulted the deceased;
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> (iii) Accused number 3 joined accused number 1 and 2 and also raped and brutally assaulted the deceased after fetching a knife;
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> (iv) The accused loaded the deceased into a metal bath and dumped her body at a rubbish dumping site;
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> (v) Following a sustained assault the deceased sustained multiple injuries over her whole body and died as a result of sharp and blunt force. In addition to being manually strangulated, she sustained multiple abrasions and wounds, a fractured mandible, bleeding neck muscles, multiple fractured ribs, a penetrating stab wound tract through her larynx and extensive bleeding to the deep tissue of the scalp;
>
> (vi) The accused throughout acted in concert with a common purpose to rape and kill the deceased.

[3] The state called S. B. (B.). He testified that he did not know the deceased before the incident and saw her for the first time on the day of the incident. He knew accused number 1 (No.1) having met him in their area and in local taverns as well as soccer fields. He knew where accused No.1 lived and had known

him for nine months before the incident. They were, however, not friends but acquaintances.

[4] He knew accused number 2 (No. 2) as they attended the same school. He also saw him in local taverns. He, however did not know accused number 3 (No.3) before the incident. He spent the evening of the 3 December 2016 at a tavern in J. called C. S. with his two friend Vuyisa and Aphiwe. He later saw another friend of his, M. N. and No. 1 and 2 were also there. He did not know whether No.3 was there or not as he was unknown to him. N. requested him to accompany him to the home of No.1 because he wanted to watch what they were doing. At that time No.1 and 2 were no longer there at the tavern.

[5] They proceeded to the house of No.1which has got a main house and a one roomed flat and No.1 stayed in that one roomed flat. When they arrived music was playing and they knocked at the door. No. 1's friend who was with him inside told them to come back later as they were busy. He later established that No.1's friend was No. 2 who was known to him from school. The door was closed with the security gate locked. However, the window as open and the blinds were open. N. peeped through the window after which he called him to also peep through.

[6] When he peeped through he saw No.1 having sexual intercourse with the deceased and No.2 assaulting the deceased with a stick on the head. The deceased was lying on her stomach on a chair. She was bleeding trying to push No.1 away and at some stage she was on the floor after being put on the floor by No.1. The deceased was wearing a t-shirt on her upper body and completely naked on the lower body. No.1 was completely naked. He was wearing a transparent condom. He observed No. 1 taking off the transparent condom and replacing it with a purple one. All this time No. 2 continued beating the girl with a stick and also a shoe. There were two sources of light being a globe on

the ceiling and disco lights which made visibility to be good. He described what he saw as gruesome. He left the scene leaving N. behind entering the room through the window and went back to the tavern. He only saw N. and No.1 and 2 the following day at C. S.. However, the girl was not with them.

[7] Under cross examination he testified that he was standing on a paint tin to be able to see through the blinds that were not completely open. His view was not completely unobstructed but he could see what was going on inside. He insisted that he saw No.1 having sexual intercourse with the deceased in the presence of No. 2 and denied that the deceased and No.1 had normal sex on the bed alone without No.2 being present. He testified that he did not see No.1 assaulting the deceased but did see him raping the deceased on the chair and on the floor and all that time No.2 was hitting her.

[8] When it was put to him that No.2 denied that he assaulted the deceased with a stick, he insisted that No. 2 did assault the deceased with a stick. He knew No.2 not by name but by sight and he later also became aware of his name after hearing people talking about the incident. He stated that he made a mistake in the first statement by saying it was No.1 who opened the window, in fact it was No.2.

[9] N. was called by the state. He testified that he resides at J. location and the deceased was unknown to him. He, however, knows No.1 from school. He used to visit him at home and they would play play station together at No.1's house. He also knew No.2 before the incident and at times they would meet together at No.1's place. He also knew No.3 as they used to meet with his other friends and at times they would be together at the stadium. Sometimes he met him at No.1's place.

[10] On the night of the incident he was at C. S. tavern which is not far from No.1's house. That day was important as it was a birthday of one of their

friends, Aviwe. All the three accused persons were at C. S. that night. No.1 and 2 left together with the deceased. Sometime after they left he also left C. S. with B. going to No.1's house. On their arrival the door of No.1's flat was closed and locked. The security gate was closed as well. They heard a bumping noise from the inside and he decided to peep through the window. He knocked at the door but the door was not opened for them.

[11] He was able to see inside as he was peeping through the window. He saw No.1 and 2 as well as the deceased inside No.1's flat. The deceased was being assaulted with a stick although he did not remember who of the accused was assaulting the deceased. The deceased's lower body was not dressed and No. 1 was not dressed. The deceased was lying on the floor. He saw that the deceased was bleeding on her face. B. left and he remained behind and shouted through the window for the door to be opened. The window was opened for him and he got in through the window. Once inside he intervened and the assault stopped. He left thereafter and returned to C. S..

[12] When the tavern was closed he and Aviwe left with another girl named Sikhanye taking her to her home. After leaving Sikhanye at her home he and Aviwe went to No.1's flat because he had told Aviwe what was happening there earlier about the girl that was being assaulted. On their arrival they found two other girls there. The deceased was not there. This bothered him and he decided to make some observations and went around the yard up to where there is a water tap. This is where he found the body of the deceased. She was lying there still and naked and he did not know whether she was still alive or not. After making these observations he went to his own home leaving Aviwe there at No.1's flat.

[13] Under cross examination he conceded that his statement does not mention him seeing the deceased lying near the tap. He confirmed that he went into

No.1's room through the window. He confirmed seeing the deceased leaving for No.1's place with No.1 and 2. He denied that No.1 left alone with the deceased and insisted that he saw No.1 and 2 leaving C. S. with the deceased. He testified that he had had a lot to drink. As a result of the consumption of alcohol there were a number of things that he did not remember.

[14] The evidence of S. P. (P.), also a state witness, was that he resides at J. location. He lives in the same house No.3 used to live in before his arrest. He is related to No.3 in that No. 3's mother was married to his maternal uncle. After the death of his mother No. 3 and his two brothers came to live with him. They have been living together for about 10 years. He stays at his home with his mother and his stepfather. He knows No.1 since childhood. He has known No.2 for a number of years now.

[15] On the night of the incident he did not leave home that evening and went to sleep at about 9 o'clock. At some point in the course of the night he heard No.3 knocking at the door. He was sleeping in an outside room. He heard noise coming from the main house and went there to investigate. He found his mother trying to stop No.3 from looking for a knife. No.3 appeared to be drunk and angry. No. 3 proceeded to his mother's bedroom where his stepfather was and demanded a knife from him. When he did not give him the knife he assaulted his stepfather. When his mother tried to stop him from assaulting her husband he assaulted his mother. He then grabbed No.3 and put him on the floor. His mother and stepfather managed to get out of the house and locked the house from outside leaving him and No. 3 inside. No. 3 freed himself and took a knife from a drawer in the kitchen and went out of the house through a window.

[16] He followed No. 3 as he was worried about his mother and his stepfather who were outside. He also got out through the same window. He saw No.3 and

followed him towards No. 1's place. However when he arrived at No.1's place he did not see No. 3. He then spoke to No. 1 and asked him to stop No.3 from causing trouble. No.1 was with No. 2 outside talking in No. 1's yard. He thereafter left and went home. Later police arrived at his home looking for No. 3 after they had apparently been called by his mother. He took the police to No.1's place. No.1 came out and the police asked him about No. 3 and he told them to look in the main house. Police went to the main house and found No. 3 sleeping in the kitchen. When they realized he was drunk they left him. They came back the following morning and took No.3 away.

[17] The state then handed up a post mortem report and called the doctor who performed the autopsy, Dr Stuart Wayne Dwyer. He testified that he examined the body of the deceased on the 08 December 2016. The post mortem report was drafted by him. At paragraph 4.1 of the report he observed a bilateral per orbital haematoma which he described as meaning that both eyes of the deceased were swollen and black. This would have been caused by blunt force to the orbits which causes bruising and bleeding into the tissues. This could be caused by any blunt object or even a blow from a fist to the eyes.

[18] At paragraph 4.2 he indicated multiple irregular and impression abrasions of the scalp visible across the forehead and some markings on the cheeks. This could have been caused by any blunt object. The irregular and impression abrasions are caused when the surface of the skin is removed from the skin by blunt force which causes friction and it becomes irregular when it has not taken the shape of the object.

[19] At paragraph 4.3 he indicated multiple small wounds and linear abrasions of the neck. He testified that these are not inconsistent with fingernail marks because they are cuts into the skin with something sharp.

[20] At 4.4 he observed a two and a half centimetre wound on the right side of the neck which went through the larynx and floor of the mouth and through the voice box into the mouth and into the oral cavity. This injury would have been cause by a sharp blade consistent with the use of a knife. The wound would have been inflicted from below the neck just below the jaw line on the right at an oblique angle through the voice box and into the floor of the mouth.

[21] At 4.5 he observed a 20mm wound left temporal area at lateral end of the left eyebrow also consistent with the use of a knife.

[22] At 4.6 he indicated a large circular abrasion, 45mm x 45mm over the right mastoid area. He described the mastoid as the bony process just behind the ear on the left hand side with a similar injury by the right ear. These injuries are consistent with the application of blunt force. The round nature of the abrasion is consistent with the use of a hammer.

[23] At 4.7 he reported a pinna of left ear and adjacent scalp posteriorly being extensively lacerated with the ear lobe being torn open. That is consistent with the application of blunt force. The force applied would have been moderate to severe thus causing deep laceration of the skin. A hammer could cause this injury but it is more likely that a stick or knob *kierie* was used.

[24] At 4.8 he reported a 20mm ragged wound over the zygoma and he described a zygoma as the cheekbone of the side of the cheek. That wound is a sharp force injury which was inflicted just under the right eye on the cheekbone.

[25] At 4.9 he reported a 40mm crescenteric abrasion right arm laterally proximal third which is a crescent moon shaped abrasion consistent with a bite mark.

[26] At 4.10 he observed irregular abrasions of all the limbs which might have been caused by either application of force or by dragging the body and abrading the skin.

[27] At 4.11 he observed sheet abrasions of both thighs anteriorly. These cover a large surface of the skin and are consistent with the dragging of the body causing the ground to scrape the skin over a large area.

[28] At 4.12 he reported large 50mm x 40mm abrasions on both knees anteriorly which are rectangular in shape extending upwards from the upper edge of the patellae. He described these as square shaped abrasions of the knees extending upwards from the knee cap. These could have been caused by a large object or were part of the dragging process but their rectangular shape was more consistent with the application of blunt force than dragging.

[29] At 4.13 he reported multiple deep linear impression abrasions interiorly. These are consistent with an object like a stick.

[30] At 4.14 he reported seven small ragged non- penetrating wounds on the left side of the abdomen lower quadrant. He described these as superficial wounds that have not penetrated into the abdominal cavity to the left hand side of the belly button just above the pelvis. These are consistent with a moderate application of a knife as it did not penetrate into the abdominal cavity.

[31] At 4.15 he reported sheet abrasion over sacrum which was visible just above the buttock cleft. The probable cause of this could have been force being applied to the front of the body with the sacrum being forced into the ground or the body being dragged and the weight of the body resting on the sacrum thus scraping off the skin.

[32] At 4.16 he reported irregular and straight linear abrasions over the left hip posteriorly proximal thigh consistent with the use of a stick.

[33] At 4.17 he reported irregular skin peeling over the left buttock.

[34] At 4.18 he observed irregular abrasions over the toes and feet dorsally. These could have been caused by kneeling when the feet are extended backwards over the rough ground.

[35] All of the above were Dr Dwyer's descriptive observations of the external injuries inflicted on the deceased.

[36] Other injuries were as follows: Head and Neck. At paragraph 5 he reported on deep tissues of the skull which is the soft tissues surrounding the skull bone. These injuries resulted in extensive bleeding in multiple areas especially on the right side where the skin of the head is almost black because of the blood under the skin caused by the application of blunt force to the head. This could have been caused by a hammer or stick or any blunt object that was applied repeatedly with severe force. There were also fractures of the mandible which are jaw bone fractures that could also have been caused by a hammer or any other blunt object. The fractures are consistent with extreme force thus breaking the bones.

[37] At paragraph 6 he reported subdural haemorrhage which means the bleeding around the brain and skull tissues. This would have been caused by the same force that caused the bleeding of the skull and the deceleration injury inside the head where the brain has been knocked to the side of the head causing the bursting of the little blood vessels that bled on to the brain.

[38] At paragraph 7 he reported orbital, aural and nasal cavity injuries where the left ear was lacerated thus causing bleeding. There were also bilateral periorbital haematomata, petechial haemorrhages. The periorbital haematoma are the two black eyes with swollen eyelids which can be caused by blunt force haemorrhages in the eye but can also be caused by lack of oxygen. Bleeding

nasal cavities which are reported means there was blood inside the nose which could have been caused by use of blunt force.

[39] At paragraph 8 he reported on the mouth, gums and pharynx where he observed presence of blood because of the wound track through the floor of the mouth on the right side under the jawbone which went through the floor of the mouth from underneath. He also reported a fracture of the hyoid bone. This is a small bone under the tongue in the shape of a horse shoe and is commonly fractured when a person is throttled. He also reported on the glottis and vocal cords which is the voice box. There was a wound track through the larynx and the voice box itself.

[40] At paragraph 9 he dealt with neck injuries where there was extensive bleeding in multiple muscle group. This is consistent with application of force during throttling where the force of fingers caused bleeding of the muscles of the neck tissues. The thyroid cartilage is described as fractured. The thyroid gland was bleeding. This is the gland located in front of the neck just before the thyroid cartilage. Its bleeding is also caused by the throttling force.

Chest

[41] At paragraph 10 he deals with the thoracic cage and diaphragm where he observed multiple fractured ribs. This would have been caused by blunt force application to the chest wall itself. There were no other injuries which he observed on the chest, abdomen and the spine. The post mortem report also reflects that specimen was taken.

[42] The specimen samples were handed to Captain Havenga of the South African Police Service. Dr Dwyer's conclusion is that the death of the deceased was caused by sharp force and blunt force each of which would have been sufficient without the other to cause the death of the deceased. The cross examination did not affect the evidence in chief in any significant way.

[43] The next state witness was Kisty Rose Heynes who deposed to an affidavit in terms of section 212 of the CPA and is dated 30 June 2017 and was admitted as exhibit "I". It is headed "*Biology Report DNA*". Her qualifications are as reflected in her report and are not in dispute. Although there was some initial dispute about some aspects of the chain evidence due to errors in some of the chain evidence documents and Havenga's affidavit these were later clarified by state witnesses and the challenge on the chain evidence was abandoned.

[44] The witness testified that she is a warrant officer employed by the SAPS as a Forensic DNA Analyst and Reporting Officer and is attached to the Biology section of the Forensic Science Laboratory in Cape Town since November 2014 and has 9 years experience in the Biology Sciences. In the affidavit she reports on the samples that were subjected to DNA analysis and makes the following findings:

> "4.1 The DNA results from the possible blood on jeans 'Q' (PAB000259726), possible blood on underpants 'R' (PAB000259726), swab 14DCAJ5621 ["*CONTAINER*"], swab 14DCAJ5621 ["*face brick wall*"], swab 14DCAM2616 ["*on the floor under the bed*"], swab 14DCAM2616 ["underneath the base of the bed"] swab 14DCAL5614 ["*inside metallic bath*"] swab 14DCAJ2928 ["*on the bed*"], possible epithelial friction on panty 'H' (PA5000662649) and swab 14DCAK6415 ["*Hummer*"] match the DNA result from the reference sample 13DBAE3056 ["*DR 505 – 16*"]. The most conservative occurrence for the DNA result of the full profile is 1 in 2.2 $X10^8$ trillion people.
>
> 4.2 The DNA result of the reference sample 13DBAE3056 ["DR505-16"] is read into the mixture DNA results from the possible epithelial friction on condom 'C' (PA5000662648), possible epithelial friction on trouser 'D' (PA3001063770) and possible epithelial friction on tights 'J' (PA3000580067). The most conservative occurrence for all the possible contributors to the mixture DNA result from possible epithelial friction on condom 'C' (PA5000662648) is 1 in 180 billion people.
>
> 4.3 The DNA result of the reference sample 13DBAE3052 is read into the mixture DNA result from swab 14D1AC8506 ["*vaginal*"]. The most conservative occurrence for all the possible contributors to the mixture DNA result is 1 in 3 trillion people.
>
> 4.4 The DNA result from swab 14DCAJ2928 ["*next to the label on the bed*"] and possible blood on trouser 'D' (PA3001063770) match the DNA result

> from reference sample 13DBAE3053. The most conservative occurrence for this DNA result is 2.2 X 10^5 trillion.
>
> 4.5 The DNA result of the reference sample 13DBAE3054 is read into the mixture DNA result from the possible blood on tights 'J' (PA3000580067). The most conservative occurrence for all the possible contributors to the mixture DNA result is 1 in 290 trillion people."

[45] Jeans 'Q' which was sealed in evidence bag PAB000259726 was confiscated from accused No. 3 and underpants 'R' sealed in evidence bag PAB000259726 was confiscated from accused No. 3. So the DNA found in these items matches the DNA of the deceased in what in layman's terms the witness described as a complete match and that it was the blood of the deceased that was in these items of clothing. Furthermore to finalize the results as contained in 4.1 of the report the swab from the container, brick wall, the swab from the floor under the bed, the swab from underneath the base of the bed, the swab from inside the metallic bath, the swab from the swab on the bed, the possible epithelial friction on panty 'H' and the swab from the hammer all matched the DNA of the deceased.

[46] With regards to 4.2 of her report she testified that the deceased DNA was found on condom 'C' the trousers 'D' and the tights 'J' and also DNA from another donor or doners which she called it mixed.

[47] With regards to 4.3 she testified that the vaginal swab 14D1AC8506 which was obtained by Dr Dwyer from the vagina of the deceased matched the reference sample 13DBAE3052 from accused No. 3 and therefore in all probability the semen, obtained from the deceased contained the DNA profile of accused No. 3.

[48] With regards to 4.4 which deals with swab 14DCAJ2928 and possible blood on trouser 'D' matches a DNA sample from sample 13DBAE3053 which was obtained from accused No. 1. This was a single profile obtained from the

blood that was next to the label on the bed and the blood on the trousers which matched the DNA profile of accused No. 1.

[49] 4.5 Deals with a mixed results from possible blood found on the tights which matched the DNA profile of accused No. 2.

[50] This is some of the evidence that the forensic analyst, Ms Heyns gave which included the analysis and conclusions made as well as the integrity of the samples and the exhibits that were received by the lab.

[51] The state called Ms N. F. who testified that the deceased was her cousin. On Saturday 3 December 2016 in the afternoon at about 5pm she was with the deceased in J. at the home of one N. where she left the deceased and returned home. She did not know the whereabouts of the deceased since she left her at N.'s house. She and other members of the family discovered that she had passed away and identified her at a police mortuary about two weeks later. She was shown photographs of the deceased's clothes which were found at various crime scenes and confirmed that indeed those items were deceased's clothes being a pair of jeans, the striped belt, panties, green pair of tights and a black vest. When she left the deceased, they had been drinking alcohol. Deceased was unmarried with two children the youngest of whom is two years old.

[52] Mr B. D. (D.) also a state witness testified that he is a seventeen years old grade 10 student and lives at No. [...] N. S. in J.. His house can best be described as sandwiched between No. 1's and No. 3's houses. He grew up together with all the accused and he therefore knows them very well. The face brick wall from which a blood sample was taken is his house's wall which is very close to the container from which another blood sample was taken. The window of his room is 1,5m from the hole in which he saw No. 3 placing the deceased naked body.

[53] He testified that it was after midnight on Saturday the 03 December 2016 when he was woken up from his sleep in his room by the voices of two people talking just below his window. He heard No. 3 whispering to No. 2. He went out of bed and peeped through the window. Although the area is dark he could see No. 3 carrying a naked person who was bleeding from the head. No. 3 placed this person down in the hole next to the container. He then heard the voice of No. 3 calling the nickname of No. 2 and saying "Nana bring the bath". Nana is No. 2's nickname. He then heard a sound from a zinc bath approaching after which he saw a zinc bath which he identified from photo No. C58 as being similar to those depicted there. No. 3 covered the body of the person that had been placed in the hole with the bath. He became scared and went to his parents' room and joined them in their bed when he could not wake them up.

[54] Under cross examination he testified that he did not hear No.2's voice but only heard No.3's voice when he instructed No. 2 to bring the bath. He also did not see No. 2. When it was put to him that because the area was relatively dark he is mistaken when he says he saw a person he identified as No. 3 and heard No. 3's voice, he insisted that he was not mistaken.

[55] The next state witnesses were the police officers who at different times worked on this case doing different things all of which concerned the investigation of this case as well as the crime scene investigation and collection and processing of samples for DNA analysis. Their evidence clarified so many issues including errors that had been made in some of the exhibits. After their evidence was led all counsel for all accused confirmed that they no longer had any issues with the chain evidence and that they had no objection to its admission. To this end the following formal admissions were made in terms of section 220 of the Criminal Procedure Act No. 51 of 1977:

Accused No. 1

"A. The deceased:

1. That the deceased in count 2 was D. N., a 22 year old female person.
2. That the said deceased's body sustained no further injuries from the time when her body was discovered at the dumping site near M. High School, J., Grahamstown (Exhibit A photographs 1-37 refer) on 5 December 2016, until such time that a medico legal post mortem examination was performed on her body by Dr Staurt Wayne Dwyer on 8 December 2016 (Exhibit "E" DR505/2016 refers).

B. The collection of a control sample for DNA Analysis

3. That Warrant Officer Anton Annandale of the SAPS obtained a DNA "buccal" control sample from Accused No. 1, Lindani Vamva, on 06 December 2016. The said sample was correctly sealed with seal number 13DBAE3053, dispatch to the biology section of the Forensic Science Laboratory, Pattekloof, processed, analysed and reported on by Warrant Officer Kistie Rose Heyns (Exhibit "I" par 4.4 refers).

C. The correct receipt and Processing of Exhibits and Swabs at the Forensic Laboratory.

4. That all exhibits and swabs reported on by Warrant Officer Kirstie Rose Heyns in Exhibit "I", were correctly received and processed at the Forensic Science Laboratory."

Accused No. 2

"A. The Deceased:

1. That the deceased in count 2 was D. N., a 22 year old female person.
2. That the deceased's body sustained no further injuries from the time when her body was discovered at the dumping site near M. High School, J., Grahamstown (Exhibit "C" photographs 1-37 refer) on 5 December 2016, until such time that a medico legal post mortem examination was performed on her body by Dr. Stuart Wayne Dwyer on 8 December 2016 (Exhibit "E" DR 505/2016 refers).

B. The Collection of a Control Sample for DNA Analysis:

3. That warrant officer Anton Annandale of the SAPS obtained a DNA "buccal" control sample from Accused No. 2, A.Ngandi, on 6 December 2016. The said sample was correctly sealed with seal number 13DBAE5054, dispatched to the biology section of the Forensic Science Laboratory, Plattekloof, processed, analysed and reported on by Warrant Officer Kirstie Rose Heyns (Exhibit "I" para 4.5 refers.

C. The Correct Receipt and Processing of Exhibits and Swabs at the Forensic Laboratory:

4. That all exhibits and Swabs reported on by Warrant Officer Kirstie Rose Heyns in Exhibit "I" were correctly received and processed at the Forensic Science Laboratory."

Accused No. 3

"A. The Deceased:

1. That the deceased in count 2 was D. N. a 22 year old female person.
2. That the said deceased's body sustained no further injuries from the time when her body was discovered at the dumping site near M. High School, J., Grahamstown (Exhibit C photographs 1-37 refer) on 05 December 2016) until such time that a medico legal post mortem examination was performed on her body by Dr. Stuart Wayne Dwyer on 08 December 2016 (Exhibit "E" DR505/2016 refers).

B. The Collection of a Control Sample for DNA Analyses:

3. That Warrant Officer Anton Annandale of the SAPS obtained a DNA "buccal" control sample from accused No. 3 Siphamandla Futhufuthu on 6 December 2016. The said sample was correctly sealed with seal number 13 DBAE3052, dispatched to the biology section of the Forensic Science Laboratory, Plattekloof, processed, analysed and reported on by Warrant Officer Kirstie Rose Heyns (Exhibit "I" para 4.3 refers).

C. The Collection of Accused No. 3's Clothing for DNA Analysis:

4. That Captain Toto of the SAPS siezed a pair of jeans ("Q") and a pair of underpants ("R") belonging to Accused No. 3, on 6 December 2016. The said jeans and underpants were correctly sealed, packaged, forwarded to the Forensic Science Laboratory in sealed Exhibit bag No. PAB3000259726 and reported on by Warrant Officer Kirstie Rose Heyns (Exhibit "I" para 4.1 refers).

D. The Correct Receipt and Processing of Exhibit, and Swabs at the Forensic Laboratory

5. That all exhibits and swabs reported on by Warrant Officer Kirstie Rose Heyns in Exhibit "I" were correctly received and processed at the Forensic Science Laboratory."

[56] The state called detective Warrant Officer Daniel Brits, the investigating officer in this matter. He testified that he has been in the police service for 26 years, 20 years of which he has been a detective. He testified that on 5 December 2016 in the morning he attended a crime scene on a dumping site near M. High School. This followed a report at the police station about a body that had been discovered in the dumping site under a lot of rubble and other

items that had been used to cover the body of the deceased. Police investigations led him and his colleagues to accused No. 1's small outside room at No. [...] in the township of J., Grahamstown. The 3x4 metre room is furnished with a double bed, a cupboard unit, a Hi-fi music system, a wall mounted TV set and a chair. The blood samples and evidential material were collected from this room as well as from the premises at or around these premises. Deceased's pair of jeans, a tight and panty were recovered inside the school yard at M. High School, a mere 14.2m, from the house of accused No. 1. Further investigations led to the arrest of all the accused persons. Mr Brits evidence marked the end of the state's case.

[57] Mr Olivier, counsel for accused No. 2 moved an application in terms of section 174 of the CPA. Section 174 reads as follows:

> "If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

[58] In moving this application Mr Olivier submitted that if regard is had to the evidence tendered by the state against the charges of rape and murder for which the accused have been charged there is no evidence on which a reasonable court can convict accused No. 2 on either of these charges.

[59] On the charge of rape the basis for the application was that there was no evidence by any of the state witnesses of accused No. 2 raping the deceased. If accused No. 2 did not himself rape the deceased, whether, in fact, rape did happen in circumstances in which it can be said that accused No. 2 made common purposes with the alleged rapist. He submitted that there was only one witness Mr B. who testified to possible sexual intercourse between accused No. 1 and the deceased as well as an alleged assault by accused No. 2 on the deceased. This would be the evidence of a single witness in respect of which there should be caution. Mr B.'s evidence would be that of a single witness

because the second state witness, Mr N. testified to having seen the assault on the deceased but could not remember who committed the assault. Therefore there is only one witness to both the rape and the assault.

[60] He submitted that besides the contradictions between the two state witnesses about who peeped first, Mr B. who testified to having seen accused No. 1 having sex with the deceased while No. 2 was assaulting her with a stick, could not have seen what he claims to have seen. Among other things he claimed to have been standing on the right hand side of the window, therefore he could not have seen anything to the left. This and the many contradictions in his evidence result in his credibility as a witness being questionable. In a nutshell there is no evidence at all that accused No. 2 did rape the deceased or had sexual intercourse with her, so went the argument.

[61] Mr Olivier further submitted that on common purpose, there would have to be evidence that rape did in fact happen in which case the question is whether No. 2 did in fact have common purpose with No. 1 regarding rape. On common purpose he relied on a Northwest High Court full bench decision in State v Loving Case no. CC202A/05 in which the court said the following:

> "The fact that he was present at the scene and displayed a keen interest in what transpired between the deceased and his fellow accused does not exonerate the State from its onus to prove the guilt of the Appellant beyond reasonable doubt. Because of the contradictory evidence tendered by the state witnesses, doubt exists as to whether the appellant did assault the deceased, and he should have been given the benefit of the doubt and should have been acquitted."

[62] The submission was that on the strength of this authority and having regard to the fact that B. was admittedly under the influence of alcohol, he was a single witness on rape and assault care should be taken to guard against a post *facto* reconstruction of what happened that night.

[63] On the charge of murder Mr Olivier submitted that the same principle referred to above in respect of rape are applicable to murder. The only evidence

by B. is the apparent assault of the deceased with a stick. Again it is questionable if B. could have seen No.2 assaulting the deceased. In any event there is no casual link between the assault and the eventual death of the deceased. The state has therefore not proved that the action of No.2 resulted in the deceased's death because it is not clear whether the blunt force trauma occurred first or whether in fact the stabbing occurred first. There is no evidence that accused No. 2 did in fact kill the deceased nor is there evidence that he could have foreseen the death of the deceased. That being the case the state has not tendered any evidence on which a reasonable court can find that No. 2 did in fact commit any of the offences with which he was charged.

[64] The state opposed the application as being without merit. On the charge of murder, Mr Engelbrecht, counsel for the state submitted that authorities are clear that if there is a vicious attack on an individual, a person associates himself with such an attack whether by beating with a small stick or a large stick as long as there is active association with the conduct of a group of persons resulting in the brutal attack which caused the death of the deceased, you are deemed to have caused that person's death on the basis of the doctrine of common purpose. This is so unless you can show that you disassociated yourself with the actions that caused the death of the deceased.

[65] He submitted that B. testified that he saw No. 1 and No. 2 in No. 1's room where No. 1 was performing sexual intercourse with the deceased while No.2 was assaulting her on the head with a stick. This was No. 2 associating himself with the attack on the deceased. On credibility of the two state witnesses, B. and N., Mr Olivier has not dealt with the fact that their evidence is corroborated by a lot of circumstantial evidence. For instance other than N. having left No. 1 and 2 at No. 1's flat, when he comes back the second time, he finds them still together at No.1's flat. He does his own investigations in the yard and finds the body of the deceased lying near the tap. This evidence, circumstantial as it is,

points to No. 1 and 2 having jointly or individually caused the death of the deceased.

[66] Then there is the evidence of D. who peeped through the window of his own bedroom and heard the person who was carrying or holding the deceased calling upon No. 2 to bring the bath. This, he submitted, was evidence of No. 2 being part and parcel of the attack on the deceased.

[67] On B. and N.'s evidence they both saw what was going on in No. 1's room, namely the deceased lying on the floor, bleeding, the deceased being not dressed. Clearly, so the submission went, they corroborated one another sufficiently for the purposes of this stage of the proceedings, namely, the consideration of the section 174 application. Therefore credibility becomes an issue only if the witnesses were extremely poor.

[68] On rape Mr Engelbrecht submitted that it cannot be true that there is no evidence of rape having occurred at all. There is DNA evidence of the semen of No. 3 having been found on the vaginal swab taken from the deceased. Clearly that coupled with the brutal assault on the deceased is indicative of rape. This and other circumstantial evidence warrants a reply from No. 2 which means that No 2 has a case to answer.

[69] It is true that there was no evidence of anybody having seen accused No. 2 having sexual intercourse with the deceased. However, B. did testify that he peeped through the window of No. 1's flat and saw No.1 having sex with the deceased while No. 2 was assaulting the deceased. On the other hand N. who also peeped through the window testified to having seen the deceased being assaulted. He, however was unable to identify the person who was assaulting. There could be many reasons for this including his state of inebriation, limited visibility due to the blinds that were slightly closed. He did manage to get inside the flat although it is not common cause whether he entered through the

window or through the door. Inside the flat he found the deceased, naked, on the floor, bleeding, with both No. 1 and 2 being inside the flat.

[70] Based on these facts and relevant circumstantial evidence I take the view that the application was ill conceived, ill-advised and devoid of all merit. The fact that in charging the accused the state made it clear that it intended to rely on the doctrine of common purpose made the section 174 application even more unmeritorious as it meant that the state did not have to prove that accused No. 2 did in fact have sex with the deceased or that the assault about which B. testified was the actual cause of the death of the deceased. All that was required was association with the conduct that led to both rape and murder of which in my view there was more than enough evidence for purposes of the section 174 application.

[71] The law is settled on the doctrine of common purpose and the requirements need no further elaboration. They were clarified in *S v Mgedezi*[1] (See also Snyman[2] who gives a meaningful treatise on the doctrine). It would in my view be a travesty of justice were it to be said that the accused should be shielded from being found guilty based on this doctrine where there is evidence not only of his presence at the crime scene but also of some form of his participation in the criminal activities that were taking place. His presence and his active participation would require him to explain his conduct in the interest of justice lest the justice dispensed by courts becomes too far removed from the society as to undermine it in the eyes of society.

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1. S v Mgedezi 1989(1) SA 687 (A)
2. Snyman CR, Criminal Law 4th ed (2002) at 260

[72] To the extent that some may argue that the doctrine is somehow not in accord with our constitutional values of a fair trial, this is not so. In *S v Thebus*[3] the Constitutional Court entrenched the position of the doctrine of common purpose in our jurisprudence in the following terms:

> "The doctrine of common purpose did not relate to a reverse onus or presumptions which relieved the prosecution of any part of the burden. The doctrine of common purpose set a norm that passed constitutional scrutiny. The doctrine neither placed an onus upon the accused, nor did it presume her or his guilt. The state was required to prove beyond a reasonable doubt all the elements of the crime charged under common purpose. When the doctrine of common purpose was properly applied, there was no reasonable possibility that an accused person could be convicted despite the existence of a reasonable doubt as to her or his guilt. The common purpose doctrine does not trench the right to be presumed innocent."

[73] Having asserted the constitutionality of the doctrine of common purpose it must be remembered that section 174 application received further clarification in *Lubaxa v The State*[4] where Nugent AJA, as he then was, had this to say:

> "(18) I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.
>
> (19) The right to be discharged at that stage of the trial does not necessarily arise, in my view from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be "reasonable and probable" cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Themmissen* 1955 (1) SA 129 (A) at 135 – E) and the constitutional protection afforded to dignity and personal freedom (S 10 and S 12) seems to reinforce it. It ought to follow

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3. S v Thebus and Another 2003 (6) SA 505 CC at 530 – 531
4. Lubaxa v The State [2002] 2 ALL SA 107 (A)

> that if a prosecution is not to be commenced without that minimum of evidence so too should it cease when the evidence finally falls below that threshold. That will be pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial in my view, would at that stage be stopped for it threatens thereafter to infringe other constitutional rights protected by S 10 and S 12.
>
> (20) The same considerations do not necessarily arise, however, where the prosecution's case against one accused might be supplemented by the evidence of a co-accused. The prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly. While it is true that the caution that is required to be exercised when evaluating the evidence of an accomplice might at times render it futile to continue such trial, that need not always be the case.
>
> (21) Whether, or in what circumstances a trial court should discharge an accused who might be incriminated by a co-accused, is not a question that can be answered in the abstract, for the circumstances in which the question arises are varied. While there might be cases in which it would be unfair not to do so, one can envisage circumstances in which to do so would compromise the administration of justice. What is entailed by a fair trial must necessarily be determined by the particular circumstances."

[74] The circumstances of this case, the evidence of the state at the close of the state's case and the principles of our law in relation to an application by an accused person to be discharged in terms of section 174, the doctrine of common purpose as elucidated in a number of decisions all led me to the conclusion that it would not be in the interest of justice to grant the application. The evidence of the state was, in my view, solid enough for that stage of the proceedings as to call for an answer from accused No. 2. I thereupon refused the application to discharge accused No. 2.

DEFENCE CASE

Accused No. 1

[75] Accused No.1 made a plea explanation in terms of which he pleaded not guilty to both charges. He however, pleaded guilty to the assault with the intention to do grievous bodily harm. The state rejected this plea and persisted with the charge of murder.

[76] The plea explanation reads as follows:

"I, the undersigned, **Lindani Vamva**, am accused No. 1 in the above matter and hereby state as follows:

1. I understand the charges against me, namely:
   Count 1 : Rape
   Count 2 : Murder
2. I have also been duly informed of the discretionary minimum sentences applicable to both Counts in the event that I am convicted of such crimes and in the absence of substantial and compelling circumstances justifying a lesser sentence.
3. I plead as follows to the charges:
   Count 1 : Not guilty
   Count 2 : Guilty to assault with the intention to do grievous bodily harm.
   And in doing so I explain as follows.
4. On the night in question I met the deceased at C. Tavern. Before that night we were unknown to each other.
5. I had spent the day drinking since attending a traditional ceremony in the morning but I was not so drunk that I did not know what I was doing or was not responsible for my actions. As a result of my intoxication I am, however not able to recall everything that happened that night with absolute clarity or at what time the different events occurred on that night.
6. The deceased accompanied me to my flat where we had consensual sex.
7. Accused No.2 then arrived and wanted to have sex with the complainant. She was not willing and Accused No.2 then assaulted her. I admit I joined Accused No. 2 in assaulting the deceased.
8. I attribute my actions to my state of intoxication but I admit that I was aware of the wrongfulness of my actions and that I was able to act in accordance with such appreciation.
9. Accused No.2 hit her with a stick. I hit her with my bare hands and we also kicked her while she was on the floor of my flat. I deny that I used any weapon to assault the deceased but I admit that in assaulting the deceased I acted intentionally and in a manner which caused her grievous bodily harm.
10. As a result of the assault she bled heavily and lost consciousness.
11. Accused No. 3 then arrived and saw the deceased lying on the floor of my flat.
12. Accused No.2 and I was not sure what to do about the deceased and accused No. 3 then left but later returned saying that he had a plan about what to do about the deceased.
13. At that stage the deceased was regaining consciousness and it was agreed that she should accompany accused No.3 but he never explained and we never asked him what his plan was.
14. After accused No.3 left with the deceased, Accused No.2 and I fetched our girlfriends and returrned to my flat with them.
15. Before our girlfriends entered the flat accused No.2 and I attempted to clean up the blood in my room but I admit that the blood which was later found in my room was that of the deceased.

16. I later saw accused No.3 on my property after he had left with the deceased but he was very drunk and I did not ask him what had happened to the deceased.
17. I was also told that accused No.3 had caused trouble at a nearby property and was in possession of a knife.
18. At some stage during the night the police came to my flat enquiring about the whereabouts of accused No. 3 and we found him asleep on the veranda of the main house on my property.
19. The police said that the accused No.3 was too drunk to be arrested and they told me that they would return the next morning to arrest him.
20. They duly did so at which stage accused No.3 was asleep on the floor of the kitchen in the main house and he was then arrested.
21. At a later stage I heard that a woman's body had been found at the rubbish dump near the M. School and I was arrested in that connection.
22. Although I admit to assaulting the deceased together with accused No.2 as mentioned above and to being guilty of assault with the intention to do grievous bodily harm, I deny that I raped the deceased and I also deny that I had anything to do with her death or that I intended that she should be killed.
23. I therefore humbly pray that I should be convicted of assault with the intention to do grievous bodily harm in respect of count 2 but that I should be acquitted on count 1.

[77] No. 1 testified that he was born on [...] 1998. On the night of the 3 December 2016 he was at a local tavern called C. S. where he and his friends who belong to a group called Chaos Firm were having a "*pens down party*" celebrating the end of the school year. He resides at No. [...] N. S., J. with his sister and her child and that both his parents were deceased already at the time.

[78] On his arrival at the tavern he saw an unknown girl who introduced herself to him as Denise, the deceased. The deceased was in the company of No.2 and his other friends. They had a conversation in which they ended up going together to his home where he stayed in an outside flat. In the flat they ended up having consensual sex. He was getting dressed when No.2 arrived. No.2 asked him *"did you have sexual intercourse with this girl"* and he answered in the affirmative. No. 2 disputed that. No.2 went around the bed to where deceased was sitting and talked to the deceased. He did not hear what they were talking about but noticed that there was a scuffle between the two. He intervened and No.2 calmed down but the deceased was aggressive.

[79] The deceased was bleeding from the nose. Because she was aggressive he slapped her with an open hand on the face because she did not want to stop her aggression to No. 2. No.2 picked up a stick which was in his room as he is required to carry a small stick as an initiate. No. 2 struck the deceased once with the stick on her upper body and she fell down. She did not get up and he and No.2 were shocked and did not know what to do. It was at this stage that N. arrived, saw deceased lying on the floor and asked them what was going on. N. told them he did not want to be involved and left.

[80] A few minutes later No.3 knocked at the door. He opened the door, went out closing the door behind him and he together with No.3 walked towards the gate. No. 2 got out of the flat and the two of them met P. who told them that No.3 was being trouble-some at home and he assured P. that he would handle No.3 and P. left.

[81] He and No.2 returned to his room where they found deceased still lying on the floor. A few minutes later No.3 arrived and asked them what was going on and on being told what happened he offered to help them. He asked No. 3 if what he was going to do is the right thing. No.3 left with the deceased holding her around his shoulders. Although he is not sure if she was conscious, she was however, walking on her feet and she was breathing. When No.2 wanted to leave he told him that they must first clean up deceased's blood. No.2 suggested that the two of them must go and fetch two other girls from the tavern. After cleaning the room they left for the tavern to fetch the girls who were their girlfriends. They spent the rest of the night with them. They never saw the deceased again.

[82] Later that night police arrived at his flat looking for No.3. He allowed them in and did not find him and they left. As he together with the police were going towards the gate they saw No.3 coming from the direction of the tap

going towards the door of the main house. The police said he was too drunk and as such they would not take him. The police left thereafter.

[83] He denied that N. entered his room through the window as well as B.'s evidence that he had sex with the deceased who was being assaulted by No.2 with a stick at the same time. He testified that the purplish condom was used by No.2 when he had sex with Z., one of the girls and that he did not use condom when he had sex with the deceased.

[84] Under cross examination he testified that in the Chaos Firm they are all equal but more respect is accorded to a member who is order and is a man in the sense of having been to a circumcision school. He testified that No. 3 is both older and a man and they looked up to him. No. 2 was sixteen years old on the night of the events in question and he was 18. He testified that No. 3 is short tempered and he was scared of him and that No. 2 was also scared of No.3 as he was also a boy at the time. No. 3 does become aggressive when he consumed alcohol. On that day No.3 was at the tavern and they drank alcohol.

[85] He initially denied that No.2 was with him and the deceased in the flat but later left to give him and the deceased some privacy to have sexual intercourse. He later admitted that No. 2 arrived back at his flat for the second time and found him half naked because he had had sex with the deceased. He denied that he had a fight with the deceased when No. 2 arrived because he wanted to have sex for the second time with the deceased who was not willing to do so.

[86] It was put to him that when No.3 arrived deceased was still alive and that No. 3 said all three of them were now part of the situation, he admitted this and the fact No.3 stood behind the door as a result of which they could not go out as No.3 blocked the door. He, however, denied being threatened by the deceased with rape charges if he and No.3 did not let her go. He admitted that No.3's aggressive character was such that No. 2 feared for his life and could not leave

the area due to fearing No.3 and that he also could not leave for the fear of No. 3.

[87] On further cross examination by counsel for accused No.3, Mr Geldenhuys, he contradicted himself very fundamentally with some of the contents of his plea explanation. I will revert to this aspect of his evidence later.

[88] Under cross examination from counsel for the state, Mr Engelbrecht he testified that he was the only person who had sexual intercourse with the deceased in his room that night and therefore could not explain the presence of No.3's DNA profile in the vaginal swab of the deceased. His further evidence about how or why the deceased was assaulted is also full of contradictions, at times justifications, down right lies and in some ways not even consistent with his plea explanation. What was consistent though is that he never thought of getting medical attention to the deceased who was bleeding and at some stage had fallen to the ground and lay unconscious for some time. He also did not think of getting help from any of the neighbouring houses.

Accused No. 2

[89] Accused No. 2 chose not to give a plea explanation for his plea of not guilty nor did he indicate at the commencement of the trial what his defence was. He testified that he was sixteen years old on the date of the incident. He is a student at V. Secondary School in Port Elizabeth where he is doing grade 12.

[90] He testified that in the evening of the day of the incident he was at C. S. tavern with his co accused and their other friends drinking. At the time he was also a member of the Chaos Firm. Accused No. 1 was 18 years old at the time and No. 3 was 19 years old. Both his co accused were both men whilst he was still a boy and in Chaos boys must give respect to men. Accused No.3 is a good person in the group and he protected them but when he was under the influence of alcohol he carries either a knife or a panga and does get involved in fights.

[91] He saw accused No.1 talking to the deceased and at some stage she and No.1 came out and No.1 asked him to accompany them to his flat. On the way to No.1's flat, No.1 told him that the deceased was from a farm and they must go together to have sex with her. On arrival at the flat he set on a chair which was behind the door inside the flat. The deceased set on the bed and No. 1 turned on music on his computer. Both the light on the ceiling as well as the disco lights were switched on. There was some talk between No.1 and the deceased about the disco light making the deceased dizzy but No.1 refused to switch it off. They hugged and the deceased indicated her discomfort at his presence. No.1 then told him to leave and come back after 30 minutes or an hour. He then went back to the tavern.

[92] He later returned to No.1's flat. He observed that No.1 was not dressed in his upper body and the deceased was only wearing panties. No.1 told him that when he arrived he was still busy. He set on the chair. No.1 went to the deceased who was on the bed and spoke to her. Their conversation turned into a quarrel. He could not make out what they were quarrelling about as the music was loud but he thought it was because No.1 wanted to have a second round. He saw No.1 slapping the deceased with an open hand on the face. She stood up pushed No.1 away and came towards him. No.1 slapped her again. He then stood up as he could see that they were fighting now.

[93] No.1 continued assaulting her with clenched fists and she fell next to the chair behind the door. He continued assaulting her and kicking her. At that stage there was a knock at the door and No.1 opened the door and N. came in alone. N. saw the deceased who was lying on the floor and bleeding from the nose, moaning. N. asked them what was happening. No.1 told N. not to make noise. N. then said he did not want to get involved and he left. He and No. 1 remained inside the flat with the deceased still lying on the floor. He denied that N. entered through the window as he had testified.

[94] Shortly after N. left, there was another knock and No.1 opened the door but did not allow the person in, he instead went out and closed the door behind him. He went out of the flat and saw No.1 coming from the direction of the gate. He told him that the person who knocked at the door was No.3 but he had managed to get rid of him. While they were having this conversation outside the flat P. arrived and told them that No.3 was being troublesome at home. No.1 assured P. that he would handle him. P. left and they returned to the flat where they found the deceased still lying on the floor bleeding and crying.

[95] Whilst they were standing there looking at the deceased No.3 knocked and let himself inside the flat. No.3 saw deceased lying on the floor and crying. No.3 laughed at them and asked what were they doing. At that stage the deceased was trying to get up. She set on her buttocks on the floor and said unless she was allowed to go she would say No.1 had raped her. This angered No.1 and he kicked the deceased, slapped her and assaulted her with clenched fists on her face.

[96] As No.1 was assaulting the deceased No.3 told them to stop as he was going to help them. No.1 then stopped assaulting the deceased. No.3 then said for him to help them they must all be in this thing and that they must all assault her. No.1 then continued assaulting the deceased. No.3 took a wooden stick behind the music system. He joined No.1 and assaulted the deceased with the stick while No.1 was assaulting her with his hands. The assault was directed at the upper body.No.3 then gave the stick to him and told him to assault the deceased as well. He did not take the stick and No.3 said if he did not assault the deceased he would end up like her.

[97] When No.3 said this he became afraid of being assaulted by him as he was drunk and he knew him to be dangerous when he was drunk. Fearing for his life he took the stick from No.3 and assaulted the deceased on her legs. No.3

told him to stop being a "*moffie*" and must hit her on the head. Because he was scared of No. 3 he struck deceased on the head about five times. No.3 then took a hammer from under the bed. He came in his direction and he was so shocked that he dropped the stick. He thought No.3 was going to hit him with the hammer for not properly assaulting the deceased. However, No.3 knelt down and assaulted the deceased with the hammer on her ribs so hard that even No.1 was shocked. He continued to assault her on her head and face.

[98] No.3 then opened the door wide saying he was solving our mess. He grabbed the deceased and pulled her towards the door and told them to clean the flat. He put her against the wall of the main house while both No.1 and 2 remained inside the flat. He was scared and could not run away as No.3 was still in the yard and he was afraid of ending up like the deceased. As they were cleaning the flat No.3 opened the door and his hands were covered with blood and was carrying a knife that looked like a bread knife. He instructed him to bring a zinc bath that was in a corner next to the toilet. He said he was going to wash the deceased's body so that when tests were conducted it would not be discovered that she had been raped. He, however had not seen any person having sexual intercourse with the deceased.

[99] He found the bath and brought it to No.3 who was near the tap. When he got to the tap area the deceased was lying there naked without the panties which she was wearing when she was taken out of the flat. He gave No.3 the bath and returned to the flat. He found No.1 still cleaning the flat wiping off the blood and he joined him in the cleaning. After having cleaned the flat he together with No.1 returned to C. S. tavern. But before they got to the tavern they met A., No.1's girlfriend who was with Z. and the four of them returned to No.1's flat.

[100] Later their friends A. K. and M. N. arrived. He and No.1 ended up having sexual intercourse with A. and A.. He used the purplish condom in his sexual intercourse with Z.. Police later arrived saying they were looking for No.3. No.3 was however not there and they left. They all remained there and left in the morning. He denied that accused No.3 said an ambulance should be called. He denied quarrelling with No.3 or that No.3 tried to stab him but ended up stabbing the deceased. He denied B.'s evidence that No.1 had sexual intercourse with the deceased in his presence. There was no material change in his version or evidence under cross examination that would have affected the totality of his evidence considered as a whole.

Accused No. 3

[101] Accused No.3 testified that he was born on [...] 1997 and is therefore 20 years old. He resides at No. [...], J. location in Grahamstown. At the time of the incident he knew both accused No.1 and 2 and he was at C. S. tavern with them that night. He pleaded not guilty and gave a plea explanation which reads as follows:

> "I, Siphamandla Futhufuthu, hereby state as follows:
>
> 1. I am aware of the offences I am charged with as contained in the indictment before court. I furthermore am aware of the provisions of section 51 of Act 105 of 1997 regarding the applicable minimum sentences in this case.
> 2. I make this plea explanation of my own free will and without being unduly influenced thereto.
> 3. I plead not guilty to the charges against me.
> 4. The facts upon which my plea is based are briefly set out below.
> 5. On the night of the alleged incident I drank with my co-accused at C. S. Tavern and then left to go to Bluetooth Tavern. I then went back to C. S. Tavern and asked the whereabouts of my co-accused and I was informed that they had gone to accused 1's residence. I then went to accused 1's home.
> 6. On my arrival I saw my co-accused with the deceased, who was lying on the floor with blood covering her face. I noticed that the deceased was still alive and I told my co-accused that an ambulance should be called and that this matter should also be reported to the police. I then went to my home, which is very close nearby, in order to fetch accused 1's cellphone from one S. P..

7. After arriving at my house my relatives assaulted me and I got hold of a knife to protect myself. I deny that I assaulted anyone there.
8. I then went back to my co-accused, who were still with the deceased. I told my co-accused that we should take the deceased outside. I then took her outside. Accused 2, however, came at me with a hammer and the two of us quarrelled. I had made the deceased lean against a fence during the quarrel when, at some point, I tried to stab accused 2 with the knife I had in my possession but ended up stabbing the deceased by accident when he moved out of the way.
9. After the stabbing I then went into the main house in accused 1's yard, where I eventually fell asleep. Before I fell asleep, however, I could hear my co-accused talk outside about how they have to dispose of the deceased's body.
10. I was arrested the next day by the police there in the main house.
11. I deny that I at any point had sexual intercourse with the deceased.
12. I also deny that I had any intention to stab the deceased or had any intention to kill.
13. I accordingly plead not guilty to both charges."

[102] He testified that at some stage during the night he went to No. 1's flat. He found No.1 and 2 standing and the deceased was on the floor with blood on her face and forehead. She was naked save for a top. No.1 and 2 looked shocked and lost. He advised them that an ambulance or the police be called after which he went home. He went home to fetch No.1's phone so that he could call an ambulance or the police. At home P.'s mother shouted at him. He proceeded to the lounge to look for P.. As he entered the lounge he felt a sharp prick at the back of his neck and felt a hard object hitting him. He realized that there were two persons one of whom was P.'s mother who was also trying to strangle him.

[103] He managed to free himself and went to the kitchen where he took a knife from a cutlery drawer and left going back to No.1's flat. He found the deceased still lying on the floor and he kicked her just to check if she was still alive. As he was kicking her, her entire body was shaking. His impression was that she was still alive as the arms were moving in a different direction from her body. He lifted her up and dragged her outside. His intention was to take her to his house and call the police in order for his family to have to explain themselves for the death of the deceased.

[104] He left No.1 and 2 in the flat but as he approached the corner towards the tap No. 2 appeared asking him where he was taking the deceased. He noticed that No. 2 was carrying a hammer. He lifted the deceased up so that she could stand on her own but she was unable to stand so he hung her on the fence next to the tap. No. 2 was standing between him and the deceased as they were arguing. He assumed that No. 2 was going to hit him with the hammer so he decided to stab him. No. 2 moved away and he accidentally stabbed the deceased who was behind No. 2. She fell down and he decided to leave and went to the main house at No.1's home. He went to the last room where he heard No. 1 and 2 talking about the removal of the body. He went out of the room and at the kitchen he got weak and fell asleep until he was woken up in the morning the following day by the police who arrested him. He did not intend to stab the deceased, he intended to stab No.2. He did not foresee that the deceased might be stabbed. He disputed D.'s evidence. He denied assaulting the deceased or threatening No. 2. He denied having sexual intercourse with the deceased and did not believe that his semen was found on the deceased's private parts.

[105] Under cross examination he testified that he occasionally carries knives as he has a lot of enemies. If a person he fights with produces a knife he also produces a knife to defend himself. When he entered No. 1's flat and found the deceased in bludgeoned state and she was with his co accused he concluded that they caused her to be in the state she was in. He was worried that if somebody else had come they could be arrested and he wanted to prevent that. He dragged the deceased out of the flat so as to frame his family at his house. His going to his home was to get No. 1's phone but he got a knife instead. He accidentally stabbed the deceased when he was trying to stab No.2. He stabbed her close to the breast. The force used in the attempt to stab No. 2 was intended to prick him. It was not a lunge with his full body weight. He admitted that there is no

stab wound near the breast. His evidence was generally so improbable, contradictory and down right lies that were concocted as he went along with his evidence. In fact, his evidence including the plea explanation was just part of a carelessly designed after thought that was meant to explain the inexplicable and to justify the unjustifiable.

ANALYSIS OF EVIDENCE

[106] A lot of evidence was led throughout the trial as a result of which a lot of events relevant to this case became common cause. I do not consider it necessary to analyse evidence of issues that are evidently common cause. As counsel for the state has correctly pointed out, the real issue is what happened to the deceased while she was at the premises or home of accused No. 1 in the presence of the three accused.

[107] The three accused face rape and murder charges. It is common cause that the only person who testified to having seen accused No. 1 having sexual intercourse with the deceased is B.. B.'s evidence is that he, together with N. went to No. 1's flat. N. knocked at the door and N. was told to leave by No.2 because they were busy. N. then peeped through the window which had blinds that were open. N. then called him to come and also peep through the window. He peeped through the window and saw accused No.1 having sexual intercourse with the deceased inside the room. He also saw No.2 assaulting the deceased with a stick on her head while No.1 was having sexual intercourse with her.

[108] However, B.'s evidence does call for more scrutiny. He testified in chief that the blinds were open. He stopped peeping through because what he saw was gruesome. He only stood there once and peeped through and after that he moved away. Under cross examination by counsel for accused No.2 his evidence was that the blinds were a little bit open or a little bit closed. This takes me to the two statements that he made to the police. The first was made

on 5 January 2017, exactly a month after the incident. In that statement he described the blinds as opened. Similarly in the statement dated 31 March 2017, two months after the first one and three month after the incident he described the blinds as having been opened as indeed he had testified to the blinds being opened when he gave his evidence in chief. When it was put to him by Mr Olivier that accused No.2 says the blinds were in the same way that they are depicted in photos "C61" and "C62" his evidence changed to the blinds being a little bit open than what is depicted in the photos.

[109] Let us look at another contradiction. In the second statement B. made to the police he talks about the beating meted out to the deceased by No.2. He says in part:

> "7. Lindani was having sex with the girl, who was unknown to me and A. was beating the girl with his fists and a shoe.
>
> 8. The girl was on the floor, close to the door.
>
> 9. Lindani wore a condom, purple in colour, during this incident.
>
> 10. M. knocked on the window and Lindani opened the window. He told M. to get through the window because the door area was blocked. M. then climbed through the window and got inside the flat. I was hiding a bit so Lindani didn't see me."

[110] Contrast this with the statement dated 05 January 2017 where in part he says:

> "2. The door was closed and M. knocked several times without an answer. He pimped (sic) through the window and he called me to see what was happening inside the room.
>
> 3. When I looked through, the blinds were opened and I saw Lindani having sex with a certain lady that I did not know. The lady was on the floor and lying still. There was another black male known to me but not his name who was assaulting the lady with a stick on her head. Lindani took out the condom he was wearing and he put another whilst we were still looking, but they were not aware that we were there.
>
> 4. M. again knocked hard and the unknown guy asked who it was and M. replied. This guy told M. to go away because they were busy inside but M. kept on knocking. M. told me to hide because his friends would not like if they saw me. The unknown guy opened a window and told M. to get inside

> through it. He got inside leaving me out. I looked through the window after he got in and after a few seconds I decided to go away because I did not like what was happening there.
>
> 5. My intentions were to stop a police van if I had seen one on my way back to C. S. Tavern but I did not see any. After a while at C. S. I saw Lindani and his friends there but I do not know when they left and I did not see M. again on that night."

[111] Some of the glaring contradictions are that in one statement the beating was with fists and a shoe and in another it was with a stick. In one statement M. knocked on the window and Lindani opened whereas in another he says the door was closed and M. knocked several times without an answer.

[112] Under cross examination he testified that he saw the deceased trying to push No.1 away. His evidence is that deceased was on the floor on her stomach and she was penetrated from behind. Besides the difficulty in understanding how a person on her stomach could push a person who is behind, there is another contradiction. In his statement dated 05 January 2017 he says the deceased was lying still. This begs the question as to whether it is at all possible to be lying still and be trying to push somebody who is behind you.

[113] I do not intend to deal with all the contradictions in B.'s evidence as they are just too many.

[114] N.'s evidence is that he knows all the accused persons. He together with B. went to No.1's flat. They both peeped through the window and he saw the deceased being assaulted. Very strangely he did not remember who assaulted the deceased. He also did not see the sexual acts which were seen by B..

[115] It is common cause that both these witnesses were under the influence of alcohol, to what extent nobody knows. It is also common cause that the blinds were not open, in fact they were slightly closed. This suggests that they did not have unrestricted view. There was also their state of inebriation which calls for caution in dealing with their evidence. The fact that it is contradictory in

material respects is not without significance. It is to be born in mind that even if B. had not partaken alcohol, the fact that he is a single witness would also call for caution.

[116] In *Pistorius v The State*[5] the Supreme Court of Appeals cited with approval the case of *S v Sauls* 1981 (2) SA 172 (A) at 180 C-H where Diemont JA had this to say:

> "In R v T 1958 (2) SA 676(A) at 678 Olivie Thompson AJA said that the cautionary remarks made in the 1932 case were equally applicable to s 256 of the 1955 Criminal Procedure Code, but that these remarks must not be elevated to an absolute rule of law. Section 256 has now been replaced by section 208 of the Criminal Procedure Act 51 of 1977. This section no longer refers to "the single evidence of any competent and credible witness", it provides merely that "an accused may be convicted on the single evidence of any competent witness". The absence of the word credible is of no significance; the single witness must still be credible, but there are, as Wigmore points out "indefinite degrees in this character we call credibility." (Wigmore on Evidence vol 111 para 2034 at 262). There is no rule of thumb, test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in S v Webber 1971 (3) SA 754 (A) at 758). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether it is trustworthy and whether, despite the fact that there are short comings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender of the witnesses' evidence were well founded" (per Schriener JA in R v Nhlapo (AD10 November 1952) quoted in R v Bellingham 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense. The

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5. Pistorius v The State 2014 ZASCA 47

> question then is not whether there were flaws in Lennox's evidence – it would be remarkable if there were not in a witness of this kind. The question is what weight, if any, must be given to the many criticism that were voiced by counsel in argument."

[117] The quality of the evidence given by Mr B. leaves much to be desired and the fact that he might have been drunk when he saw what he saw makes it even worse. This is not to say he deliberately lied. It may very well be that he believed that he was telling the truth but his belief is irrelevant for purposes of conviction. I do not even have to find that he lied to reject his evidence.

Suffice it to say that as a single witness his evidence is not sufficient for purposes of conviction when caution is applied.

[118] Accused No.1's evidence is not just as bad but worse. He lied and was evasive and contradictory in most material respects. However and despite this there is no basis for rejecting all of his version which no state witness has challenged or questioned if B.'s evidence is discounted. No.1's evidence is that he and the deceased left the tavern together for his flat. This is corroborated by N. who says he saw No.1 and No.2 leaving with the deceased. It is common cause that they were going to No.1's flat.

[119] I have no basis for rejecting No.1's evidence that he did have unprotected sex with the deceased consensually while only he and the deceased were alone in the flat. In fact No.2 does corroborate this piece of evidence when he testified that as N. pointed out he did indeed leave the tavern with No.1 and the deceased for No.1's flat where, he left them for an hour or so to give them privacy. I have no basis to discount the probability of consensual sex having taken place between No.1 and the deceased. Even if his evidence in this regard was improbable I would still not be able to convict him.

[120] This type of situation was aptly articulated by the Zulman JA in *S v V* 2000 (1) SACR 453 at 454 where the learned Judge of appeal had this to say:

> "It is trite that there is no obligation upon an accused person, where the state bears onus, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true."

[121] I must add that these sentiments are a correct statement of our law and they are of equal application to this case regardless of the fact that an accused

may have given generally poor evidence sprinkled with contradiction, improbabilities and even downright lies as No.1's evidence was. The burden on the state to prove its case beyond reasonable doubt is not in any way lessened by these characteristics in accused's evidence. In the circumstances I believe that there is no credible quality evidence on which to convict accused No.1 on the charge of rape.

[122] There was no evidence tendered by any of the state witnesses that accused No.2 did in fact have sexual intercourse with the deceased whatsoever. Once evidence of accused No.1 having raped the deceased is found wanting common purpose cannot arise in so far as accused No.2 is concerned on the rape charge.

[123] This brings me to accused No.3. There is no evidence by any of the state witnesses that accused No.3 was seen raping the deceased in fact have sexual intercourse with her. Furthermore, none of the accused testified about accused No.3 having had sexual intercourse with the deceased in the flat. If accused No.3 did in fact rape the deceased the rape did not take place in the flat and in the presence of accused 1 and 2 who were with the deceased throughout the whole ordeal that was suffered by the deceased in the flat. At some point all the accused including accused No.3 testified that No.3 did take the deceased out of the flat and was with her outside for some time before he re appeared on the door of the flat with bloodied hands and knife.

[124] However there is an important piece of evidence that points to accused No.3 having raped the deceased. This evidence is contained in exhibit "I" captioned "*BIOLOGY REPORT: DNA*" Paragraph 4.3 of this document reads as follows:

> "The DNA result of the reference sample 13DBAE3052 is read into the mixture DNA result from swab 14D1AC8506 *["vaginal"*]. The most conservative occurrence for all the possible contributors to the mixture DNA result is 1 in 3 trillion people."

[125] Giving evidence with regard to these results Heyns testified at page 260 lines 5-25 of the record as follows:

> "The DNA profile of the semen from the vaginal swab of the deceased was then compared to each of the accused. As stated in paragraph 4.3 on page 4) the DNA result of the reference sample from accused No.3 is read into the mixture DNA result from the vaginal swab. The profile obtained from this vaginal swab is what we refer to as a low level mixture. M'Lord, if you directly compare the DNA profile from the vaginal swab to that of accused No.3 you can see that all of the numbers correspond, except for at the location D19. M'Lord, at D19 for the vaginal swab we have the two numbers 7 and 13 whereas for the accused we have the two numbers 13 and 13. M'Lord, this swab was taken from an intimate area of the deceased's individual, therefore it was possible that some of her DNA is also present in this final DNA profile. And if we look at the DNA profile from page 2 of 6 of the deceased's individual we see that at D19 she is 7/15.2. It is possible that this additional number for the vaginal swab has been donated in fact by the deceased individual. The most conservative occurrence for all the possible contributors to the mixture DNA result of the vaginal swab is 1 in 3 Trillion people."

[126] Then at page 262 line 9 Mr Engelbrecht asked the witness as follows:

> "Engelbrecht: So in laymen's terms what would you say is the chances or the probability of the vaginal swab, the DNA on the vaginal swab not being that of accused No.3? Heyns: M'Lord, at the risk of sounding biased, I would have to say minimal, or I cannot say none existent because it is a mixture, but minimal."

[127] No evidence was given by accused No.3 to cast doubt on these results or the evidence. In the circumstances I am satisfied that on the totality of the evidence accused No.3 did in fact rape the deceased somewhere outside the flat, where exactly is immaterial.

[128] Counsel for accused No.3 did make submissions in argument about the possibility of the deceased being already dead when he arrived at accused No.3's flat from the alleged assault by accused No.1 and 2.

[129] After B. and N. left and accused No.3 arrived, the evidence of all three accused is that the deceased was alive immediately before she was dragged out of the flat by accused No.3.

[130] In the plea explanation at paragraph 13 and 14 accused No.1 says:

> "At that stage the deceased was regaining consciousness and it was agreed that she should accompany accused No. 3 but he never explained and we never asked him what his plan was.
>
> 14. Accused No.3 left with the deceased, accused No.2 and I fetched our girl friends and returned to my flat with them."

[131] The idea of the deceased being possibly dead when she was pulled out of the flat by accused No.3 can at best be an after-thought. This is so because it was never put to any of the accused or the state witnesses that the deceased possibly died in the flat. Secondly when No.1 in his plea explanation said that the deceased was regaining consciousness and it was agreed that she should accompany accused No.3, it was never put to accused No.1 that that would not have been possible because the deceased was already dead.

[132] Furthermore in his own plea explanation accused No.3 makes it clear that the deceased was still alive when he arrived. He says at paragraph 6 of his plea explanation:

> "6 On my arrival I saw my co accused with the deceased who was lying on the floor with blood covering her face. I noticed that the deceased was still alive and I told my co accused that an ambulance should be called and that this matter should also be reported to the police. I then went to my home which is very close nearby in order to fetch accused 1's cell phone from one S. P.."

[133] To put the issue of the deceased being alive when he took her out of the flat accused No.3 testified in his evidence in chief at page 820 of the record, lines 16-25 as follows:

> "Mr Geldenhuys: Could you ascertain whether she was still alive? Accused No. 3: As I was kicking her, her entire body was shaking, but as her body was going towards the left hand side her thumb were going towards the right hand side facing towards the right.
>
> Mr Geldenhuys: So could you see if she was still alive or not? Accused No.3: I wanted to say that she was still alive because the movement of her arms did not go towards the direction the body was moving towards."

[134] Then at page 821 line 20 he says he lifted her up as he wanted her to stand on her own but she was unable and he therefore hung her on the fence just next to the tap. His semen being found in the vagina of the deceased is consistent

with accused No.3 having raped the deceased when on his own evidence the deceased was not dead when they were both outside the flat.

[135] He has admitted to stabbing the deceased. He, however says he stabbed the deceased near the left breast. As indicated above there is no stab wound at all in the area he admits to have stab her in. We know from the evidence of Dr Dwyer and the post mortem report he compiled which was admitted in evidence as exhibits "E" that the cause of death was sharp force and blunt force. The deadly sharp force wound was a "25mm wound right side of neck, 40mm from midline (wound track through larynx and floor of month)". No suggestion was made that the knife that accused No.3 was carrying and with which he claimed to have accidentally stabbed the deceased could not have caused the deadly wound that Dr Dwyer described or any of the other wounds that he testified about which he found on the deceased's body.

[136] The only issue that remains to be dealt with is the assault on the deceased inside flat of accused No.1. It is common cause that in the flat the deceased was, assaulted with a stick, bare hands, kicked and hammered as well. There is no point in detailing the evidence relating to who inflicted which injury. The reason for this is that Dr Dwyer's evidence which has not been challenged but has, if anything, been corroborated by the three accused is that blunt force injuries were inflicted and sharp force injuries were inflicted all of which individually or together caused the death of the deceased.

[137] No.2, among other things, testified that all three of them assaulted the deceased with a stick following accused No.3 offering to help No.1 and 2 to solve their problem about which they were confused. There are conflicting versions about why the assault took place initially with No.1 saying it was because No.2 wanted to have sexual intercourse with the deceased who was refusing and No.2 saying it was because No.1 wanted to have a second round of

sexual intercourse which deceased was refusing. I do not find it necessary to make a determination of why the fight started or rather why the initial assault on the deceased was started.

[138] It is also common cause that when No.3 arrived deceased had already been assaulted and was lying on the floor. He then offered to help. My sense is that everybody knew or would have known what he meant by offering to help when he told them that they must all take part. It is also common cause that both accused 1 and 2 are younger to No.3 and they feared him. It is not accused No.1's case that he assaulted the deceased because of that fear or he did so because he was under duress. He simply denies that he assaulted the deceased in the presence of No.3.

[139] No.2's evidence is that he did not want to assault the deceased and was forced to do so by No.3. No.1, who in my view, needed help more than anybody else was quite happy to participate. Accused No.2 testified that other than assaulting the deceased in the lower body he was forced to assault her on the upper body which he did at least five times on the head. My impression is that accused No.2 was telling the truth in his account of what happened. In fact he implicated himself more than he needed to. It is only through him that there is evidence not only that the blood found on the hammer was that of the deceased as Heyns testified but he tells us that deceased was assaulted with the hammer by accused No.3.

[140] In terms of self-implication both 1 and 3 greatly minimized their role in the murderous assault and No.1 did his best not to implicate No.3 at all in the assault. It is my view that we may never have a full picture of what happened in that flat due to the fact that the deceased is not able to tell her story. Her murder was in any event designed to ensure that she did not live to tell the story.

[141] On the totality of the evidence I am unable to exclude the possibility of accused No.2 having participated in the murderous assault on the deceased out of necessity to save his own life as he testified. In any event he has no obligation to prove his innocence. The only witnesses who testified to having seen what happened in that flat are B. and N. whose evidence is just not sufficient for purposes of a conviction. In my view the domineering character of accused No.3 on the other members of the Chaos Firm might very well be true especially on accused No.2 who was a mere boy of sixteen years at the time. In fact if there was any doubt about his character, P.'s evidence dispels all those doubts. P. testified that on that night he, his mother and his step father were terrorised by No.3. If he is capable of doing that to his family, I do not see why it should not be possible for him to force a sixteen year old boy to do as he pleases.

[142] In *S v Van der Meyden*[6] Nugent J stated the legal position 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 he might be innocent. (See, for example, *R v Difford* 1937 AD 370 especially at 373, 383). These are not separate and independent tests, but the expression of the same

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6. *S v Van der Meyden* 1999 (2) SA 79 (WCD)

> test when 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 not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true."

[143] The evidence that throws a better light and gives more detailed and credible information and about who inflicted these injuries is that of accused No.2.

[144] Whether I believe accused No.2's explanation or not is not the test and even if I were to hold the view that his explanation is improbable, to the extent that it is not so improbable as to be false and is therefore reasonably possibly true, if assessed objectively, he is entitled to acquittal. I am unable to find that on the totality of the evidence accused No.2's explanation for his participation in the deceased's murder is so improbable as to be false. I need to add something about accused No.1. The whole exercise started with him and was escalated quickly to the deceased being on the floor by his own actions in the absence of accused No.3. When No.3 arrived and took control of the situation No.1 was a willing participant who must have understood accused No. 3 to be involving himself in the crime just to save him. On the principles of the common purpose doctrine already articulated above both accused 1 and 3 willingly participated in the murderous activities that resulted in the deceased body being found with multiple wounds and injuries buried in a rubbish heap in the dumping site near M. High School. Whether accused No.3 took him there alone or was assisted by another person other than No.1 and 2 is irrelevant for purposes of establishing their guilt.

[145] I must express my absolute disgust at the fact that the whole group of young people were all not considering it necessary to help the deceased, even those who were not even remotely connected with her murder. B., N., and all three accused adopted an approach that sought to hide the murder and rape of an innocent young girl who seems to all of them to have been part of their entertainment facilities that must be disposed off after use. Clearly both B. and N. knew that the girl had been killed and disposed off to hide her death.

[146] This must be particularly painful not only to the family of the deceased but also to the entire community of J. and the surrounding areas as a case like this would no doubt, have attracted public attention and disgust. However, it would be both dangerous and reckless if courts, whose constitutionally ordained duty is to administer justice, were to be influenced by public perceptions of guilt or innocence or even feelings of disgust. This reminds of the salutary comments expressed by Erasmus J in *S v Nombewu*[7] wherein he said:

> "The court should in fact endeavour to educate the public to accept that a fair trial means a constitutional trial and vice versa. Pronouncements on human rights by the courts and academics obviously add body to the jurisprudence which surrounds the Constitution. But abstract statements of law very often mean different things to different people and very little to the bereaved and the aggrieved who see factually guilty accused go free in consequence of some infringement of his constitutional rights by officials. It is therefore the duty of the courts in their everyday activity to carry the message to the public that the Constitution is not a set of high minded values designed to protect criminals from their just deserts: but it is in fact a shield which protects all citizens from official abuse. They must understand that for the courts to tolerate invasion of rights of even the most heinous criminal would diminish their constitutional rights. In other words, the courts should not merely have regards to public opinion, but should mould people's, thinking to accept constitutional norms using plain language understandable to common man."

[147] As I evaluated all the evidence and making the conclusions that I did about the evidence I was guided, inter alia, by our constitutional value system. In the result I have come to the following conclusion in respect of

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7. S V Nombewu 1996 (2) SA CR 396 (E)

the rape and murder of the deceased D. N.:

1. Accused No. 1 is found not guilty of rape.

2. Accused No.2 is found not guilty of rape.

3. Accused No.3 if found guilty of rape as charged.

4. Accused No.1 is found guilty of murder as charged.

5. Accused No.2 is found not guilty of murder.

6. Accused No. 3 is found guilty of murder as charged.

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JOLWANA J

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the State: J ENGELBRECHT

Instructed by: NDPP

GRAHAMSTOWN

Counsel for the Accused No. 1: J C McCONNACHIE

Instructed by: LEGAL AID BOARD

GRAHAMSTOWN

Counsel for Accused No. 2: W H OLIVIER

Instructed by: YOKWANA ATTORNEYS

GRAHAMSTOWN

Counsel for Accused No. 3: D P GELDENHUYS

Instructed by: LEGAL AID BOARD

GRAHAMSTOWN

Matter heard on: 22 March 2018

Judgment handed down on: 16 April 2018