REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: SS20/4/2011

DPP REF NO: JPV2011/0022

DATE:03/11/2011

NOT REPORTABLE

In the matter between

THE STATE

and

JACINTO ANTONIO CHILENGE ACCUSED 1

FELIX JOSE MACHAVA ACCUSED 2

J U D G M E N T

VAN OOSTEN J:

[1] The accused are jointly charged on an indictment consisting of 36 charges. Accused 2, in addition, is charged with one count of escaping from police custody (Count 37). Both accused pleaded not guilty to all the charges, and no plea explanation, as to the merits of the matter, was tendered on their behalf.

[2] The charges preferred against the accused arise from 6 separate incidents, all having occurred at different houses in the Braam Fisherville-area, Dobsonville, Roodepoort. The incidents span over a period of approximately one year, the first having occurred on 11 April 2009 and the last on 17 April 2010. The events that occurred at each of the six incidents, are strikingly similar: the early hours of the morning was the preferred time, at least two men wearing balaclavas, armed with firearms, forcibly gained entrance to the house; one usually remained at or near the entrance door while the other proceeded to the bedroom where the occupant/s were sleeping commanding the handing over of money and cell phones. In some instances cell phones were handed to them while other items such as clothing, TV and DVD sets were removed. Finally, one or more of the women present in the house were eventually raped once, and in some instances, more than once and further sexually assaulted.

[3] The accused, who have both testified, deny all the allegations against them. The identity of the offenders accordingly is in issue. The State, broadly stated, relies on the identification of two eye witnesses concerning the first

incident, the recent possession of a cell phone that had been robbed from one of the complainants concerning the second incident and DNA evidence linking the accused to different incidents which I shall presently refer to.

[4] Before I proceed to examine the evidence it is necessary to refer to the admissions that were by consent, recorded in terms of s 220 of the Criminal Procedure Act. The admissions comprise a large number of formal aspects such as photographs that were taken of certain scenes, the medical examination of the complainants, the obtaining, marking and dispatch of sexual assault evidence collection kits and the DNA results obtained from the analyses. It was, however, agreed between the State and the defence that certain expert witnesses would, notwithstanding the admissions, be called to testify. Those witnesses indeed have given evidence concerning those aspects.

[5] It further bears mentioning that, except for the charges I shall presently refer to, the State has succeeded in proving all the essential elements in respect of each of the housebreaking with intent to rob and robbery charges in regard to each incident as well as the rape of each complainant, referred to in the rape charges. The only real issue accordingly, remains identity, in respect of which the State has also placed reliance on the doctrine of similar facts evidence, to which I shall revert later in the judgment.

[6] A convenient point of departure is to refer to those charges on which the State has led no evidence or where, for some other reason, they do not require further consideration:

- Count 3 (Rape) is a duplication of count 2 in respect of which the accused were discharged at the end of the State's case, in terms of s 174 of the Criminal Procedure Act.
- Counts 5, 18, 24, 31, and 35 relate to the unlawful possession of firearms. Although, as I have indicated, the uncontested evidence shows that firearms were in the possession of the assailants at each incident, no particulars of the firearms, except for the colour and approximate size thereof, were given. The evidence, moreover, and as was readily conceded by counsel for the State, is insufficient to sustain a finding of joint possession of any of the firearms described in the evidence.
- Counts 6, 19, 25, 32, and 36 relate to the unlawful possession of ammunition. No evidence exists to show that either of the accused was in possession of ammunition.
- Count 16 (Rape) is identical to count 15 (Rape) and accordingly constitutes a duplication which needs not be considered any further.

[7] This brings me to the remaining charges. I shall, for the sake of convenience and ease of reference, adopt and adhere to the classification of the charges under the respective Dobsonville CAS numbers, as set out in the indictment. Against this background I now proceed to examine the evidence in regard to each of the incidents, under a separate heading.

DOBSONVILLE CAS: 278/04/2009

[Counts 1 (Housebreaking/Robbery); 2 (Rape: B N); and 4 (Rape: B N)]

[8] Two witnesses for the State testified concerning the events that occurred during the first incident: firstly, the complainant, B N, and secondly, her cousin, Onteretse Moono, who at the time was present in the house.

[9] The fact of the housebreaking/robbery and the rape of the complainant having occurred is not in dispute. A brief summary of the events is the following: On 11 April 2009 the complainant, together with two others, was asleep in her house. At approximately 02h30 that morning two unknown men forcibly gained entrance to the house. The complainant as well as Moono, for the first time in their evidence, identified the two intruders as accused 1 and accused 2. I pause here as it is convenient at this stage to deal with their evidence as to the identification of the accused.

[10] The identification of the two accused by these witnesses was a so-called dock identification. The value thereof, as has been held in numerous cases, often is doubtful, for apparent reasons (see S v Maradu 1994 (2) SACR 410 (W)). Evidence of a dock identification however, is admissible and it forms part of the evidential matter upon which the case has to be decided (see S v Bailey 2007 (2) SACR 1 (C); S v Matwa 2002 (3) All SA 715 (E) 720 – 722). In the assessment of the value of such evidence, the necessary caution must be exercised (S v Tandwa 2008 (1) SACR 613 (SCA) para 129 – 132 and S v Mdongwa 2010 (2) SACR 419 (SCA) para 10).

[11] The dock identification by the two witnesses however, does not stand alone. Their identification is confirmed by the DNA evidence, which is to the effect that accused 2's DNA profile can be read into both a swab that was taken from her during the medical examination, later that morning, at 06h35, by Dr Mashigo, as well as a sample taken from the complainant's panty. The DNA analysis of the swab and sample did not include the DNA profile of accused 1.

[12] The evidence of the complainant as to the identity of the person who had raped her is on all fours with the DNA results: she testified that accused 2 raped her (Count 2) and that he thereafter instructed her to suck his penis (Count 4), which she complied with. Accused 1, she testified, was instructed by accused 2 at gunpoint, to "come on top of her". Accused 1, she further testified, proceeded to open the zip of his trousers, then lowered himself upon her and placed his penis on her private parts, but was unable to get an erection. Accused 1 then asked her to kiss him, which she did. Accused 2 then proceeded to rape her.

[13] After careful consideration of the evidence as a whole concerning this incident, I have come to the conclusion that in the circumstances of this case, the identification of the accused by the two witnesses is reliable. My reasons for the finding are the following:

13.1 Both the complainant and Moono were reliable witnesses and the cogency of their evidence is beyond question. The complainant testified that she "had a good look" at the accused and that she could see them well. It is

true, as she has described, that both accused were wearing balaclavas, covering the upper part of their heads. She was, however, able to describe the clothing they were wearing.

13.2 The complainant's evidence that accused 2 was armed with a firearm and accused 1 with an "iron rod" is materially corroborated by Moono. Although Moono described the item in possession of accused 1 as a "screw driver", I have no doubt that the witnesses in fact observed and described the same weapon.

13.3 The two witnesses further corroborate each other in all material respects concerning the events that transpired on the morning of the incident.

[14] As against the evidence I have outlined above, the version of the accused must now be considered. Both accused relied on a bare denial in respect of all the incidents. Their denial crumbles down once consideration is given to the evidence against them showing overwhelmingly that they in fact entered the complainants' house on the morning of the incident. Accused 1 transparently and falsely raised allegations of a conspiracy by the investigating officer to implicate him in the commission of the offences. I do not hesitate for a single moment to reject their denial of being present at this and the other incidents, as false beyond any doubt. No argument to the contrary, in any event, was advanced.

[15] For these reasons I find that the State has proved beyond reasonable doubt that the two accused forcibly gained entrance to the house of the

complainant and that they robbed her of the items referred to in the indictment (ie 3 cell phones, a TV set, blankets, a music centre, Nike shoes and food).

[16] It remains to deal with the accused's guilt on each separate count concerning this incident. On count 1 (Housebreaking/Robbery), both the accused, having been present in the house, accused 1 armed with an iron rod/screw driver and accused 2 with what was described as a firearm, are guilty. On count 2, the evidence shows that accused 1 was instructed by accused 2 to rape the complainant which he, evidently, did not intend doing. His request to the complainant to kiss him clearly forms part of the simulation he was setting up and there is accordingly nothing to show that accused 1 in any way associated himself with the conduct of accused 2 in raping the complainant. It follows that only accused 2 is guilty on count 2 (Rape) and count 4 (Rape).

DOBSONVILLE CAS 479/11/09

[Counts 7 (Housebreaking/Robbery); 8 (Rape: TM); 9 (Compelling/Causing V S to be present/watch a sexual act); 10 (Rape: V S) 11 (Compelling/Causing T M to be present/witness a sexual act); and 12 and 13 (Unlawful possession of firearm and ammunition)]

[17] The complainants referred to in counts 8 and 10, TM and V S, testified as to the events that occurred on 17 November 2009, at approximately 02h00.

[18] Similar to the first incident, two unknown men forced entry into the house of M, who was at the time sitting on her bed talking on her cell phone while

waiting for transport to her workplace. Both men were, according to both complainants, wearing black balaclavas, which resulted in their inability to identify them. S was asleep but was woken up by M, who informed her that people were trying to break in. The intruders having gained entry demanded money. M observed that one of them was armed with a firearm and S testified that both were armed with firearms.

[19] M was robbed of her cell phone by one of the robbers, being the one, she testified, she had observed was armed with a firearm. She identified the cell phone as a Nokia 3500 Classic, which was handed in as Exhibit 1. The State led the evidence of four further witnesses to show that Exhibit 1 on 17 November 2009, at approximately 12h00 was sold by accused 2, who then was in the presence of accused 1, to Karmoni Maswanganyi, at his work place, “Moses Fruit and Veg”. The transaction as such was not disputed by accused 2. He however challenged the model of the cell phone that he had sold to Maswanganyi. According to him it was a Nokia 1600 cell phone and not a Nokia 3500 Classic. Accused 1 denied that he was present when the deal was struck although he admitted having arrived there later that day.

[20] Accused 2’s denial that he had sold Exhibit 1 to Maswanganyi is clearly false. Maswanganyi testified as to the whereabouts of Exhibit 1 which had eventually found its way to Maphuto. At the request of the police he arranged for its return and he handed it over to the police. The cell phone number of Exh 1 in use at the time of the robbery was forwarded to Vodacom and Petro Heyneke, employed as the Forensic Liason Manager at the Forensic Services Division of Vodacom, testified concerning the cell phone data and the calls

made and received from Exhibit 1 as well as the change of sim cards that had occurred. This evidence was left unchallenged and on all material aspects corroborates the version of M and Maswanganyi on this aspect.

[21] I accordingly conclude that it has been proved beyond reasonable doubt that M's cell phone, that had been robbed during the incident, was sold a mere few hours later by accused 2, who then was in the presence of accused 1, to Maswanganyi. Accused 2 therefore was in recent possession of the robbed item. The finding of course, as I shall presently deal with, is of crucial significance once consideration is given to the identity of the robbers.

[22] To revert to the incident, M further testified that she was raped by one of the intruders. This happened in the presence of S who had been called from her room and instructed to get onto the bed, although her head was covered with a blanket.

[23] S testified that she was blinded by the blanket but that she heard that M was being raped. She was after that also raped. No condom was used. Blankets were thrown over them and the robbers left.

[24] The facts I have alluded to prove beyond reasonable doubt that the complainants were raped and robbed of the items referred to in count 7.

[25] This brings me to the identification of the offenders. The DNA analysis done in respect of swabs obtained from the two complainants (the same morning at 10h30 and 09h20 respectively, by Nurse Ntiulili) produced the

following results: accused 1's DNA profile was found in a swab taken from S and accused 2's DNA profile in that of M.

[26] The totality of the evidence accordingly proves beyond reasonable doubt that both the accused were present during this incident, which is confirmed by accused 2's possession of and dealings with Exhibit 1, in the presence of accused 1, which had earlier been robbed from M. The cell phone, as I have alluded to, according to M, was robbed by the intruder who was in possession of a firearm, and it was he who had raped her. Accused 2's DNA profile moreover links him to the rape of M, and it was accused 2 who was in possession of the cell phone which he traded to Maswanganyi.

[27] As for each of the individual charges in regard to this incident, my findings are the following: both the accused are guilty on count 7 (Housebreaking/Robbery), accused 2 is guilty on count 8 (Rape: T M) and accused 1 is guilty on count 10 (Rape: V S). It must further be accepted, on the evidence as a whole, that accused 2 was in possession of a firearm and further that the firearm was in good working order as a shot was fired inside the house, which the complainant testified, struck the floor. Accused 2 accordingly is also guilty on counts 12 and 13 (Unlawful possession of firearm and ammunition).

[28] It remains to deal with counts 9 and 11. These charges are based on the provisions of s 8 (1) of the Criminal Law (Sexual Offences and Related matters) Amendment Act, 32 of 2007. The operative part of the section makes it an offence to "compel or cause" a person 18 years and older to "be in the presence of" or "to watch" the commission of a sexual offence. The evidence

of the two complainants shows that they were both ordered to be present when the rapes were committed, although their heads were covered with blankets. The accused accordingly caused each of them to be present when the other was raped. It follows that accused 2 is guilty on count 9 and accused 1 on count 11.

DOBSONVILLE CAS 513/11/2009

[Counts 14 (Housebreaking/Robbery); 15 and 16 (Rape: L M) and 17 (Compelling/Causing Nzwandile Mazibuko to be present at a rape); and, against accused 2, count 37 (Escaping from lawful custody)]

[29] The complainant, L M and her then boyfriend, Nzwandile Mazibuko, testified as to this incident. The date thereof was 18 November 2009, and the time approximately 03h00. The complainant and her boyfriend were asleep.

[30] Forceful entry was once again gained by two unknown men, both armed with firearms, their heads and faces covered by balaclavas. They demanded money and a cell phone was handed to them. Several other items were taken. Mazibuko's head was covered with a blanket and the complainant was raped by each of the intruders, one after another, while Mazibuko was present. Only the second rapist, she testified, made use of a condom.

[31] Mazibuko's version is corroborated by the evidence of the complainant in all material respects. Both were however, unable to identify any of the intruders.

[32] The DNA results links accused 1 to the rape of the complainant: his DNA profile can be read into the swab taken from the complainant at 10h20 that morning, by Nurse Segotso, who conducted the examination of the complainant, and who further testified that the complainant was pregnant at the time.

[33] It follows that accused 1 is guilty on count 14 (Housebreaking/Robbery), count 15 (Rape: L M) and count 17 (Causing Mazibuko to be present at the rape).

[34] The State relies on similar fact evidence in respect of accused 2's involvement in this and the other incidents to which he has not been linked. The application of the doctrine of similar facts evidence also arises concerning the other incidents both in regard to accused 1 and accused 2. The similar facts relied upon, broadly stated, are the following: the time of the incidents, the area where they had occurred, that in each instance the house was broken into and the manner in which the robberies and the rapes were committed.

[35] Similar fact evidence can be admissible in order to identify an accused as the offender (S v D 1991 (2) SACR 543 (AD) at 546e; S v C 1996 (2) SACR 181 (C) 184f; S v Moti 1998 (2) SACR 245 (SCA)). It is a prerequisite for the doctrine to apply that there must be similarities in the events. In the present matter the six incidents bear the following striking similarities: six houses in a particular area were targeted which were broken into in the early hours of the morning; the assailants were in possession of firearms; their heads were

covered wholly or in part with balaclavas; the occupants were threatened and the handing over of money and phones was commanded; cell phones, when on hand, were there and then seized; other items such as TV and DVD sets were robbed, and the complainants, once they had been subdued, all adult women, were raped. (See S v M 1963 (3) SA 183 (T) at 186F where facts similar to those in this case were considered (at p 187G) and S v M 1985 (1) SA 1 (AD) at p 4, where it was held that a sufficient nexus must exist between the various incidents in order to show the identity of the assailant)

[36] In the consideration of the facts relating to the six incidents in the present matter, the dates of their occurrence are of significance. The accused are cousins. They were both involved in the first and second incidents, that occurred on 11 April 2009 and 17 November 2009. The third incident, where accused 1 was involved, occurred the day thereafter on 18 November 2009. Then followed the fourth incident, where accused 2 was involved, some two weeks later, and three days after that, the fifth where accused 1 was involved. The last incident, where accused 1 was involved, occurred some four months later, on 17 April 2010. Taken together all the similarities and other factors I have referred to, in my view, corroborate the other circumstantial evidence and provide ample justification for the finding that both accused were involved in all six incidents.

[37] For these reasons, and having applied the doctrine of similar facts evidence, I conclude that accused 2 is guilty on count 14

(Housebreaking/Robbery) and count 17 (Causing Mazibuko to be present at the rape).

[38] Finally, I turn to count 37 (Escaping from lawful custody) against accused 2 only. Sgt Mushwana testified that accused 2, the day after his arrest, on 23 April 2010, and while on their way walking back to their vehicles to return to the police station, with his hands cuffed behind his back, dashed away in the direction of Slovoville. He gave chase and apprehended accused 2 some 900 metres further. Accused 2 admitted the event but claimed that he was assaulted by the police which compelled him to escape. The alleged assault was denied by Sgt Mushwana as well as Warrant Officer Msweli, who was also present. Accused 2's allegations concerning the assault cannot stand against the evidence of the police officers and are clearly false. It follows that accused 2 is guilty on count 37.

DOBSONVILLE CAS 60/12/2009

[Counts 20 (Housebreaking/Robbery); 21 (Rape: KM); 22 (Assisting/Encouraging an accomplice to commit rape); and 23 (Compelling/Causing Roy Mavale to be present at a rape)]

[39] The complainant, K M, was the only witness to testify concerning this incident. Her boyfriend, Roy Mavale, who was with her at the time, could not be traced. The complainant's evidence described what by now has become a familiar scenario: four men, two armed with firearms, forced entry into her house, on 1 December 2009 at 03h00. They demanded money and were told that there was none. They proceeded to remove a number of household items

such as a TV set, a DVD set and CD's which were placed outside. Upon their return her boyfriend was asked to cover his head and they, in his presence, proceeded to rape her, one after another. They left and she heard two shots being fired outside the house.

[40] The DNA results obtained from a cervical swab taken of the complainant at 12h50 that very morning, by Dr. Thompson, links only accused 2 to the rape. It must therefore be accepted that accused 2 was one of the intruders and that he raped the complainant. Accused 2 accordingly is guilty on counts 20 (Housebreaking/Robbery); 21 (Rape: K M) and 23 (Causing Roy Mavale to be present at the rape). Count 22 (Rape: K M) is a duplication of count 21, albeit with the additional allegation that the accused "assisted and/or encouraged the third accomplice" to commit rape. There is no evidence in support of these allegations.

[41] Accused 1, on the basis of the similar facts doctrine that I have already dealt with, I find, was also present and he therefore is guilty on counts 20 (Housebreaking/Robbery), 21 (Rape: KM) and 23 (Causing Roy Mavale to be present at the rape).

DOBSONVILLE CAS 91/12/2009

[Counts 26 (Housebreaking/Robbery); 27 (Abduction: S
M); 28 (Rape: SM); 29 (Rape: S M) and 30 (Rape: S M)

[42] Two witnesses testified as to this incident: the complainant, S M, and her boyfriend, Bonginkosi Mthombeni. They were asleep at 02h10 on 4 December 2009, when three unknown men, wearing balaclavas and armed with firearms,

entered the house. They demanded cell phones and money. One of them struck several blows on Mthombeni's head with the butt of a firearm. Items were removed, including a TV set, which Mthombeni was ordered to take outside.

[43] The complainant was escorted outside by two assailants. The third assailant remained behind with Mthombeni. Having walked some distance they arrived at a certain spot in the veldt, where both raped her, one after another. She was ordered to get dressed and to return home. On her way home she came across the third assailant, who, without more ado, raped her. In addition he, after the rape, inserted his penis into her mouth (Count 30) and after that ordered her to go home.

[44] Mthombeni corroborated the complainant's evidence on every material aspect. Both witnesses were unable to identify the assailants. Accused 1 however is linked to this incident by the DNA results, obtained from a swab taken by Dr. Thompson, at 08h35, that very morning as well as a sample obtained from the complainant's pants.

[45] Accused 1 accordingly, is guilty on counts 26 (Housebreaking/Robbery) and 28 (Rape: S M).

[46] Although the evidence on count 27 (Abduction: S M) shows that the complainant in fact was abducted, her evidence only implicated two of the three assailants in the abduction. In the absence of evidence identifying the

abductors, I am unable to find that either of the accused abducted the complainant or that they were part of a common purpose to abduct the complainant. On count 29 (Rape: assisting/encouraging a third accomplice) no evidence exists in support of these allegations against either of the accused. Finally, on count 30 (Rape: S M), the complainant, as I have alluded to, testified that the act was committed after the third rape, while she was on her way home. In the absence of identificatory evidence as to who the assailant was, I am unable to find that either of the accused was involved in the commission of the crime.

[47] Accused 2, on the acceptance of the similar facts, accordingly is guilty on counts 26 (Housebreaking/Robbery) and 28 (Rape: S M).

DOBSONVILLE CAS 393/04/2010

[Counts 33 (Housebreaking/Robbery); and 34 (Rape: NM)]

[48] The last incident occurred on 17 April 2010, at 02h45. The complainant testified that she was alone and asleep in her house. She woke up when three unknown men who had gained forcible entry, were in the house. They wore balaclavas covering their faces and she was unable to identify them. Two assailants were armed with firearms. They demanded cash and cell phones. One of them proceeded to rape her. No condom was used. All the items listed in the indictment under count 33, were removed and nothing was recovered. They tied her up and left.

[49] The DNA results obtained from a swab taken that same morning, at 11h30, by Nurse Segotso, links accused 1 to the rape and thus to both counts 33 and 34. Accused 1 accordingly is guilty on both these counts.

[50] Accused 2, on the acceptance of the similar facts evidence, is guilty on count 33, having been present during the incident. In the absence of evidence to link him to count 34, he is entitled to his acquittal on this count.

[51] In the result:

51.1 Accused 1 is found guilty on counts 1, 7, 10, 11, 14, 15, 17, 20, 21, 23, 26, 28, 33 and 34 and not guilty on the remaining counts.

51.2 Accused 2 is found guilty on counts 1, 2, 4, 7, 8, 9, 12, 13, 14, 17, 20, 21, 23, 26, 28, 33, and 37 and not guilty on the remaining counts.

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FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

COUNSEL FOR THE STATE	ADV LR SURENDRA
	ADV BF MNISI
COUNSEL FOR THE ACCUSED	ADV M BOSIKI
DATE OF JUDGMENT	3 NOVEMBER 2011