REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: JPV 2011/250

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

29 MAY 2013 **FHD VAN OOSTEN**

In the matter between

THE STATE

and

SIBUSISO BLESSING NYEMBE **ACCUSED**

Criminal law – trial - multiple charges of kidnapping, rape, robbery with aggravating circumstances, rape, kidnapping - evidence - DNA analysis and results - only evidence implicating the accused - sufficiency of where chain evidence and correctness of analysis admitted.
Sentence - accused convicted on multiple charges – severity of offences - previous convictions - personal circumstances of accused - approach to be adopted where minimum sentence provisions apply - interests of society – proportionality of sentence to crimes convicted of - life imprisonment imposed.

J U D G M E N T

VAN OOSTEN J

[1] The accused has been arraigned for trial on an indictment consisting of altogether 14 counts, as follows: 3 counts of kidnapping (counts 1, 5 and 11), 6 counts of rape (counts 2, 7, 8, 9, 12 and 15), 3 counts of robbery with aggravating circumstances (counts 3, 10 and 14), one count of attempted murder (count 4) and one count of wrongfully pointing of an object resembling a firearm (count 6). The accused pleaded not guilty on all counts and elected not to tender a plea explanation.

[2] A number of admissions were by consent recorded in terms of section 220 of the Criminal Procedure Act 51 of 1977. The admissions comprise *inter alia* the medical examination of the complainants referred to in the rape charges, the correctness of the forms J88 completed pursuant thereto, the collection of genital specimens during those examinations, the sealing of the samples in evidence collection kits, the despatch to and receipt thereof at the Forensic Science Laboratory in Pretoria, the subsequent forensic examination and analysis of the various specimens, and, finally, an album containing photographs of the scene of the crime, at Chiawelo 2, Soweto, as pointed out to the police by the complainant, F T (referred to in counts 11 to 14).

[3] Altogether 9 witnesses testified for the state. The accused testified in his own defence and no witnesses were called for the defence.

[4] The sole issue for determination by this Court is the identity of the perpetrator of the crimes the accused is charged with. The fact that the crimes were committed has not been disputed and can therefore be accepted as common cause. The state in essence relies on the results obtained from the DNA analysis, which is the only evidence implicating the accused in the commission of the crimes.[1] The accused denied knowledge of or having committed any of the crimes and raised an alibi to which I shall revert in due course.

[5] The salient facts of this matter, which are not in dispute, are the following. The charges arise from three separate incidents of rape. The first occurred on

[1] As to fingerprint evidence, see *S v Nzimande* 2003 (1) SACR 280 (O); *Seyisi v The State* (117/12) [2012] ZASCA 144 (28 September 2012).

24 November 2007, at Chiawelo, when the complainant, E R, was kidnapped (count 1), raped (count 2), robbed (count 3) and stabbed with the intent to kill her (count 4). The second incident occurred on 12 January 2008, also at Chiawelo, when the complainant, SC, was kidnapped (count 5), an object resembling a firearm pointed at her (count 6), and she was raped (counts 7, 8 and 9), and robbed (count 10). The third incident occurred on 16 February 2008, again at Chiawelo, when the complainant, F T, was kidnapped (count 11), raped (counts 12 and 13) and robbed (count 14).

[6] The three complainants testified. The evidence of S C was corroborated by her boyfriend, Heinen Mabayi, who had seen and spoken to her shortly after the incident. The evidence of F T was corroborated by her aunt, Dorcas Mandamela, who had seen her shortly after the incident and who accompanied her to hospital. As I have mentioned their evidence was not disputed. None of the complainants was able to identify the assailant. The incidents they described bear striking similarities: each of the complainants left home early in the morning on their way to work, an unknown man appeared armed with a firearm (according to C) or a knife (according to the other two complainants), he demanded money and personal belongings which were handed to him, they were assaulted if resistance was offered and he then dragged or pushed them to an open veld, adjacent to a school, where they were raped in the way as set out in the rape charges (counts 2, 7, 8, 9, 12 and 15) whereafter he simply disappeared.

[7] The crucial evidence for the state concerns the DNA testing, analysis and the results obtained.[2] Lt van der Merwe, the forensics expert at the Forensic Science Laboratory, testified on these aspects. As a point of departure she testified that no two persons have the same DNA profile except identical twins. She described and explained the nature and composition of DNA and the scientific process of the STR-DNA analysis system. The conclusion she arrived at was that the accused's DNA result obtained from a blood sample,

[2] See "DNA profiling and the law in South Africa", Potchefstroomse Elektroniese Regsblad Vol 14 no 4; "DNA testing in criminal justice: background, current law, grants and issues", CRS report to members of Congress, USA, Congressional Research Service: 7-5700 R41800: www.crs.gov.

taken by Dr Mabaso on 14 March 2012, in all 9 STR-LOCI, matches the DNA results obtained from all three the complainants. The possibility of a similar occurrence in the DNA analysis from the same samples, she added, can conservatively be limited to 1 in 350 billion people.[3] Her evidence was not challenged. Neither was the chain of the DNA evidence challenged (see *S v Maqhina* 2001 (1) SACR 241 (T)). The nett result hereof is that it remains undisputed that, after collection of the genital specimen swabs from the bodies of the complainants, they were properly sealed, referenced, transported and received by the Forensic Science Laboratory and that a proper analysis was conducted and compared with the control blood sample that had been obtained from the accused in prison, without any contamination or the occurrence of any irregularity.[4] This body of evidence was met by a bare denial by the accused.

[8] The alibi raised by the accused must be considered, not in isolation, but in the context of the totality of the facts of this matter. In *S v Liebenberg* 2005 (2) SACR 355 (SCA) the Supreme Court of Appeal held:

'[15] Where a defence of an alibi has been raised and the trial court accepts the evidence in support thereof as being possibly true, it follows that the trial court should find that there is a reasonable possibility that the prosecution's evidence is mistaken or false. There cannot be a reasonable possibility that the two versions are both correct. This is consistent with the approach to alibi evidence laid down by this Court more than 50 years ago in *R v Biya* 1952 (4) SA 514 (A). At 521C-D Greenberg JA said:

'If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime'.'

(see also *S v Trainor* 2003 (1) SACR 35 (SCA) para [8]–[9]; *Crossberg v S* [2008] 3 ALL SA 329 (SCA) para [121]). In *Sithole v S* (868/11) [2011] ZASCA 85 (31 May 2012), the Supreme Court of Appeal held:

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[3] See the interesting article by *MA Muller* "Handling uncertainty in a court of law", Stellenbosch Law Review 23 (3) (2012) 599-609, in which the writer discusses different aspects of what he considers faulty reasoning concerning uncertainty arising from DNA analyses, in legal matters.

[4] Cf *S v Mogale* [2011] ZAGPJHC 57 (18 March 2011).

'A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. The correct approach is set out in the following passage from *Mosephi and others v R* LAC (1980 – 1984) 57 at 59 F-H:

'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees'.[5]

[9] Upon a consideration of the totality of the facts in this matter the DNA result obtained, in my view, is corroborated by the similar fact evidence of the three incidents in the course of which similar offences were committed, within a timespan of less than three months, in the same area, at the same time, by one man. The accused testified that he, at the time, lived in Senoane, which is across the road from Chiawelo, where the incidents occurred. As against this, the accused's bare denial cannot stand and it falls to be rejected as false. I accordingly find that the State has, on the evidence as a whole, succeeded in proving beyond reasonable doubt that the accused was the perpetrator of the crimes he is charged with.

[10] In the result the accused is found guilty on counts 1 to 14, as charged.

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[5] *Quoted with approval in S v Hadebe & others* 1998 (1) SACR 422 (SCA) at 426f – h; see also *S v Mbuli* 2003 (1) SACR 97 (SCA) para 57.

COUNSEL FOR THE STATE	***ADV (MS) DE ZINN***
COUNSEL FOR THE ACCUSED	***ADV MP MILUBI***
DATE OF JUDGMENT	***29 MAY 2013***