

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NO: SS 031/2021

Reportable:  
Of interest to other Judges:  
Revised:  
9/03/2022

IN THE MATTER BETWEEN:

STATE

VERSUS

SPHAMANDLA KHUMALO  
BERTHWELL NKOSI

Accused No:1  
Accused No: 2

JUDGEMENT

MOILA AJ:

INTRODUCTION

[1] Mr Sphamandla Khumalo 32 years old male referred to as accused number one (1), appears before court charged with all 7 counts.

Mr berthwell Nkosi 29 years old male referred to as accused number two (2) appears before court charged with count 1,4,5,6 and 7.

[2] Accused number 1 is represented by Mr. Nobangule, an attorney on Judicare instructions and accused number 2 is represented by Advocate Thipe, on Judicare instructions from Legal aid South Africa.

[3] COUNT 1 MURDER – READ WITH THE PROVISIONS OF S. 51(1) OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

In that on the 29 July 2018 at [...] Great B[...] Street in Turfontein in the Regional Division of Gauteng, the accused did unlawfully and intentionally kill Luciano Topers, a male person, by stabbing him on his legs. Cause of death determined stab wound on the left thigh.

COUNT 2 RAPE C/S 3 of the Criminal law amendment act (sexual offences and related matters) 32 Of 2007; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997.

In that on the same day 29 July 2018 at the place mentioned in count 1, accused number 1, did unlawfully and intentionally commit an act of penetration with Z[...] D[...], a female person by penetrating her vagina without her consent.

COUNT 3: ATTEMPTED RAPE

In that on or about the same day mentioned above, at the same place accused number one (1), did unlawfully and intentionally attempt to commit an act of sexual penetration with Ms D[...]1 D[...] a female person by attempting to penetrate her vagina without her consent.

COUNT 4: ROBBERY WITH AGGRAVATING CIRCUMSTANCES READ WITH SECTION 51(1) ACT 105 1997

In that on the same day and place, both the accused assaulted D[...]1, Luciano and Z[...] D[...] and with intent force take their personal belongings (3 Cellphones), aggravating factor being that, the accused were in possession of a knife.

COUNT 5: ASSAULT WITH THE INTENT TO DO GRIEVOUS BODILY HARM

In that on the same day at the same place, both the accused did unlawfully and intentionally assault Jermaine by stabbing him with a knife with the intent of causing grievous bodily harm.

## COUNT 6 ASSAULT WITH THE INTENT TO DO GRIEVOUS BODILY HARM

In that on the same day and at the same place, both the accused, unlawfully and intentionally assault Luciano Topers by stabbing him with a knife with intent of causing him grievous bodily harm.

## COUNT 7: AGAINST ACCUSED NUMBER ONE (1) HOUSEBREAKING WITH INTENT TO RAPE AND ROBBERY

On the same day, at the same place, accused number one (1) broke open and entered the premise at [...] Great B[...], Turfontein and stole personal belongings with, 3 cell phones with intent to rape and rob.

## COUNT 7 AGAINST ACCUSED NUMBER TWO (2) HOUSE BREAKING WITH THE INTENT TO ROB AND ROBBERY

In that on the same day at the same place, the accused broke open and entered the premise s at No. [...] Great B[...] and stole, belongings of the complainant to wit, 3 cell phones with the intent to rob

Prior Plea the court informed both accused, about the provision and consequences of Section 51(1) of Schedule 2 of the Criminal Law Amendment Act 105 of 1977, applicable upon conviction.

## 2. THE PLEA

[4] Accused number one (1) pleaded not guilty to count 1,3 and 6 and pleaded guilty on count 2,4,5 and 7

[5] Mr Nobangule, legal representative for accused number one (1), confirmed the plea and stated in terms of Section 115 of Act 51 of 1977 that he has no plea explanation for count 1,3 and 6.

[6]In count 2,4,5 and 7, he read into the record a statement in terms of section 112(2) of Act 51 of 1977 that accused number one(1) on count 2 admits that on the 29 July 2018 at Great B[...], Turfontein he unlawfully and intentionally raped miss Z[...] D[...], a female minor by penetrating her vagina without her consent, further admitted on count 4, that he assaulted D[...]<sup>1</sup> D[...], Luciano, Z[...] and with force took their personal belongings to wit, 3 Cell phones and he was using a knife to subdue them.

[7] On count 5 admitted that he unlawfully and intentionally broke open and entered the premise situated at, No. [...] Great B[...] and stole personal belongings to wit, 3 cell phones belonging to the complainants, with the intent to commit an offence as mentioned.

On Count 7, he pleaded guilty to the count of Housebreaking with the intent to commit an offence as set out in Section 262 of the Criminal Procedure Act 51 of 1977.

[8] Accused number one (1), confirmed the basis of his defence and also confirmed the contents of the statement in terms of section 112(2) of Act 51 of 1977, statement was accepted as exhibit A.

[9] On count 5 accused one (1) pleaded guilty to housebreaking with the intent to rob while charged with assault with intent to do grievous bodily harm and on the other counts the state didn't accept the plea because the plea statement read into the record was merely a repetition of the allegations and no facts stated on which the allegations were based.

[10] The court requested the attorney to relook at the plea and correct but the attorney handed in a hand written supplementary statement which didn't take the plea further.

Accused no 1 confirmed the plea. It was accepted as exhibit B.

[11] The court was not satisfied that the accused admitted all the elements of the offence in count 2,4,5 and 7, the plea didn't contain facts upon which the admissions were based and changed the pleas to not guilty in terms of section 113 of act 51 of 1977.

[12] Accused number two (2) pleaded not guilty to count 1,4,5,6 and 7, Adv. Thipe confirmed the plea and in terms of section 115 of Act 51 of 1977 and stated that accused number two (2), elected not to give a plea explanation and accused NO 2 confirmed same.

[13] The state in proving its case called 15 witnesses and handed the following exhibits:

Exhibit C – Photo album by warrant Gumedede, of the scene of the crime

D – SAPS 329 Form. Identification parade form completed by Captain Botha, where the 3 state witnesses positively pointed out accused number two (2).

E – Photos of the ID parade

F – J 88 by Dr Ntlhabati, who examined Z[....] D[....]

G – Section 212 statement by warrant Officer Chetty.

H – Post-mortem Report by Dr Stuart.

J – Section 212 statement by Warrant Officer Jamieson

K – DNA reference Sample Collection Kit form – Donor Accused Number one (1).

L – DNA reference Sample Collection Kit form – Donor Accused Number two (2).

M – Affidavit in terms of section 212 (8) of Act 51 of 1977 by Moabi Ramosunya

N – J15 Regional Court Booysens.

Exhibit 1 and 2 were the two (2) knives found by warrant officer Gumede at the scene of crime

That concluded the evidence of the state, states case closed.

[14] Mr Nobangule applied for the discharge of accused number one (1) on count 3, in terms of section 174 of Act 51 of 1977 stating that there is no evidence that accused committed the offence. The application was opposed by the state.

The application was dismissed by the Court and reasons reserved until Judgement.

[15] Accused number one (1) testified and didn't call any witnesses in his defence. Accused number (2) also testified in his defence and called no further witnesses and subsequently, defence closed its case.

[16]] The State Advocate handed in the heads of argument on the merits of the case and it was accepted as exhibit 'O'. Submitting that both accused be convicted as charged.

[17] Mr Nobangule addressed the court on the merits of the case, submitting that accused no one (1) had acknowledged the crimes he committed and the other crimes not attributed to him was not admitted.

[18] Advocate Thihe on merits submitted that accused no two (2) testified and was consistent with the evidence put to the state witnesses. That he was at his place of residence that night. Investigation officer conceded that medical and scientific evidence do not link accused no 2. The state only rely on evidence of Id parade and accused must be acquitted on all counts.

#### SUMMARY OF FACTS:

[19] The first three (3) state witnesses were the mother, D[....]1 D[....], her son Jermaine and the daughter Z[....]. They are complainants and eye witnesses.

The first and second state witnesses were testifying about sexual offences, the Court ordered that their evidence be heard in camera in terms of section 153 of the CPA.

They testified about how the two accused broke the front window of their house, made a hole in the main bedroom door and entered the bedroom. Accused no 1 was wearing a balaclava but at one stage took it off. Accused no 2 was wearing a beanie. Both accused were in possession of knives. They stabbed Jermaine on his left leg. When Luciano moved in front of Jermaine, he was also stabbed multiple times. Both accused demanded cellphones and they were given 3 cellphones. Accused no 1 grabbed Z[....], took her to another bedroom, where he sexually penetrated her without a condom without her consent. Accused no 2 took the refuse bags emptied goods on the cupboards. Z[....] was brought back and accused no 1 took her mother T[....] to the other room. Pulled her pants down, accused no 2 called him and he left. Accused no 1 then brought Z[....], Charmaine to that bedroom and locked them in from the outside. The house went quiet. Jermaine broke the door and they found Luciano lying in the passage. Ambulance arrived and Luciano was certified dead. Z[....] was taken to the hospital for medical examination.

[20] The 4<sup>th</sup> state witness Raymond Joubert testified that he is the complainant's neighbour and saw 2 gentlemen coming out of the house, jumping the palisade fence. Fired a warning shot and they ran away.

[21] The 5<sup>th</sup> state witness Paseka Tanjie-- testified about taking the complainant Z[....] to the hospital. The doctor examined her and gave the officer a crime kit which was sealed. He booked it on SAP 13 storage.

[22] The 6<sup>th</sup> state witness was Warrant officer Thokozane testified that he attended the scene of crime, took photographs as per exhibit C, collected swabs from door handles. There were 2 knives found at the scene. Swabs were sent to forensic department for analysis.

[23] The 7<sup>th</sup> state witness was Captain Botha, he received a request to hold an identification parade for Accused no 2, there was a photographer and officers assisting him to watch the witnesses before and after the parade. The line-up were 9

people, all 3 witnesses pointed out the suspect. Acc no 2 never complained or raised a concern. ID parade was procedurally conducted as per exhibit D.

[24] The 8<sup>th</sup> state witness was Amo Maluleke, a sergeant at SAPS assisted at the ID parade by guarding the witnesses coming out of the parade. He was not familiar with the facts of the case.

[25] The 9<sup>th</sup> state witness David Modiba a sergeant at SAPS. He was assisting at the ID parade. He was guarding the witnesses before the parade. He was not familiar with the case.

[26] The 10<sup>th</sup> state witnesses was Lesetja Matlou a sergeant who received a complaint and visited the crime scene at [...] Great B[...] Turffontein. The lady of the house Mrs D[...] related how the suspects broke and entered their house, raped her daughter and stabbed her sons.

He entered the house and found a man lying on the floor with injuries and summoned an ambulance. That man was certified dead by paramedics. The girl who was raped and other boy were taken to the hospital. The suspects were not found.

[27] The 11<sup>th</sup> state witness was Dr Ntlabathi a medical doctor registered with the medical council and trained as a sexual care practitioner examined a girl who was 14 years old on the 29/09/2018 at 4:10 am. The girl had blood on her pants. Her eye had hematoma, she was upset and crying. She reported that she was assaulted, threatened with a knife and penetrated. On gynaecological examination the Frenulum of clitoris was red, space between labia Majora + Labia minora appears red, there was a tear on the fossa navicularis, tears at 08 o'clock bruises at 6,7,8,9 o'clock, blood in the vagina, Perineum painful on touch and concluded that there was evidence of penetration by a blunt object.

On cross examination, she explained in detail how she collected the swabs and put it in the crime kit, with seal no 16 D1AB 0542

[28] The 12<sup>th</sup> state witness was Warrant Officer Chetty. He has a bachelors in biotechnology with 9 years of experience as an analyst. He received a file booyesen CAS 535/07/2018. He analysed the DNA and found that Vaginal vault swabs matches DNA reference 20DBAR7240 .Blade vault swab matches to reference sample PA 6001767172.

Testified further that DNA in our saliva and body is the same, each person has a unique DNA.

[29] The 13<sup>th</sup> state witness was Dr Shirley Stuart. She is a specialist doctor who conducted a medico legal post mortem examination on body DR 1860/18. She concluded that the cause of death was stab wound of left thigh, a major blood vessel was cut. She saw one stab wound, but it is possible that he was stabbed multiple times but the knife did not penetrate the clothes

[30] The 14<sup>th</sup> state witness was Hector Mackenzie. He is a Warrant officer employed as a forensic analyst in Pretoria. He conducted a comparative search on the forensic DNA database indicating that the person of interest in Moffatview CAS 279/05/2017(SA Khumalo/16ABCF5447) was involved in Booyensens CAS 535/07/2018 (LAB 27633/2018). He is suspected of being the donor of the genetic material found on the scene.

[31] The 15<sup>th</sup> state witness Sergeant Mori Jacob Mashamaite. He is the investigation officer. On the 31<sup>st</sup> January 2019 he received results of the DNA test (forensic department) that a person arrested at Moffatview for another case matches the DNA in his case. He had submitted a crime kit and DNA swabs to the forensic. He went to Moffatview to investigate and arrested Accused no 1, explained to him his constitutional rights. While on the way to the police station they saw 2 men walking on the street. Accused no 1 pointed Accused no 2 Bertha Nkosi as the other accused who was with him at [...] Great B[...] street. Arrested Accused no 2.

Accused no 1 was linked by DNA. He then obtained their buccal swabs and as per exhibit K and L. It was taken to forensic for analysis and comparison and when compared with the sexual kit and swabs from the mortuary. DNA results matched the



DNA of Spamandla Khumalo, accused no 1.-He the arranged ID parade for Accused number 2. Accused no 2 was positively identified by three (3) complainants. The knives retrieved by Warrant officer Gumede at the scene was booked on SAP 13 storage. Exhibited in court. Accepted as exhibit 1 and 2. It is as per photos 69 and 70 on exhibit C.

[32] Both accused testified.

Accused no 1 testified that he was with Accused no 2 and Jovis when they broke into the house at [...] Great B[...] Street.

It was Accused no2's idea to go break in. Jovis remained outside when he and accused no 2 entered the complainants 's house. He is guilty of raping Z[...] D[...]. Admits that they robbed the complainants of their 3 cellphones. Admits that he I guilty of breaking into the complainant's house with intent to rape and robbery.He didn't attempt to rape Mrs D[...] and didn't stab Jermaine and Luciano.Luciano was stabbed by accused no 2.

Accused no 2 testified that he doesn't know Acc no 1. That night he was at home at moffat street with his siblings. He didn't commit all offences that he is being charged with. He has never been to [...] Great B[...] Street, and he was arrested while walking with Bheki on the street. Admits that he was pointed out by 3 state witnesses at the Identification parade. Admits he knows Jovis.

## FACTS NOT DISPUTED

[33] On the 29/07/2018 at 1:00 am accused no 1 and another person broke the window of house no [...] Great B[...], Turffontein and with intent to rob, assaulted D[...]1, Luciano, Z[...] and with force took their personal belonging and 3 cellphones aggravating in that they threatened them with knives.

The deceased Luciano D[...] was stabbed with a knife at his home at [...] Great B[...] street, Turffontein. He was declared dead on the scene. The cause of death as per exhibit H is stab wound of the left thigh.

Accused no 1 sexually penetrated a female minor Z[....] D[....] on her vagina without her consent.

Accused no 2 was positively pointed out by three (3) state witnesses at the Identification parade.

Chain evidence and DNA results admitted.

## FACTS IN DISPUTE

[34] Who stabbed Luciano D[....] and caused his death?

Did Accused no 1 attempt to rape T[....] Danha?

Who stabbed Jermaine?

Was Accused no 2 with Accused no 1 at [....] Great B[....] on the night of the incident?

Did Accused no 1 and 2 act together in a furtherance of a common purpose?

[35] In *Sv Combrick* 2012 1 SACR 93 SCA

Judge Shongwe said it is trite that the state must prove its case beyond reasonable doubt and that no onus rests on an accused to prove his innocence.

## EVALUATION OF EVIDENCE

[36] In *S v Chabalala* 2003 (1) SACR 134 SCA,

The Court held that:

“Correct approach to evaluating evidence is to weigh up all elements which point towards guilt of accused against all those which are indicative of innocence, taking proper account of inherent strengths and weaknesses, probabilities and

improbabilities on both sides and, having done so, to decide whether balance weighs so heavily in favour of State as to exclude any reasonable doubt about accused's guilt.'

[37] The expression intention to kill does not in law necessarily require that the accused should have applied his will to commit the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result.

Reliability of evidence from identity parade. The court is required to look at whatever evidence was reliable.

An attempt is deemed a crime itself if a person intended to commit the crime took a direct but ineffective step towards the crimes commission.

Attempted rape is an attempt to have sexual intercourse with another person without that person consent where no penetration occurs. The perpetrators may withdraw from the attempt or victim successfully fight off the attempt. Evidence of attempted rape could include the removal of the victim's clothes.

In criminal law, the doctrine of common purpose establishes that where two or more people agree to commit a crime, each will be responsible for the acts of the others that fall within their common purpose.

In terms of Section 196 (2) of the CPA,

The evidence which an accused may, upon his own application, give in his own defence at joint criminal proceedings, shall not be inadmissible against a co-accused.

[37] The court accepts the version of the state because of the following reasons:

Sergt Jacob Mashamaite, the investigation officer testified that acc no 1 was arrested after he submitted the sexual crime kit obtained from Dr Ntlabathi and the DNA swabs to the forensic science laboratory thereafter he received information that the

DNA results matched the DNA of Sphamandla Khumalo from another case at Moffat view.

Further that after arresting accused no 1, while driving to the police station, accused no 1 pointed out accused no 2 as Borthwell Nkosi who was with him on the 29/07/2018 at no [....] B[....] Street.

After arresting accused no 2 he arranged for identity parade and accused no 2 was pointed out by all 3 complainants.

Accused no 1 testified under oath that accused no 2 suggested they go and break in in the property situated at [....] Great B[....] Street and they were with their friend Jovis.

Further that after breaking the window of the complainant's house, he and accused no 2 entered the house and Jovis remained outside.

In terms of S 196 CPA when an accused gives evidence under oath incriminating his co-accused, such evidence is admissible.

Accused no 1's evidence was not challenged by accused no 2's Counsel on cross examination.

SAP 329 form completed by Captain Botha which was handed in as Exhibit D, indicates that accused no 2 was pointed out by the 3 complainants at identification parade.

At the parade accused no 2 had requested to change clothes and was also changing positions.

When he was pointed out by D[....]1 D[....], he was standing in position 2 holding number 8.

On photo 10 of exhibit E, he was wearing a black T-shirt.

When he was pointed out by Z[....] D[....], accused no 2 was standing in position 7 holding number 2.

On photo 18 of exhibit E, he was wearing a red T-shirt.

When pointed out by Jermaine Topers accused no 2 was standing in position 7 holding number 5. On photo 30 he was wearing a red t-shirt.

Evidence of the 3 complainants was that accused no 2 was only wearing a beanie when he broke into their house. They will never forget his face.

The court is satisfied that identity of accused no 2 has been proved and that he has been placed on the scene of crime.

The court is also satisfied that accused number one (1) and two (2) agreed to commit a crime of breaking into a house at [...] [...] Great B[...] street and rob the complainants, therefore each will be responsible for the acts of the other which fall within their common purpose.

After the court altered accused number 1 's plea to not guilty the following admissions from his statement in terms of S 112(2) CPA remained proof of the particular allegations in terms of S.113 CPA.

He admitted that he unlawfully and intentionally raped Z[....] D[....] a female minor by penetrating her vagina without her content

Further admitted that he unlawfully and intentionally assaulted D[....]1, Luciano, Z[....] and with force took their personal belongings and three (3) cellphones, using a knife to subdue them.

That he unlawfully and intentionally broke, opened and entered the premises at [...] Great B[...] Street.

Accused no 1 also confirmed this admission when he testified under oath.

[38] On Court 1

There is evidence before court by the 3 complainants that both accused no 1 and 2 stabbed the deceased.

It is evidence that there were (2) two knives at the scenes.

The deceased was certified dead by paramedics at the scene.

Dr. Stuart, a forensic specialist who conducted a medico legal postmortem examined on the body Dry. 1860/18 and concluded that the cause of death was stab wound of the left thigh.

She also referred to the photo album at the scene, that is photo 43-45 that deceased was wearing clothes at the scene. There is a possibility that the deceased might have been stabbed multiple times but the knife didn't penetrate his body.

The court finds that both accused acted in a furtherance of a common purpose, stabbed the deceased and caused his death. Although we do not know who between accused no 1 and 2 caused the wound on the deceased's left thigh. The common purpose was out of active association. The requirements in *S v Mgedezi and others* 1989 (1) SA 687 A were satisfied in that they were both present at the scene and aware of what was happening and took part in the assault. They should have subjectively foresaw that by stabbing the deceased several times with knives would possible cause the death of deceased.

[39] On Count 2

There is evidence by the 3 (three) complainants about how the state witness Z[...] was taken to another bedroom by accused no1. On coming back, she immediately reported to her mother that she was raped.

The evidence of the first report is admissible not to corroborate the evidence of the complainant with regard to the incident of rape but to indicate that, the complainant is consistent in her conduct (see *S v Hammond* 2004 SACR 303 SCA)

The accused also admitted that he sexually penetrated the complainant who was a minor without her consent.

[40] n Count 3

The first state witness testified that when accused no 1 brought back her daughter Z[....], he then grabbed her and took her to another bedroom.

Accused no 1 pulled down her pants and accused no 2 called him and he left.

Accused no 1 used the same modus operandi on how he acted before taking Z[....] to the other bedroom and how he then grabbed the mother and took her to the other bedroom.

If the victim's clothes had already been removed and the accused withdraw from the attempt because in this case accused no 1 was called by accused no 2 that would amount to attempted rape.

The only interference that can be drawn is that if Acc no 2 didn't call him, he would have continued to sexually penetrate her.

An attempt is deemed a crime itself if a person intended to commit the crime took a direct but ineffective step towards the crimes commission.

[41] Count 5 and 6 of Assault with intent to do grievous bodily harm, it will amount to duplication of convictions because Assault with intent to do grievous bodily harm is a competent verdict on a count of murder and robbery with aggravating circumstances.

[42] Regarding count 4 and 7 accused no 1 admitted to breaking open and entering the house of the complainants with intent to rob and robbery with aggravating circumstances.

In S v Benjamin and others 1980(1) SA 950A.

The court held that there are two tests which were developed by the courts in order to determine whether a duplication of charges had occurred, and these are:

- Whether the offences were committed with a single intent and were part of one courteous transaction or
- Whether the offences differed from one another in their elements.

The court finds that the offences in count four (4) and seven (7) were committed with a single intent.

[43] In Bam v S 2020 SACR 584 WCC

The court said in paragraph 47 “I think it may safely be said that ordinarily, where an accused could be convicted of housebreaking with intent to commit an offence and that offence as well, and both would be committed with the same intent (e.g. housebreaking with intent to steal and theft or housebreaking with intent to rob and robbery). There can and should only be a single conviction on a composite, rolled up charge, and only a single punishment would be competent.”

There is evidence by the (3) complainants that both accused upon entering the bedroom demanded cell phones and money. That both accused were in possession of knives.

The court is satisfied that both accused number 1 and 2 acting in a furthering of a common purpose broke, opened and entered the complainants house with intent to rob and robbed them. Aggravating in that they stabbed Luciano and Jermaine and threatened D[....]1 and Z[....].

Aggravating circumstances has been described in section 1 of act 51 of 1977:

(1) In this Act, unless the context otherwise indicates-

**“aggravating circumstances”**, in relation to-



(b) robbery or attempted robbery, means-

(i) the wielding of a fire-arm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during

or after the commission of the offence;

Overall the three complainants made a favourable impression on the court. The court is satisfied that the evidence given by the witnesses was clear, satisfactory and reliable in all material respects.

Minor contradictions can be expected from the witnesses as this event caused the witnesses considerable stress and experience had shown that two or more witnesses hardly ever gave identical evidence with reference to the same incident. The second state witness could have faltered at times but did not appear to be a dishonest witness.

[44] The version of both accused is rejected by this court in toto because of the following reasons:

Accused number 1 alleges he had taken alcohol and dagga but take full responsibility for what he did. He chooses what to remember. On the charges that he admitted he testified in full about what he did and what accused number 2 did.

Accused number 2's defence is a bare denial. He wants the court to believe that he didn't know accused number 1. He knows Bheki and Jovis who are also known to accused no 1. Initially on his evidence in chief he testified that he didn't know Jovis but on cross examination he says he took the police to Jovis's place. The address appearing on the J15 of his first appearance is [...] Church street and accused no

1's address is [...] Church street. They are both from Zimbabwe. The version that he was staying at Moffat street, is rejected by this Court.

He wants the court to believe that two of the complainants, the mother and her son saw him in court before the identification parade. On the identity parade he changed t-shirts and positions but even Z[...] identified him.

On a holistic view of the evidence this is one of those cases where the state evidence was so convincing to exclude the reasonably possibility that both accused might be innocent.

[45] The court is satisfied that the state has proven beyond reasonable doubt that accused no 1 is guilty of:

Count 1\_ murder *dolus eventualis* as provided in S.51(1) Act 105 of 1997

Count 2\_ rape C/S 3 of the Criminal law amendment act (sexual offences and related matters) Act 32 of 2007 as provided in S. 51(1) Act 105 of 1997

Count 3\_ attempted rape

Count 7\_ housebreaking with intent to rob and robbery with aggravating circumstances as intended in S. 1 of Act 51 of 1977

Acquitted on count 4,5,6

Accused no 2 guilty of

Count 1- murder as provided in section 51(1) of schedule 2 of the criminal law amendment act 105 of 1997

Count 7- housebreaking with intent to rob and robbery with aggravating circumstances as intended in S. 1 of Act 51 of 1977

Acquitted on count 4,5,6

N.L MOILA  
**ACTING JUDGE OF THE HIGH COURT**

APPEARANCES

On behalf of accused 1: **Mr S. Nobangule**

Instructed by Legal Aid South Africa

Accused 2: **Advocate Thipe**

Instructed by Legal Aid South Africa

On Behalf of the State: **Adv. V Maphiri**

Instructed by Director of Public Prosecutions (DPP)

Date of Hearing: **22 February 2022**

Date Judgement handed down: **09 March 2022**