

REPORTABLE

**IN THE KWAZULU NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

CASE NO.: CC12/2010

In the matter between:

THE STATE

versus

NDUMISO MKHIZE

THAMSANQA SANELE NTOMBELA

JUDGMENT

NGWENYA AJ:

Introduction

[1] The accused in this matter appeared on the following charges:

1.1 Housebreaking with intent to rob and robbery with aggravating circumstances (as defined in section 1 of Act 51 of 1977) read with the relevant provisions of section 51 and Schedule 2 of Criminal Law Amendment Act 105 of 1997;

1.2 Rape in contravention of section 3 read with sections 1, 55(a), 56, 57, 58, 59 and 60 of the Criminal law (Sexual Offences and Related matters) Amendment Act 32 of 2007 further read with section 256 of Criminal Procedure Act 51 of 1977 and the relevant provisions of section 51 and schedule 2 of the Criminal Amendment Act 105 of 1997 ("Rape");

1.3 Rape

Mr. H.M Zulu appeared for the State while Mr. A Khan and Mr. A van Heerden appeared for accused number one and two respectively.

[2] **Plea**

At the commencement of the proceedings the accused pleaded not guilty to all the counts and elected not to disclose the basis of their defence and remained silent.

[3] **State Case**

3.1 The State case relies on five witnesses whose evidence can be summarised as follows. The complainant's homestead is in Matatiel and she is employed there at Maluti. On or about 25 March 2009, she arrived at Pietermaritzburg apparently on the invitation of her sister, looking for work. Her sister operated mobile phone business in Church Street. This is where she met Mr. Mthembeni Zondi (Zondi) who owns a tavern at Mpophomeni, in Howick. Zondi wanted someone to manage and run his tavern for him. He was apparently aware that someone from Matatiel would be arriving in the city soon looking for employment. While complainant was as yet to seek employment Zondi approached her. After confirming with her that she was indeed looking for employment, he offered her the position to manage his tavern. They agreed to meet the following day on the same spot so that they could travel together to Mpophomeni.

3.2 On 26 March 2009, Zondi and complainant travelled together to Mpophomeni where they arrived after midday. On arrival there were about five young men in Zondi's yard including the two accused. Zondi introduced the complainant to the two accused and told her that these were the young men who "*looked after his yard*" and that she could

trust them. Thereafter he showed her inside the tavern and assured her that it was a safe place. She started work there immediately thereafter. She was to sleep inside the tavern after work and would also eat and stay there as if she was the owner. Zondi had accommodation elsewhere in the city. He then left her as soon as she had settled. Earlier on when Zondi introduced the accused to the complainant, they had asked him who the complainant was that now she knew who they were. He then told them who the complainant was and what she was coming to do in the tavern. Complainant continued working this day until late in the evening when she closed.

3.3 The following day she opened the tavern for business at half past seven in the morning. She does not know what time the two accused arrived in the premises but only noticed them later in the company of the same young men they were with when the complainant arrived the previous day. Sometime later in the day she ran out of liquor stock. This prompted her to send Zondi a message via mobile phone to call her. Indeed Zondi responded and enquired whether everything was still in order. She told him that she was running out of stock. He then told her to give accused number one money to go and replenish stock. This, she did. She gave accused number one a sum of R150.00 to go and buy stock she wanted plus another R7.00 to buy her bread. Accused number two accompanied accused number one to do the purchases. On his return from doing purchases accused number one told complainant that Zondi told them to look well after her. She worked until nine o'clock (21h00) in the evening. Thereafter she closed for business. Before going to sleep she ensured that she locked up the front security gate, closed the front door and packed the tavern chairs behind the door as told by Zondi before he left the previous day.

3.4 The bedroom she slept in had no door. Before going to sleep she

counted the money she had. This money included the money that was there before she arrived. In total she had counted R5000-00 and kept it in a plastic container and went to sleep. She had the lights switched off. While in deep sleep she was woken up by people making noise moving from one window to the next, shouting Zondi's name demanding that he should open the tavern so that they could buy beer. These people had a torch lit up and sounded aggressive. She then took out the mobile phone Zondi gave her and gave him a call, only to find that his phone was off. These people continued with their noise. They knocked at the front door and the window. She could hear that the front security gate was being broken and the door being pushed.

3.5 On hearing the sound of the security gate, she woke and put her skirt on. The lights were still off. She then wrapped herself with a comforter and then sat on the bed. It was at this moment that one of these people came in and proceeded to her bedroom. He had his face covered with his hooded jersey which he wore on his upper body. This person had left a small part of his face and his eye uncovered. This enabled him to walk to the wall where the switch was to put the light on. He asked where Zondi was. This voice which she heard was that of accused number two. He further asked her where the mobile phone was. She told him it was in her bag. After switching the lights off, he had his face fully covered again. He then grabbed complainant around her breast and ordered her to open for the person outside. He thereafter grabbed the complainant by the scruff of her neck and pushed her through the passage to the front door. He ordered her to open the security gate. Instead she gave him a bunch of keys apparently for him to open.

3.6 Accused number two selected from the bunch of keys one key she should use and gave the whole bunch back to her and told her to open the security gate. She took the keys and used the selected key to

open the security gate for accused number one to enter. At that stage accused number two's face was no longer covered up to his forehead. The room was not completely dark but dim. The street light outside illuminated the area including, the house. The curtains were light. The court understands this to mean that curtaining was transparent allowing for easy passage of the external light.

3.7 After accused number one entered the tavern, the two of them (i.e. accused number one and two) drove the complainant to the bedroom.

3.8 Complainant further testified that when accused number one, who is dark in complexion according to her entered, his face was not covered and she did not immediately make out who he was but the clothing he had on were those she had seen him wearing earlier in the day. Once inside she was able to identify that it was indeed him.

3.9 As they walked through the passage of the tavern, towards her bedroom, the accused demanded money and liquor from her. She told them that the money was on the table. However at that stage accused number two was already assaulting her with an open hand. Accused number one took the money and the knife complainant had used earlier in the day to cut bread. Accused number one then tripped and pushed her and pressed her onto the bed. She was lying on the bed with her back. Accused number one lifted her skirt and pulled her panty and threw it aside from one leg. When she tried to scream and kick, accused number two pointed the knife at her and said he would kill her. Accused number one took out his belt and his pants and thereafter took out his penis and put it in her vagina until he ejaculated. He was wearing no condom. At the same time accused number two was pressing her and holding a knife. After accused number one finished having sex with the complainant, he swapped roles with accused

number two. The latter took out his pants and had sex with her while number one pressed her while holding the knife. When she tried to kick and scream accused number one threatened to kill her.

3.10 Like accused number one, accused number two was wearing no condom. He took long having sex with her such that accused number one left the scene and went for the money. He called accused number two by his name in abbreviated fashion, calling him "Thami" and urging him to finish so that they could leave. Accused number two became angry with number one also calling him back by his name in shortened form "Ndu". Eventually accused number two ejaculated and then put on his pant and left the complainant. By then the bed had fallen. He told complainant that when Zondi comes she should tell him it is them who did this. Both accused then left.

3.11 Complainant then got up, locked the security gate and closed the door. She noticed that they had taken the money and liquor from the fridge. She again tried to raise Zondi by phone, but only to find that it was still off. She wrapped herself with a duvet and eventually fell asleep. She woke up at about five o'clock (05h00) in the morning and raised Zondi again. This time his mobile was on and he enquired why is it that she has been phoning him throughout the night. She told him that thugs had invaded the place. He said he was on his way but would first have to go pass elsewhere. By the time Zondi arrived, accused number two was already on the premises coming to buy beer. Upon his arrival he had paid attention to the broken security gate and enquired what had happened. He was still wearing the same set of clothing he was wearing at the time of the incident except the green jersey. She told him not to touch the security gate and that some people had broken it at night. Zondi arrived at that moment. Accused number two left then and Zondi entered the tavern and complainant related the episode to him. He then said they must go and report the

incident to the local police. They both walked on foot to the police station. Zondi related the incident to the police on arrival. Complainant thereafter made a statement to the police and was then taken to the District Surgeon who examined her.

3.12 Zondi accompanied the police to the accused place of abode. Accused number one was not at home and they proceeded to accused number two's place. His mother was at home and he was in the out building. The police found him there and arrested him. Accused number one was found in one of the shops. He tried to flee but was caught and arrested. Both accused were initially taken to the local police station and thereafter to Howick Police Station. The police initially did not take a warning statement from them as they smelt of liquor. Only the following day did the police advise both accused of their legal rights. They both chose to remain silent, and said they would speak in court.

[4] **Defence Case**

4.1 The accused case is that they both came into contact with the complainant on Wednesday, 25 March 2009. They saw her at Zondi's tavern. Accused number one saw her again on Friday, 27 March 2009 between half past seven (19h30) and quarter to eight in the evening (19h45). He came there at Zondi's tavern from work to wait for accused number two, for whom he works occasionally cutting grass for individual homeowners. He waited at Zondi's tavern for accused number one when the latter went home until he returned and thereafter the two proceeded to Tata's tavern. They bought liquor there and drank and were later joined by one, Thandanani Brian Ndlovu (Ndlovu) with his friends. Accused number two left Tata's tavern at about ten o'clock (22h00) to half past ten (22h30) in the evening. Although accused number one did not see accused number two's girlfriend, it is

number two's evidence that she was with him at Tata's tavern and left with him when he proceeded to his homestead. He was with her the whole night even when the police arrested him she was with him in the room but no one else saw her. Accused number one, does not know what became of Ndlovu. He however remained in the tavern until the following morning when the tavern closed at approximately seven o'clock (07h00).

4.2 When Tata's tavern closed, accused number one proceeded to the canteen where he and Sbu, his friend purchased more liquor and drank. After they finished the beer they had bought, they proceeded to Phenduka store. It was himself, Sbu and his three friends and Ndlovu. On arrival at Phenduka store, Sbu and his friends left for their respective homes and accused number one remained with Ndlovu. He bought one quart of beer and as the two started drinking, the police arrived and arrested him. On arrival at the police station accused number one was able to notice for the first time who else was in the police van other than him, the policemen and accused number two. He saw Zondi, the complainant and one, Sazi Sibiya disembarking from the police van.

4.3 Accused number two denied going to Zondi's tavern as testified by the complainant and Zondi. He says in the morning of the arrest he was visited by Mbongeni Ndlovu early in the morning. He gave Mbongeni two empty beer bottles and R20-00 to go and buy him beer. He was arrested as he was meeting Mbongeni returning with his beer. They asked him the whereabouts of accused number one. Thereafter they proceeded to look for number one at the taxi rank where he was ultimately arrested.

4.4 At the commencement of the trial, accused number two and his

counsel approached the investigating officer Constable Mbhense to help trace accused number two's girlfriend. On the first occasion Mbhense was given a wrong contact mobile phone number while on the second occasion, he was given a number that does not exist. On the third occasion he was given to understand that there was a lady who knew where accused number two's girlfriend lives and that accused number two was to report back to him on 10 September 2010 on whether the lady was prepared to help in this regard. Accused number two never reported anything back to him. That was the only effort accused number two employed to trace his girlfriend.

[5] Submission by Counsel

- 5.1 Mr. Zulu appearing for the State submitted that the court should find both accused guilty as charged. His contention is that the accused contradicted each other and gave unreliable versions to court. On the other hand, the complainant's version could not be displaced. While the circumstances under which she identified the accused were compromised by darkness, it was not completely dark that a person could not identify an acquaintance. Furthermore, he submitted that accused number two's alibi must be rejected as a recent fabrication.
- 5.2 Mr. Khan and Mr. van Heerden for the defence put too much storm on the State case. They contend that this was a mistaken identity and that complainant is unreliable. Mr. van Heerden went on to say that Court must apply a cautionary rule in that complainant is a single witness. Furthermore, that complainant materially contradicted herself in the second statement she made to the investigation officer and her evidence in court. He submitted that accused number two's alibi is valid. If any criticism is to be levelled on this score it can only relate to the late revelation to the State.

[6] Applicable Legal Principles

- 6.1 Evidence of identity is treated with caution and circumspection by our Courts.

See: ***R v Masemang 1950 (2) SA 488 (A) at 493; R v Shekelele 1953 (1) SA 636 (T) at 638; R v Dladla 1962 (1) SA 307 (A) at 310; S v Jochems 1991 (1) SACR 208 (A) and S v Pretorius 1991 (2) SACR 601 (A).***

A mere bald assertion that the crime was committed by the accused is not sufficient. To ask a witness to describe the accused or assailant is relevant and admissible. However in many cases it may be extremely difficult for a witness to give a description for an accused depending on the circumstances. Identity should preferably be thoroughly investigated as early as possible and more particularly before the trial.

- 6.2 The onus of proof rests on the State throughout. An alibi is no special defence or exception. The State is required like in all other defences to prove its case beyond reasonable doubt.

See: ***R v Hlogwane 1959 (3) SA 337 (A); S v Zwayi 1997 (2) SACR 772 (CK) and S v Thebus 2002 ALL SA 781 (SCA) 795, Thebus & Another v S 2003 (10) BCLR 1100 CC.***

In ***S v Zwayi, supra***, it was held that the value of an accused's evidence of an alibi could be adversely affected if he failed to furnish details of his defence before the closure of the State's case.

[7] Applying the Principles to Facts

7.1 The only issue between the State and the defence in this matter is that of identity. Differently put, did the State bring the right perpetrators of the particular crimes referred to in the indictment to court or is this the case of mistaken identity? To answer this question the court must do a proper assessment of all the evidence at hand. In doing so, the court will assess each version on its own. This means the court does not have to reject the defence version in order to accept the State version or vice versa. If both versions are equally true it means the party who bears the onus of proof beyond reasonable doubt shall have failed to discharge such onus.

7.2 However before considering each version let me first deal with the approach to alibi under the current constitutional order. The question which immediately comes to mind is the right of the accused to remain silent in an instance where his defence is that of an alibi. In this instance the following remarks by Ebrahim AJ, in **S v Zwayi, supra**, at 778 G - J are apposite here:-

"The Court is required to assess his alibi in the same way as any other defence, namely whether it can be accepted as being reasonably possibly true or whether it should be rejected as it is obviously false. See R v Biya 1952 (4) SA 514 (A) at 521D - E at 521D - E and R v Hlongwane 1959 (3) SA 337 (A) at 340H and 341A - B at 340H and 341A - B as well as S v Mhlongo 1991 (2) SACR 207 (A) at 210 d-f at 210d-f.

It should be apparent that if the Court is properly to assess whether there is a reasonable possibility of the alibi being true, the details thereof should be provided since in its absence the accused's defence is simply a bare denial. In my view, if these details are only disclosed, as in the present instance, at the late stage when the accused testifies, the value to be accorded to the alibi may be adversely affected. I cannot see on what basis an accused can claim that he would be prejudiced in the presentation of his defence if he had to disclose the details of his alibi defence during the cross-examination of the State's witnesses. On the other hand, if he withholds same until he testifies there is prejudice to the State since the State will not have been provided with the opportunity of leading evidence which could expose the alibi as being false".

7.3 This approach in my respectful view does not impinge upon the

accused's right to silence. All that the accused is expected to do is to put his defence of alibi to the State witnesses where relevant as he would do in respect of any defence during cross-examination. Therefore in the present case both accused will be treated in accordance with these principles. Stated otherwise, no adverse inference ought to be drawn against the accused arising out of their prior non-disclosure of their alibi defence.

7.4 Reverting now to the merits of the State case, I have already pointed out that in one breath the State case rests solely on the credibility of the identification evidence while on the other hand the defence of the accused rests solely on the credibility of their alibi testimony. If the court accepts their evidence, that is the end of the matter. They would be entitled to an acquittal. The converse is true. With regards to the complainant's evidence the following is common cause or undisputed. From Thursday, March 26 to Friday March 27 2009, she worked at Zondi's tavern at Mpophomeni, in Howick. On Thursday she spent half the day in the tavern selling liquor. She closed at approximately nine o'clock (21h00) in the evening and later on went to sleep until the following morning without any incident.

7.5 It is also undisputed that it was complainant's first visit to Mpophomeni and she knew no one else. I think it is fair to conclude that in her short space of time the people she came to know close and by name at Mpophomeni except Zondi were the two accused. As at the time of the incident she had prior knowledge of the accused. This does not necessarily mean therefore her identification is correct. It must still be subjected to proper scrutiny. In this regard it is appropriate to refer to ***S v Mthetwa 1972 (3) SA 766 (A) at 768*** where the court had this to say "It is not enough for the identifying witness to be honest, the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight, the proximity of

the witness, his opportunity for observation, both as to time and situation, the extent of his prior knowledge of the accused, the mobility of the scene; corroboration, suggestibility; the accused face, voice, build, gait and dress; the result of identification parade if any, and of course the evidence by or on behalf of the accused.”

7.6 In the present matter there is no evidence on identification parade. I have already alluded to the complainant’s prior knowledge of the accused. The criticism of the complainant’s evidence by Mr. van Heerden and Mr. Khan has to do with the extent of light in the tavern at the time of the incident. I think this criticism is founded on the fact that darkness impairs one’s vision and the visibility of the object being identified. But where the criticism goes overboard in my judgment is when it implies that the witness could not identify her assailants altogether. For the court to accept the criticism to this extent it must naturally conclude that the witness could not in the circumstances of this case walk from her bedroom to the front door and back without the aid of light in the tavern. There is no justification for such conclusion.

7.7 In this court’s observation and analysis of the evidence the following factors are relevant. Complainant was able to see that her first assailant had his face covered before he put the light on momentarily. She was able to see the colour of his clothing which she says were the same as those he wore earlier on. This part of her evidence was not placed in dispute. It was not disputed either that the assailant spoke to her for sometime and that he held her at close range even after the second assailant was allowed in. In short while lighting must have an adverse effect on her ability to see clearly, the other factors like prior knowledge, clothing, voice and close proximity to the assailant sustained her credibility. Furthermore the fact that complainant knew only the two accused in this area better than anyone else limit the chances of mistaken identity. This is further fortified by the fact that

while during cross-examination it was put to the complainant that both accused last saw her on Thursday 26 March 2009, in their testimony accused place themselves on the scene in the manner described in greater details later in this judgment. This then renders the dispute between the State and the defence to that of hours. This means, were the accused there at Zondi's tavern during the commission of the offence.

- 7.8 Another criticism of the complainant by Mr. van Heerden relates to alleged inconsistencies and contradictions by the complainant. This led to some debate between the court and Mr. van Heerden. Apparently the complainant made two statements to the investigating officer. The first one, when she laid charges and the second statement was made some time in August 2009. It is common cause that complainant is Xhosa speaking while the investigating officer is Zulu speaking. Both statements are in English. There is nothing wrong with this subject to explanation as to how it came about. Asked by the court why is it that the statement was not reduced into writing in at least one of the languages spoken between the complainant and the investigating officer, the latter replied that in terms of the police standing orders, all statements must be reduced to writing in English. It is a matter of record that the investigating officer also testified in Zulu using the services of the interpreter. The complainant testified that she is not conversant in English and that the statement was not read back to her. The investigating officer testified that he read the statement in English and also translated it to the complainant in Zulu. It is not necessary to resolve this conflict between the two versions. The court is of the view that the statement in question meets all the requirements of admissibility and was therefore admitted as exhibit "N". However the contents thereof remained an issue because firstly it was not read to the record. Secondly, it was not confirmed with the complainant. Therefore no probative value could be attached thereto. In any event while a witness statement is made under oath it does not constitute

evidence upon which much value could be placed before court in preference to the evidence under oath before court. It is in this context that the alleged apparent contradictions by the complainant must be seen.

7.9 In passing, I consider it necessary to express a view that it is unfair for a witness who speaks one official language to be forced or required to have her statement reduced to writing into another language simply to meet the convenience of officialdom rather than that of justice and fairness. The best route in my respectful view is to engage the translation services so that statements are at least available in their original format in case of dispute. By original I mean in the official language spoken by the witness. It is unfair to confront the witness with the contradictions from a statement which was not proved to be hers. Likewise it is unfair to the accused person to be denied the opportunity to discredit a witness on apparent contradictions. For these very reasons a person who challenges a witness statement must first satisfy court that the witness concerned indeed made the statement in the language it is written in or that it was properly translated in the language it is written in and confirmed with the witness concerned.

7.10 Reverting back to the general criticism of the complainant by the defence, it should be noted that Zondi corroborated complainant's version in at least four aspects. The first in relation to her first encounter with the two accused when she arrived at his tavern for the first time. Secondly, the presence of accused number two at the tavern when Zondi arrived on the 28 March 2009, in the morning. Thirdly, on what happened at the police station. Fourthly, how the accused were apprehended in the absence of the complainant.

7.11 The complainant made a good impression to the court as a witness.

She did not try to create an impression that she always had a favourable view to identify her assailants. Neither did she try to exaggerate and make her assailants look worse than was the situation. There is only one reservation with regards to her testimony pertaining to whether the assailants were wearing any condoms when the alleged rape took place. Taking the medical evidence into consideration the probabilities are that they were. In any event her evidence here was inferential as opposed to direct on this score.

7.12 Viewing her evidence in totality, the court is satisfied that her evidence is reliable and must be accepted.

7.13 As pointed out earlier it is an incorrect legal premise to reject the defence case simply because the court has found the State case credible. The defence case deserves the same treatment and analysis like the State case. At the end of this process the court may either reject it or accept it on its own merits. I propose to do this in respect of the defence case here.

7.14 Both accused chose not to disclose the basis of their defence when they pleaded not guilty to all three counts in terms of section 115 of the Criminal Procedure Act. Their defence became apparent during the cross-examination of the State witnesses and also during the defence case. While they took issue with their identification by the complainant they also took issue with the exact date they met her for the first time. They contend they met her for the first time one day earlier than she testified to. While the significance of this dispute is not readily apparent it might be relevant in the overall credibility assessment of either the State case or that of the defence. It was put to the complainant that accused number 1 would testify that on Friday, March 27, 2009, he did not come to Zondi's tavern as "he would be at work".

It was further put to her that accused number 2 would likewise deny having been at Zondi's tavern but instead he was at Tata's tavern until just before ten when (22h00) when he left for home with his girlfriend, Vuyo Ngubane. It was accused number two's testimony that he was with his girlfriend throughout the night and when the police effected an arrest on him.

7.15 The defence case must further be understood in the context of one State witness with whom they joined common cause. This, I say, because his evidence was not placed in dispute. Ndlovu, to whom reference has been made earlier testified that he arrived at Tata's tavern at seven o'clock (19h00) in the evening. He joined his friends there. Later on they were joined by accused number one. He bought four quarts of beer and opened one from which he drank one sip and thereafter left, leaving all four quarts to Ndlovu and his friends. It was only around twelve midnight (24h00) to one o'clock (01h00) in the morning that accused number one returned, now in the company of accused number two. They bought Smirnoff and beer and Ndlovu joined them in drinking. The complainant on the other hand under cross-examination testified that both accused left after eight (20h00) as she closed the tavern at nine (21h00) in the evening. Ndlovu disputed that accused number two arrived at half past eight (20h30) or just before ten (22h00) at Tata's tavern. He also disputed that both accused were the first to arrive at Tata's tavern and that he, Ndlovu arrived when these two were already there. Ndlovu drank with them for a while and thereafter accused number two does not know what happened to him. The next occasion he apparently connects with Ndlovu is the following day at the canteen. He was with Ndlovu until the police arrested him. It was put to the State witness, Zondi that the reason why he attempted to run away is because he thought the police wanted to arrest him for drunkenness.

7.16 Mr. Zulu on behalf of the State did not have kind words for the

accused. He criticised their alibi as a recent fabrication which the court should reject. It should be noted that accused number two did approach the investigating officer to assist with his alibi at the commencement of these proceedings. His approach was a half hearted measure as is evident from the incorrect information he provided and thereafter simply left the matter hanging in the air. I say this because according to the investigating officer, he was supposed to report to the investigating officer the following day whether the lady who apparently knew the whereabouts of his girlfriend was prepared to assist or not. This he never did. It is not without significance that although he was apparently with his girlfriend even at Tata's tavern neither accused number one nor Ndlovu saw her. Even more curious when the police came to arrest him, she was with him. But no efforts were made by him to secure her statement. Even when he had been released on bail, he did link up with her. He says he decided against taking her to the investigating officer for statement lest he be accused of unduly influencing whatever she would tell the officer. It is also curious that the only person that could testify about his alibi is a girlfriend whose existence is mysterious. It is mysterious because only he knows her and only he saw her that day despite so many people he met at the tavern.

- 7.17 In paragraph 7.15 above, I have tried to sum up some of the contradictions between the accused version, as between themselves, and as between each one of them and Ndlovu. And as between them and the complainant. While one understands and would expect the contradiction between the State version and that of the defence it is too much when the defence version on its own is characterised by contradictions one after the other and incoherencies. To take this further, let me illustrate once more. According to accused number one, who by the way started from the premise that he was a casual worker and this assertion developed into a full employee of accused number two, on Friday 27 March 2009, he and accused number two worked at

Howick for the whole day. They both travelled back together to Mpophomeni. He then chose to wait for accused number two at Zondi's tavern while accused number two went home. I must stress here that during his testimony an impression was created in the court's mind that accused number two knew where to find him on his return. However, according to accused number two this was not so. According to him, on their return from Howick each proceeded to his homestead to have a shower. It was for this reason that when accused number two left his homestead he proceeded to accused number one's home to look for him, only to be told that he has just left. It was just coincidence that on his way he saw accused number one on the veranda of Zondi's tavern. According to accused number one, he was waiting for number two. The latter was just walking past. How one can wait for someone at a place that was not agreed upon before remains a mystery. It becomes even more mysterious if the sole purpose on the part of accused number one was to wait there in order to meet and thereafter proceed to a tavern which was just three hundred and fifty metres (350m) away from the one where he was waiting. It should be recalled that according to Zondi these were the young men who frequented and guarded his place in his absence. He had trust in them such that he said so to the complainant and even asked in particular accused number one to go and do purchases for her. This was never placed in issue. However it came as a surprise when accused number two belatedly in his version stated that he did not get along with Zondi.

- 7.18 The accused were sitting in court right throughout and had the opportunity to listen to the complainant testifying in her vernacular which I must say had marginal difference to theirs. They did not dispute that they went together to replenish liquor for the complainant. Instead they suggested that they knew her for longer than she stated albeit a day's difference. Despite their alibi the defence put to the complainant was sometimes inconsistent with the alibi. For instance, it was put to her that accused number two will testify that complainant

occasionally served him at Zondi's tavern. Even if one takes accused two's own version that he came to meet complainant for the first time on a Wednesday, at best it is hyperbolic to regard three (3) days as occasional. But his version put through his counsel to the complainant was different. It was that accused number two saw complainant twice before his arrest. It was on a Wednesday and again on Thursday after work. To this the complainant replied that she saw the accused on Friday at Zondi's tavern and that when they left they attended a party in the community hall which was directly opposite Zondi's tavern across the road. It was also put to the complainant that accused number two will deny visiting Zondi's tavern on Saturday morning but that his evidence would be that he sent Mbongeni Ndlovu to buy him beer for R20 -00. His evidence was however slightly different. He did send Mbongeni to go and buy him beer but he did not specify where and therefore Mbongeni could have gone anywhere.

7.19 It will be noted from what is said about the defence case that its foundation is a shifting sand and slips through each time one tries to make sense out of it. Like shifting sand the further one takes it, the deeper it sinks. For some reason it was put to the State witness that opposite Zondi's tavern there is a community hall, skills development centre, a theatre and a library. That there are at least three (3) security guards guarding the community hall. The relevance of this proposition eludes me. Viewing the defence case as a whole, it is underpinned by contradictions, inherent improbabilities and keeps changing all the time. Both accused did not give a good impression in court. What was put to the witnesses under cross-examination was not repeated when each of them took the witness stand. I lump the accused together here not because they testified jointly but because the quality of their evidence is the same even where they tried to back each other up. In the final analysis, the court is inclined to agree with Mr. Zulu that their so called alibi is a recent fabrication.

7.20 It should be clear from the findings above that not only does this court

reject the defence version but it has also accepted the State case as credible. Left with only one version, the court must conclude that the accused were correctly identified by the complainant as the perpetrators of the offences I will refer to shortly.

[8] The Indictment

8.1 Both accused are charged with housebreaking with the intention to rob and robbery with aggravation circumstances in count one.

8.2 The evidence presented is however otherwise. Firstly, it is only accused number two who gained entry by force. He got through an opening in the security gate and pushed the door which was not locked open and gained entry into the tavern. Judging by his conduct while inside the tavern one cannot conclusively say his intention was to rob as suggested by the State. There is sufficient evidence though that his intention was to commit a crime and this he did by raping the complainant and stealing money and liquor. But these crimes were only committed together with accused number one. I will revert to this shortly. For now let me deal with accused number one.

8.3 There is no question that accused number one was allowed entry to the tavern by accused number two. This accused two did by commanding complainant to open the security gate. Therefore for the purposes of housebreaking with the intention to commit crime, accused number one cannot be found guilty. I say this because in count one all the elements of the offence which are (a) breaking, (b) entering, (c) building or structure, (d) unlawfulness, (e) intention, (f) theft of money and liquor and (g) through violence or threat thereof must be satisfied before any conviction could follow.

8.4 As currently formulated, count one in the indictment presents some

difficulties in convicting either accused. It would be noted that violence was used by both at the same time to induce complainant into submission to rape. To link any violence or threat there on the part of the accused to the removal of money and liquor would amount to stretching the principles too far. By the time money and liquor were removed complainant had long submitted to whatever they chose to do. The question that remains is whether the accused can truly be found guilty of any other offence under count one other than accused two who I have already said his conduct meets all the requirements of an offence of housebreaking with the intention to commit a crime. Furthermore there is no question that the State has proven the commission of the crime of theft. But can the court convict on these two lesser crimes.

- 8.5 The relevant provisions for the purposes of the issues at hand of section 260 of the Criminal Procedure Act, provides that:-

“If the evidence on a charge of robbery or attempted robbery does not prove the offence of robbery or, as the case may be attempted robbery, but -

- (a) ...*
- (b) ...*
- (c) ...*
- (d) the offence of theft*
- (e) ...*
- (f) ...*

The accused may be found guilty of the offence so proved or where the offence of assault with intent to do grievous bodily harm or the offence of common assault and the offence of theft are proved, of both such offences.”

- 8.6 In the present matter as I have already said two offences of lesser nature were proved under count one. However, it will be noted from what the section states above that housebreaking with the intention to commit a crime is not one of the listed competent verdicts. The purpose of the section was to set out competent verdicts in respect of the crime of robbery. It is not for this court to add to this list although it

would appear that there is a crying need to revisit it especially in cases like the one at hand. No doubt a number of heinous and serious crimes like murder and rape are preceded by housebreaking. However it is not for this court to usurp the legislative powers. That aspect is deferred to the appropriate arm of government. Furthermore, it would be unfair to the accused were they to be convicted on a charge for which they were not indicted, which is not a competent verdict and for which they were not afforded an opportunity to contest. In the result there is only one competent verdict for which the accused may be found guilty in terms of section 260 of the Criminal Procedure Act in this matter. It is that of theft.

- 8.7 With regards to the two counts of rape by both accused, the evidence speaks for itself and the court is satisfied that both accused are guilty as charged in respect of count two (2) and three (3). It is also the court's finding that accused acted in concert with common purpose to all the charges they are found guilty on.

[9] Verdict

- 9.1 In respect of both accused, the court makes the following findings:-
1. Count one (1) – not guilty on the charge as per indictment but each one guilty on a count of theft of R5000-00 plus liquor for unspecified amount;
 2. Count two (2), Rape – both are guilty as charged; and
 3. Count three (3), Rape – both are guilty as charged.

This verdict is a unanimous conclusion by the court.

Date of Conviction : 23 September 2010

Date of Sentence : 23 September 2010

State Counsel : **Adv. H. M Zulu**

Instructed By : Director of Public Prosecutions

Accused No. 1 Counsel : **Mr. A Khan**

Instructed By : Legal Aid Board

Accused No. 2 Counsel : **Adv. A van Heerden**

Instructed By : Legal Aid Board