

**IN THE HIGH COURT OF SWAZILAND****HELD AT MBABANE****CRIMINAL CASE NO. 93/03****In the matter between:****REX  
VS****BONGANI GECEVU MHLANGA****1<sup>ST</sup> ACCUSED****MKHOSI ZWANE****2<sup>ND</sup> ACCUSED****MARIBA BONGANI ZWANE****3<sup>RD</sup> ACCUSED****CORAM  
FOR THE CROWN  
FOR ACCUSED****MAMBAJ  
MS. N. LUKHELE  
IN PERSON**

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**JUDGEMENT****24<sup>TH</sup> January, 2008**

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[1] There are 3 Accused persons in the original indictment.

The 1<sup>st</sup> Accused is Gecevu Bongani Mhlanga who is a young man of Matimatima area in the District of Shiselweni. He was born in 1986. The second accused is Mkhosi Zwane an adult Swazi male person who is also from the same area as the 1<sup>st</sup> Accused. He is almost the same age as the 1<sup>st</sup> Accused as well. The third Accused is Mariba Bongani Zwane a brother to the 2<sup>nd</sup> Accused. He, however, died before the commencement of this trial in which the Accused

are charged on an indictment involving 18 counts of rape. The offences are alleged to have been committed by the accused who were at all times material hereto acting jointly and or severally in the furtherance of a common purpose.

[2] These crimes are said, to have been committed in Matimatima area in or about the period beginning in August 2002 and ending in November 2002. These offences were allegedly committed against 18 separate young girls of the same area. The youngest of these rape victims was 6 years whilst the eldest was only 11 (eleven) years old, at the time of the commission of the offences in 2002.

[3] At the commencement of the trial on 7<sup>th</sup> September 2006, the crown informed the court that the 3<sup>rd</sup> Accused had since died and it therefore withdrew the charges against him.

[4] The remaining two Accused persons were unrepresented during the trial and had their rights explained to them during the various stages of the proceedings. Both pleaded not guilty to all 18 charges contained in the indictment.

[5] At the close of the case for the Crown the Accused applied to be acquitted and discharged on all the counts, but

before that the Crown withdrew the charges on counts four (4) and fifteen (15) and both Accused were accordingly acquitted and discharged on those two counts.

[6] After considering argument on both sides and reviewing the evidence by the crown, I dismissed the application for the acquittal and discharge of the first Accused and held that there was evidence implicating him on all those remaining charges. I acquitted and discharged the second Accused on counts 2, 3, 5, and 18 as there was no evidence indicating that he was either directly or indirectly involved in the commission of those offences.

[7] This ruling meant that there was evidence implicating the first accused on all the counts except count 4 and 15 whereas there was no evidence implicating the 2<sup>nd</sup> Accused on counts 2, 3, 4, 5, 15, and 18. I now examine the evidence on the rest of the counts on which the two accused were not acquitted and discharged at the close of the case for the Crown.

[8] The following facts may be extrapolated from the evidence led by the Crown.

1. The rape victims were all minors between the age of six years and eleven years.

2. They were all students at Mahlandle Primary School in Matimatima area.
3. They were raped during the day on their way home from school.
4. They were warned not to report the incidents to any one and threatened with violence should they fail to heed this warning.
5. At all times material hereto, the accused lived at their mother's home, KaKhetsiwe and were known to some of the complainants.
6. The rape victims were examined by a medical doctor either in late November or early December 2002. These medical reports were handed in by Counsel and the Accused did not challenge the contents thereof.
7. Each rape victim lost her virginity as a result of the rape.

[9] The complainant on count one is Phiwokuhle Mabundza who gave evidence as PW 28. When she testified on 17 July 2007 she was twelve (12) years old and must have been about 7 years old when she was allegedly raped in 2002. She testified that she was raped on two separate occasions by the first Accused who was in the company of the 2<sup>nd</sup> Accused and the deceased. She told the court that she was raped whilst in the company of Nompumelelo Makhanya

(PW16) and Nonjabulo Matsebula (PW17) who are the complainants on count 2 and count 16 respectively. Her evidence is therefore relevant to those counts as well.

[10] On the first occasion the three girls met the Accused and this was on a Friday. The second Accused asked for their names and having told him their names, the first Accused pulled them aside and told them not to proceed on their journey home. The first accused felled PW17, caused her to lie supine, removed her cloths, instructed her not to cry or shout for help or else he would stab her with a knife. PW17 complied with his orders. He undressed himself and raped PW17. He had in the meanwhile instructed the second Accused to prevent the other two girls from leaving the scene. Second Accused did this.

[11] After raping PW17 he then raped PW28 followed by PW16. PW28 testified further that notwithstanding the threats and or warning issued to her by the first Accused, she reported her ordeal to her mother Phindile Mhlongo (PW3), who then took her to Nonjabulo's home for further enquiries on the matter.

[12] PW28 testified that on the second occasion whilst in the company of the two girls mentioned above, they came

across the Accused persons. This was near the 1<sup>st</sup> Accused's maize field. The first Accused verbally chastised or rebuked them for having run away from him near the community water tap. He then got hold of her, undressed her and himself and raped her. He warned her not to cry or shout for help. Having raped her, he then raped Nompumelelo Makhanya (PW16) and Nonjabulo Matsebula (PW17) was raped last. The girls proceeded to their respective homes after being warned by the first accused not to tell anyone what he had done to them. When she got home she reported her ordeal to her mother who then examined her genitalia before going to PW 17's home to report on what had been reported to her by PW 28.

[13] The substance of this reporting by the two children, namely PW28 and PW17 is confirmed by PW3. However, PW3 says that it was PW17 and her mother (PW1) who came to her home not that PW3 went to the home of PW1.

[14] PW3 gave evidence that before the children were taken to the police to make a report, she examined PW28's genitalia and noticed that the hymen was absent. There was also a whitish discharge from her vagina. PW28 was examined by a medical doctor at Hlathikhulu Government Hospital on the 30<sup>th</sup> November 2002 at 5.45 p.m. This

report has been filed as exhibit O. The doctor confirms having observed a slight vaginal discharge on examining her. The Doctor, however, did not notice any other thing abnormal on the patient. The report is silent on the presence or otherwise of the hymen. The doctor merely put a question mark in the column where he was expected to record his findings relating to the hymen.

[15] PW17 Nonjabulo Matsebula, is the rape victim on count two. Her evidence, is similar to that of PW28 in that she was raped twice by the first accused as she was on her way from school. She told the court that the first incident was on a Thursday and the second one on the next day.

[16] There are, however, certain aspects or details in her evidence that are not contained in the evidence of PW28. First, PW17 said Bongiwe Shabangu was with them on both occasions whereas PW28 does not mention Bongiwe at all. PW17 said that Bongiwe Shabangu was raped by Mariba on both occasions. Secondly, PW17 said their assailants were Mariba and the first accused was present on the two days on which they were sexually assaulted. She was, however, adamant that PW28, PW16 and herself were all sexually molested by the first accused on the two encounters she referred to.

[17] One further significant aspect of her testimony is that when they were raped on the Friday, they were near Mkhaliphi's homestead and that as a result of the sexual assault they cried and Mr Mkhaliphi came to the scene. The first accused and Mariba ran into the nearby bush and the girls were able to report to Mr Mkhaliphi what had happened to them. After reporting to Mr Mkhaliphi, they immediately went to their school and made a report to the Headmaster of the school, PW31. Mr Mkhaliphi was not called as a witness.

[18] The evidence of PW17 tallies with that of PW28 regarding the sequence in which the 3 girls were raped by the first accused on the 1<sup>st</sup> day. These witnesses are also in agreement that it was PW28 who was raped first by the first accused on the 2<sup>nd</sup> day. They, however, differ as to who between PW 16 and PW17 was raped next. It is also of significance that PW16, Nompumelelo Makhanya reported to her mother, Ntombifuthi Makhanya (PW25) that she was raped whilst in the company of Bongekile Mkhonta, Skhulile Matsebula and Nonsikelelo Ngobese. She did not mention being raped in the presence of either PW28 or PW17; and she did not witness these two being raped by anyone. I shall return to the evidence of PW16 and her mother (PW25) later in dealing with counts 9 & 11 herein.

[19] PW17 was examined by a medical doctor on the 29<sup>th</sup> November 2002 at the Nhlanguano Health Centre. The doctor noted that there were bruises in her vestibule and the hymen was broken. The doctor was of the view that this was evidence of the patient having been sexually penetrated.

[20] I have referred above to the apparent differences in the evidence of PW28 and PW17. Both witnesses were very young during the commission of the offences. They gave their evidence about 5 years after the event. The events they testified about had occurred not just once but on two occasions and it is not to be unexpected that they may differ in terms of their detailed observations and description on the same events they both witnessed at the same time. Both witnesses said they were both raped by the first accused. The first accused's defence was a bare denial and it is rejected. The crown has proven its case beyond any reasonable doubt that the first accused did rape PW17 and he is found guilty as charged on count two.

[21] There is no evidence of penetration of the complainant on count one. The doctor was unable to say in exhibit O whether or not there was evidence that the complainant was

sexually penetrated. The evidence on this count is that the first accused caused PW28 to undress, lie supine on the ground and he, the first accused inserted his penis in the region of her groin. This caused pain in the complainant's vagina. In acting as he did, the first accused clearly made an attempt to rape PW28 and he is accordingly found guilty of attempted rape on this count (count one).

[22] There is no sufficient evidence, in my judgement, to show what acts were done or performed by the second Accused to show that he made common cause with the acts of the 1<sup>st</sup> Accused herein. His mere presence at the scene with the 1<sup>st</sup> Accused is not enough evidence of acting in the furtherance of a joint or common purpose with him.

[23] Reference herein is made to what was said by the court in the case of **S v MGEDEZI AND OTHERS 1989(1) SA 867 at 705-706B** where the court stated as follows

i°In the absence of proof of a prior agreement, accused no. 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in **S v SAFATSA AND OTHERS 1988 (1) SA 868(A)**, only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must

have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.”

The second Accused is accordingly acquitted on count one.

[24] The indictment on count 3 is that the Accused raped Thobile Ngobese who was eight (8) years old at the time. Thobile Ngobese gave evidence as PW14. She testified on the 31<sup>st</sup> January, 2007. She was 12 years old then and in Standard 4.

[25] PW14 told the court that one afternoon just after 2 pm she was on her way home from school in the company of Lindiwe Mabuza, Nokuthula Shongwe and Winile Ngobese. They came across the three Accused persons. She already

knew the 1<sup>st</sup> and 2<sup>nd</sup> Accused. The first Accused was employed at a Dlamini homestead in the same neighbourhood. She testified that the first Accused called them to come to him and they did so. He asked for their names and they all told him their names. The first Accused then ordered her to completely remove whatever she had on and lie on the ground supine. She complied with his orders. The first Accused also removed his trousers and underwear and then raped her. She said it was painful and she tried to resist but could not escape. After the first Accused had finished raping her he ordered her to dress up and proceed on her journey home which she did. She left the scene whilst her other three companions and school mates were being held by the 2<sup>nd</sup> and 3<sup>rd</sup> Accused and she reported what the first Accused had done to her to her mother (PW5) on arrival home.

[26] PW5, Rose Ngobese told the court that PW14 was born on 27<sup>th</sup> June, 1994 and was in Grade 2 in the year 2002. She said during November 2002 PW14 came home and told her that she had been sexually assaulted by the 1<sup>st</sup> and 3<sup>rd</sup> Accused. She could not remember the date but said it was a Friday. This witness inspected the child's genitalia and observed that there was a whitish watery discharge from her

vagina. The opening to the vagina was wide and she could insert her index finger without much difficulty. The complainant told her further that she had been raped near a forest next to the home of Indvuna Makhanya having been dragged from the footpath. PW5 further told the court that PW14 had told her that a condom had been pulled over her head by the 1<sup>st</sup> and 3<sup>rd</sup> Accused and she had been threatened that if she resisted the rape, the condom would be pulled over her face so that she would be suffocated. According to PW5, PW14 also told her that it was Mariba (3<sup>rd</sup> Accused) who first raped her whilst the first Accused just stood there and watched. The first accused then raped her after the 3<sup>rd</sup> Accused. PW14 is also to have told her mother of the presence of Lindiwe Mabuza, Winile Ngobese and Katshi Shongwe, who were also raped in her presence.

[27] PW5 also testified that PW14 led her to the scene of crime and there she observed that some twigs or leaves had been laid out on the ground and PW14 told her that she had been made to lie on these twigs or leaves during the rape.

[28] One notes from the outset that the evidence of PW5 is more detailed than that of the complainant, PW14. The other aspect of the evidence of the complainant (PW14) is

that she told the court that she did not notice what happened to her three companions during and after the time she was being raped by the 1<sup>st</sup> Accused. She also did not, in her evidence in court say that the 3<sup>rd</sup> Accused also raped her. She also did not refer to the incident involving a condom being pulled over her head.

[29] Nokuthula Shongwe (PW8) gave evidence on the 24<sup>th</sup> January 2007. She was fifteen years old then. She is the complainant on count 17 herein. She testified that in August 2002 she was in the company of PW14 (Thobile Ngobese) and PW23 (Nonsikelelo Ngobese) when they were accosted into a bush by 3 men near the home of Mr Makhanya and then all 3 girls were raped in turns by all three men. These men were unknown to her although she had seen them before this incident in one of the shops in the area and she would not be in a position to identify them if she came across them.

[30] Again one notes that PW8 does not include Lindiwe Mabuza and Winile Ngobese as part of the rape victims near the Makhanya homestead. Lindiwe Mabuza of course died before she could give evidence and Winile Ngobese was not called as a witness. Her mother said she was ill and residing

in the Republic of South Africa. PW8 also does not say anything about the use of condoms to blind-fold them during the sexual assault. The evidence of Thobile Ngobese (PW14) is that she was raped by the 1<sup>st</sup> Accused only. She is supposed to have told her mother though that she was raped by the 3<sup>rd</sup> Accused and the 1<sup>st</sup> Accused, in that order. Pw8 says all three girls were each raped by each of the 3 men.

[31] Exhibit N is the medical report compiled by the Medical Doctor who examined PW14 on the 12<sup>th</sup> December, 2002. The Doctor observed that her hymen was still intact and there was no vaginal discharge observed on her.

[32] The Medical Doctor who examined PW8 noted that there was a discharge on both the labias and that the hymen was perforated. He was of the view that these, and in particular the perforated hymen was strong evidence of penetration. The patient was examined by the Doctor at Hlatikhulu Government Hospital on the 29<sup>th</sup> November 2002. The Medical report is Exhibit F. PW23 Nonsikelelo Ngobese is the complainant in count 11.

[33] The evidence of PW23 corroborates that of PW14 and

PW8 in material respects. There are three other dimensions to it; that the accused raped them on two successive days, threatened them with a big knife and also threatened to set dogs on them if they ran away.

[34] PW23 was 13 years old when she gave evidence in court. The other significant part of the evidence of PW23 is that all the 4 girls were each raped by the 2<sup>nd</sup> Accused on the first day. On the 2<sup>nd</sup> day PW23 was raped by the 1<sup>st</sup> and 3<sup>rd</sup> Accused and PW8 was raped by the 1<sup>st</sup> Accused only. The Accused persons were known to PW23 prior to the first rape incident.

[35] PW23 was examined by a medical doctor on the 27<sup>th</sup> November 2002, as per Exhibit I. The Doctor noted that her hymen was broken and her vestibule had bruises. There was also a laceration in the fourchette. From these observations the Doctor concluded that she had been sexually penetrated.

[36] The Accused persons denied having sexually molested the complainants. Theirs was, as in the other counts, a mere denial.

[37] Accepting and being mindful of the fact that the court is dealing with the evidence of very young children who may be prone to suggestions by other people, I am of the view that the apparent differences in the evidence of these witnesses is not the product of either fabrication or suggestion implanted in their minds by others. These apparent differences relate to detail and may be an indication that the witnesses have not rehearsed their evidence or been taught a single story to tell to the court. I have no hesitation in accepting the evidence of PW8, PW14 and PW23 that they were sexually assaulted by the Accused persons at the material time.

[38] As stated above, Thobile Promise Ngobese PW14 the complainant on count 3 says she was molested by the first accused only. She testified that the first accused inserted his penis into her vagina. This caused her a lot of pain in her vagina. The evidence presented before me is not strong enough to satisfy me beyond any reasonable doubt that there was the requisite penetration to ground a conviction of rape. The first accused, however, directed his penis to the complainant's vagina and made up and down sexual movements or thrusts. By so doing he not merely committed an indecent sexual act on her but, beyond any reasonable doubt, tried to rape her. He is therefore found

guilty of that offence-attempted rape. There is no evidence against the second accused on this charge and he is acquitted and discharged on count 3. This court is, however, alive to the evidence of PW23 who said the second Accused did rape all four girls on the first day.

[39] On count 11, PW23 (Nonsikelelo Ngobese) together with her companions including PW8 and Pw14 testified that all four girls were raped by the second Accused (Mkhosi Zwane). She stated further that on the 2<sup>nd</sup> day she was also raped by the first Accused. This evidence is supported by the evidence of PW8 (Nokuthula Shongwe). The doctor who examined her on the 27<sup>th</sup> November 2002 observed that her hymen was broken and her vestibule had bruises. The Doctor was of the opinion that she had been penetrated. I have no doubt that this conclusion is justified and I hold that she was raped by both the Accused persons herein. They are accordingly found guilty of rape on count 11.

[40] As stated above, the evidence of PW8, Nokuthula Shongwe is that together with PW14 and PW23, they were raped by three men who were unknown to her. This occurred near the homestead of Mr Makhanya. These 3 men have been identified by PW14 and PW23 as the Accused persons. They knew them.

[41] According to exhibit F, the Doctor who examined PW8 on the 27<sup>th</sup> November found that her hymen was broken and both her labias had discharges. He concluded that the complainant had been penetrated. I find that, on the totality of the evidence before me, the complainant was sexually penetrated by the accused persons. She did not consent to such sexual intercourse. The first and second Accused are found guilty of rape on count 17.

[42] I now examine the evidence on count 5 and the other counts connected with it. The complainant in this count is Nosipho Nhlabatsi. She gave evidence as PW18 and I shall refer to her as such in this judgement.

[43] Like the rest of the complainants herein, PW18 lived in Matimatima area in the District of Shiselweni in 2002 and attended Mahlandle Primary School. She lived with her mother Thabsile Nhlabatsi at home. Thabsile Nhlabatsi is PW10 in these proceedings.

[44] One afternoon Pw18 was on her way from school in the company of PW22, Fikile Mabaso and they came across the three Accused persons. This was near a Zwane homestead. The first accused ordered them to remove their cloths and lie

on the ground. They complied with the orders by the first Accused who then inserted his penis into her vagina. The second accused did the same to PW22. The two girls were raped about a metre from each other. After the first Accused had finished what he did to PW18 he ordered her to put on her cloths and proceed on her journey home. She again obliged and proceeded home living PW22 behind being sexually molested by the 2<sup>nd</sup> Accused. The first Accused warned her not to tell anyone what he had done to her failing which he would kill her and throw her into a big well or donga.

[45] For fear of being killed as threatened by the first Accused, PW18 did not report her ordeal to her mother. Until her mother got information from a parents meeting at the school that the school children in the area are being sexually molested.

[46] On being questioned by PW10, PW18 told her that she had been raped by the first and second Accused whilst she was in the company of Fikile Mabaso (PW22) and Tengetile Zikalala (PW19).

[47] But before PW18 revealed that she had been sexually assaulted, she had in August 2002 told her mother that the

“Boys from KaKhetsiwe”, being the first and third Accused had set dogs on them whilst on their way to and from school. Her behaviour at home suddenly changed. She would cry in the morning when told to go to school, would come back from school and go straight to bed and would not eat and complained of a stomach ache. This went on for a week. She then revealed to her that she had been raped by the first and third Accused and threatened with death if she should talk about it.

[48] PW10 inspected her private parts and observed that she had sores. The matter was reported to the police and she was taken to hospital for medical attention.

[49] She was examined by a Doctor on the 27<sup>th</sup> November, 2002. The Doctor did not observe anything abnormal about her except that her hymen was broken. He formed the opinion that she had been penetrated. The medical report is exhibit M.

[50] The evidence of Fikile Mabaso (PW22) is materially the same as that of PW18 save for the fact that she says she did not know the three boys. However, she used to see them thereafter at a certain homestead where liquor was being sold in the area. She said all the three boys gang raped her

and she was ordered to leave the scene of crime before PW18 left. PW18 said she was the first to leave, leaving PW22 at the scene.

[51] I note further that PW18 did not in her evidence in court, say that Tengetile Zikalala (PW19) was present when she was raped by the Accused. PW22 said she was raped only once. Notwithstanding that Tengetile Zikalala (PW19) does say in her own evidence in court that she was raped in presence of PW22 and did witness PW22 being raped, this relates to another incident and not that testified to by PW18 and PW22. I think PW10 is mistaken that PW18 told her she had been raped in the presence of Tengetile Zikalala (PW19).

[52] It may well be that PW22 left the scene of the rape after the departure therefrom of PW18. If this is true, then this may explain why PW18 only saw the second Accused rape PW22, the other two Accused persons may have raped her in the absence of PW18. However, this is speculation. The corroborated evidence is that the second Accused raped her.

[53] When the Medical Doctor examined PW22 on 21<sup>st</sup> November, 2002 he noted that there were abrasions on her vestibule and lacerations on the fourchette. The hymen was broken and this was indicative of penetration.

[54] From the totality of the evidence before me, I am satisfied beyond all reasonable doubt that she was raped by the 2<sup>nd</sup> Accused under the circumstances described by her and Nosipho Nhlabatsi (PW18). The second Accused is found guilty of having raped her as charged in count 6.

[55] The first Accused is found guilty of having raped Nosipho Nhlabatsi the complainant in count 5 and is acquitted on count 6.

[56] Similarly, the second Accused is found not guilty and acquitted on count 5. In fact this was the verdict at the close of the case for the crown. There is no evidence that they acted in the furtherance of a common purpose. The evidence suggests that each of the accused independently targeted his own victim or prey, without the assistance or active connivance of the other. See MGEDEZI (supra).

[57] I now return to the evidence of Tengetile Zikalala (PW19) who is the complainant on count 7. Pw 19 testified that one afternoon near the home of Mr Mkhalihi. She came across three boys whom she did not know at the time. She was on her way from school and in the company of PW20 (Nomcebo Nonsikelelo Joice Kunene), Fikile Mabaso

(PW22) and Nonsikelelo Mkhwanazi (PW30). She was later to be told and shown by her grandmother that these three boys were the Accused persons.

[58] She testified that the boys ordered them to remove their cloths and caused them to lie supine on the ground and had their hands and feet tied with grass on the ground. Their legs were tied wide apart, and then they were each raped. The story as told by Nomcebo Kunene is different.

[59] PW20 confirms that the incident took place at Lubhuku near Mr Mkhaliphi's homestead. This was on the 10<sup>th</sup> August 2002. She said she was in the company of PW19 only; she does not include the presence of Fikile Mabaso and Nonsikelelo Mkhwanazi, whom PW19 said were present. Fikile Mabaso (PW22) said that she was raped whilst in the company of Nosipho Nhlabatsi only.

[60] PW30 also confirms that she was also present and was one of the rape victims when PW19 was raped near the Mkhaliphi homestead. Like PW19, she says Fikile Mabaso was also present. Her evidence differs from that of PW 19 in that she does not say that Nomcebo Kunene (PW20) was also present and was one of the girls raped by the Accused.

[61] This witness, (PW30) did not know the three boys who raped them that day but said she learnt from Fikile Mabaso that they were Gecevu, Mariba and Mkhosi. She further told the court that she would not be in a position to recognize them if she came across them. In spite of this though, she told the court that the first Accused is Gecevu Zwane and the second Accused is Mkhosi Mhlanga. She was clearly guessing and her guess was wrong.

[62] According to PW19, she was raped only once. She was, according to her evidence, raped by Mkhosi (second Accused) who also raped Nonsikelelo Mkhwanazi (PW30). Fikile Mabaso and Nomcebo Kunene were both raped by first Accused. Nonsikelelo Mkhwanazi, however, said she was raped by the second Accused; Fikile Mabaso was raped by the second Accused and Tengetile (PW19) was actually raped by the third Accused.

[63] This conundrum is not solved by the evidence of Nomcebo (PW20) either. She said she was raped by the first Accused who also raped Tengetile (PW19). She was adamant that she saw her companion, PW19, being raped by the first Accused who, after releasing her (PW19) to go, then raped this witness.

[64] Accepting for the moment that these little girls did not actually know their assailants and that the crown's case is that the accused acted in the furtherance of a common or shared purpose and that therefore there is no need to prove who actually did what on each of the three complainants herein, the story is, in my judgement, so confusing or so muddled up that I do not think it would be safe to rely on it. There is certainly a ring of truth in the evidence tendered by the Crown, but the quality and cogency thereof is not as to satisfy this court, beyond all reasonable doubt that the accused are guilty of any offence on count 7 and count 8.

[65] They are both found not guilty and acquitted on these two counts.

[66] Bongekile Mkhonta gave evidence as PW36. She related to court four encounters with the Accused persons. All four incidents occurred whilst she was on her way home from school in 2002. This witness is the complainant in count 9. She gave evidence on the 16<sup>th</sup> October, 2007. She was 13 years old and must have been eight years old when she was allegedly raped by the Accused herein. Referring to the first incident she said she was walking home with Tholakele Dlamini (PW15), Siyabonga Dlamini (PW35) and Tengetile Msibi and they met the three Accused persons

near the home of Mr Mkhalihi. The Accused blocked their path and prevented them from going any further on their journey. The second Accused was armed with a knife and he threatened the girls with it. He, the second Accused, caught Tholakele Dlamini (PW15), ordered her to undress and lie down on the ground. She submitted to his commands and the second Accused proceeded to rape her about three metres away from this witness. PW15 was crying when all this happened to her.

[67] After raping PW15, the second Accused proceeded to rape Siyabonga Dlamini (PW35) whilst the first Accused was raping PW15.

[68] This witness was then raped by the first and third Accused. The second Accused then had sex with Tengetile Msibi. The third Accused also sexually assaulted Tengetile Msibi,

[69] The accused then warned the girls not to report what had occurred to them to anyone, failing which they would be killed by the Accused.

[70] The second incident described by this witness is said to have taken place in August 2002. This time the witness was

in the company of Nompumelelo Makhanya, the complainant on count 16 herein. The second Accused forced Nompumelelo Makhanya (PW16) to remove her cloths and lie down on the ground. She submitted to his wishes and was raped by the second Accused. On this occasion PW36 was raped by the 1<sup>st</sup> Accused.

[71] On the third occasion, it was on a Thursday in August 2002. When the quartet came across the trio once more. After the same threats that were made on the previous two encounters, this witness (PW36) was raped by the first Accused, PW35 and PW15 were raped by the second Accused. Tengetile was spared this time.

[72] The forth incident occurred at the now common spot, near the Makhaliphi homestead. On this occasion, the accused caused the quartet to lie supine on the ground and tied their hands and feet on the grass and left them there. Siyabonga (PW35) managed to free herself first and then untied her companions. They went to their respective homes without any further harm.

[73] The second Accused did not cross examine this witness. The Accused have not been charged with any offence committed against Tengetile Msibi. Siyabonga Dlamini

(PW35) refers to only two incidents involving her encounters with the Accused persons. She said these two occurrences were 3 days apart.

[74] On each of the two episodes, the accused persons threatened them with violence before subduing them to the vile acts. The first incident she refers to occurred in August 2002. She already knew the Accused. The first accused took Bongekile away and second accused took Tholakele with him. She remained with the third Accused who then had sex with her without her consent. When she tried to resist, the third Accused threatened to report her to the second Accused who would then assault her.

[75] She left the scene alone and went to her home. She met the other two girls on the following day and reported to them that she had been raped by the third Accused the day before. The two girls also reported having been each raped by the 1<sup>st</sup> and 2<sup>nd</sup> accused.

[76] I note here that she does not include Tengetile Msibi as having been present during this incident. However, she does mention that Tengetile Msibi was present during the second incident described by her.

[77] On this occasion again the four girls were threatened with violence and being thrown into a big well or donga and then forced to submit to the demands of the Accused. The second accused is alleged to have taken both Tholakele and Tengetile to a certain spot away from this witness's view. She remained with the third accused, first accused and Tengetile Msibi. She was eventually raped by the third accused and the first accused raped Tengetile.

[78] The accused did not cross examine her on her evidence and made a general denial of her evidence when they gave their respective testimonies in court.

[79] Tholakele Dlamini is PW15. She was 16 years old when she gave evidence on 31<sup>st</sup> January, 2007. She tells of only one rape incident which she was with Tengetile Msibi, PW36 (Bongekile Mkhonta) and PW35 (Siyabonga Dlamini). This incident occurred near the MkhaliPhi homestead. Again the quartet came across the three accused who were in the company of two dogs. When the Accused asked the girls for their names, the girls refused to tell them. The first accused then held Siyabonga (PW35) and ordered her to remove her cloths before he raped her. This witness (PW15) had her legs tied to the ground with grass and raped by the second Accused. The first accused thereafter raped PW36 and the

2<sup>nd</sup> accused also raped Tengetile Msibi.

[80] The first accused did not cross examine this witness on her evidence.

[81] The court notes that on the 17<sup>th</sup> July, 2007 Bongekile Mkhonta was tendered by the Crown as PW29. When the Crown and the court posed to her certain questions aimed at establishing whether or not she was competent to give evidence; such as whether she was aware of what was expected of her as a witness and whether or not she appreciated the difference between the truth and untruth, she appeared not to appreciate or understand those issues and the court ruled that she was incompetent to give evidence - if she did not know the difference between a lie and the truth.

[82] When the same person was presented to court about three months later on the 16<sup>th</sup> October 2007, the same preliminary questions were posed to her by the crown and the court. This time she appeared more calm and composed and she passed the test. In fact she gave her evidence in an orderly manner. Her evidence, as compared to that of her other companions, contains more details in

terms of time and period and what made her remember these details. She was also able in her evidence to give four distinct or separate occasions where she and her school mates were molested by the accused persons. On the last of the four incidents she testified on, they were not actually raped but tied to the ground and left there by the Accused.

[83] On both instances where she was part of the quartet, she said she was raped by the first Accused. It is the first accused who also raped her on the occasion she was in the company of Nompumelelo Makhanya (PW16). Third accused also did, according to her, rape her on the first encounter. Tholakele (PW15) seem to refer to one rape episode.

[84] Her evidence is that it was the first accused who raped both PW36 and PW35. PW35 said it was the third accused who raped her, on both occasions.

[85] All the three girls were in agreement that the second accused raped them all, including Tengetile Msibi.

[86] The second accused was well known to these girls. The rape was committed in broad day light and there is no question of them not having had a good opportunity of

identifying the culprit.

[87] The second accused has in his evidence suggested that these witnesses have conspired against him because of a family dispute in the Matimatima or Mahlandle area. He has, however, not told these witnesses what this family dispute is and how they have conspired against him. I do not find any reasonable basis for this conspiracy. I dare say that even if such a dispute existed involving his family and some other community members, this alone, without any factual link would not be sufficient evidence for me to hold that these witnesses have conspired to falsely testify against him. There must be a link between the dispute and the evidence tendered in court. Just because I have quarreled and accuse my neighbour of having stolen my donkey, cannot of itself, be a ground by my neighbour to accuse my son of conspiracy if my son should lay a charge of assault against my neighbour. The two charges against my errant neighbour may exist independently of each other.

[88] PW15 was examined by the doctor as per exhibit A, on the 10<sup>th</sup> December 2002. Her hymen was broken and the doctor said this was evidence that she had been penetrated. The same is true of Bongekile Mkhonta (PW36). The medical report in her case is exhibit C.

[89] The accused have not been charged with the rape of PW35 (Siyabonga Dlamini and Tengetile Msibi).

[90] From the evidence stated above the second Accused is found guilty as charged on counts 9 and 14; i.e. for having raped Bongekile Mkhonta and Tholakele Dlamini respectively.

[91] On count 16 there is the evidence of PW16 and PW36 plus exhibit P. PW16 is the complainant on count 16 and she testified that she was sexually molested by the Accused persons on two occasions. On the first occasion she was raped by the third accused and on the second time it was the second accused who raped her. PW36 said she also witnessed the second accused rape PW16.

[92] The medical Doctor who examined PW16 found that her hymen was broken. He was of the view that she had been penetrated.

[93] The same report was handed in as exhibit P. I have no doubt whatsoever that in the circumstances of this case, it was the 2<sup>nd</sup> accused who sexually penetrated her and that she had not consented to this. He is therefore found guilty of raping her as charged on count 16.

[94] There is no sufficient evidence on which to convict the first accused on count 16. Although he was present when the second accused raped the complainant, there is nothing to indicate that he made common cause with whatever was done by his co-accused. He is therefore found not guilty and is acquitted on this count.

[95] I am satisfied though, beyond any reasonable doubt, that the first accused is guilty on counts 9 and 14; that is to say he raped Bongekile Mkhonta and Tholakele Dlamini, respectively.

[96] Thembekile or Sthembile Sangweni gave evidence on count 10. She is PW21.

[97] The substance of her evidence is that in 2002 and 2003 she was in Grade 3 at Mahlandle Primary School. On her way to and from school she used to travel with Nomcebo Kunene (PW20) and Cebisile Kubheka. On their way from school they were confronted by the accused persons who set dogs on them, caught them and tied their hands and feet; held them captive, had condoms pulled over their heads and suffocated and eventually raped. She said this occurred twice and she reported it to her grandmother Evelyn

Phumaphi Sangweni (PW6).

[98] PW21 said that during the 1<sup>st</sup> encounter she was raped by the second accused followed by the 1<sup>st</sup> accused. She also made the suggestion that the first accused also raped Nomcebo before raping her and that Cepsile was raped by the third accused.

[99] On the second occasion, she is supposed to have been raped by the 1<sup>st</sup> accused. The second and third accused raped Nomcebo Kunene and Cepsile Kubheka respectively.

[100] PW10 confirms that PW21 reported to her on being asked by her, that she had been raped on two occasions by the accused persons and had been actually raped by the third accused. As observed above, in her testimony in court she did not say that the third accused had actually had sexual intercourse with her on any of the two incidents she referred to.

[101] Cepsile Kubheka was not called as a witness and the accused have not been charged with any crime committed against her. Nomcebo Kunene, however, did give evidence. She is PW20. Whilst she confirms to being raped by the

accused persons, the circumstances under which this occurred are, in my judgement, not those alleged by PW21. She said she was raped together with Tengetile Zikalala and she does not mention either Cebesile Kubheka or PW21 in her evidence. I have already referred to her evidence in more detail in dealing with count 8 above and there is no need to plough the same ground twice here.

[102] PW6 told the court that she did not detect anything abnormal on inspecting the complainant's (PW21) genitalia other than that there was "evidence of an attempted forced entry into her vagina." She did not say what this evidence was. The medical report which was tendered as exhibit H also does not assist the Crown in its quest for a conviction on this count. This witness was examined by the doctor on the 12<sup>th</sup> day of December 2002. The offences are alleged to have been committed during the period ending November 2002. On examination of the outside of the witness's genitalia, the doctor could not observe anything abnormal. The hymen and fourchette were intact.

[103] The evidence of PW21 is in my view not supported by that of Nomcebo Kunene or by any other testimony before me. It would, in the circumstances, be unsafe to rely on her evidence as it stands alone.

[104] In the result, both accused are found not guilty and acquitted on count 10.

[105] Nozipho Matsebula (PW37) was the last crown witness. She gave evidence relating to counts 12, 13 and 18. She was fifteen (15) years old when she gave evidence in court, and must have been about ten years old when the events she testified on occurred in 2002.

[106] She told the court that on a Friday in October 2002 she was near the community water tap in Mahlandle area together with her sister Nomthandazo Matsebula (PW11) and Zanele Tsela (PW32). They came across the accused persons who were some distance away from their path. The accused beckoned the girls to come to them and the girls refused. The accused then set their dogs on the girls, chased after them and eventually caught her and her sister (PW11). Zanele escaped. The first and third accused held PW11 and PW37 respectively. They pulled condoms over their heads, ordered them to remove their cloths and lie down. The two girls resisted. The first accused kicked or tripped PW11 on her legs and caused her to fall down. He then raped her. The third accused raped this witness (PW37).

[107] After raping them they released them and allowed them to go home. They warned them not to tell anyone about what they had done to them failing which the accused would stab and kill them and throw their corpses into a pit or well near the river.

[108] The two girls obeyed and did not report to anyone until what the accused were doing in the area became common knowledge and this witness reported to her mother what the accused had done to her and her sister.

[109] Both accused did not cross-examine this witness.

[110] The evidence of PW 37 is not supported by her sister (PW11). She i.e PW11 testified about a totally different incident. She said it was on a very hot day and she had gone to the river with Nonjabulo Matsebula and Phiwokuhle Mabundza to get water. She left her companions there and proceeded on her journey home but before long, the first accused had suddenly alighted from a tree near her path.

[111] The first accused pulled her away, undressed her and raped her. When her companions arrived at the scene, the first accused sent her away and was joined by the third

accused. She left them at the scene with her two companions. This is the Crown's evidence in support of count 18. I shall revert to it later in the judgement.

[112] This witness does not mention the use of dogs to capture them nor does she mention the presence of Zanele Tsela during this incident.

[113] Zanele Tsela also does not confirm having been present or having been pursued by the accused with the aid of dogs.

[114] The evidence of Zanele Tsela stands alone. She said she was confronted by the second accused only. The second accused had a dog with him. Twice he called her to come to him and twice she refused to go to him. The second accused then called his dog and that persuaded Zanele to go to him. The second accused then got hold of her, threw her to the ground, removed her uniform and panties and raped her. This was in August 2002 and Zanele was in Grade 4. She was Eleven years old then.

[115] Zanele Tsela did not report the matter to her Grandmother then. She was afraid to do so, but when she eventually told her what the second accused had done to

her, her grandmother did nothing about it.

[116] She was examined by a medical doctor at Hlathikhulu Government Hospital on the 27<sup>th</sup> November, 2002. The doctor observed that her hymen had been perforated. He concluded that this was evidence of penetration.

[117] The evidence of this witness, as stated above, stands alone-bar the medical report which is exhibit D. When she was raped she was alone. The second accused was with his dog.

[118] This witness gave her evidence in a straight forward coherent and consistent manner.

[119] The second accused denied having raped her and told the witness that she had been schooled to give false evidence against him.

[120] The second accused was well known to this witness. He used to go to her home to visit the brother of this witness who was apparently his friend. There is no reason, to suggest that this witness has fabricated the story against the second accused, as he has suggested. This witness stopped living at Matimatima in 2003 and now lives at ELwandle near

Manzini.

[121] This court has no doubt whatsoever that her evidence is truthful. The second accused raped her under the circumstances described by her and he is found guilty as charged on this count. (count 13).

[122] There is, however, absolutely no evidence implicating the first accused on this charge and he is accordingly found not guilty and he is acquitted and discharged on this count.

[123] I return now to the evidence of PW37 on count 12 and 18. Her evidence is not corroborated by the evidence of her sister PW11 and Zanele Tsela PW32. Whilst PW11 testifies that she was raped by the first Accused, the circumstances under which she was allegedly raped are totally different from those described by Nozipho (Pw37). Her evidence is unsatisfactory. I cannot rely on it. I have my doubts whether the events she testified about actually took place. My doubts are reasonable in view of the fact that one would have expected both Zanele and Nomthandazo to confirm or corroborate her evidence if they were indeed involved in the events described by her.

[124] Both accused are found not guilty and are acquitted on

count 12.

[125] At the close of the crown case, the second accused was acquitted and discharged on count 18, it being found that there was no evidence at all implicating him on this charge.

[126] I have referred above to the evidence of Nomthandazo Matsebula (PW11) relating to count 18. Accepting that she says she was raped by the first accused whilst alone, she tells the court that she had temporarily separated from PW17 and PW23 and these two girls found her with the first accused before the first accused could release her to go home. When she was released by the first accused to go home, PW17 and PW28 remained with the first and third accused at the scene of crime. Both PW17 and PW28 do not refer to this incident at all in their respective testimonies. Even if they had not witnessed anything untoward happening to her, one would have expected them to at least say that they were both held captive by the first and 3<sup>rd</sup> accused whilst PW11 was commanded or set free to go home by the first accused. PW17 does of course refer to her second encounter with the first and third accused near the Mkhalihi homestead. She said both accused dismounted from a tree and then attacked them. When this occurred

she was in the company of Nompumelelo Makhanya, Bongiwe Shabangu and Phiwokuhle Mabundza. PW11 is at least not mentioned to have been present. Her evidence on the issue is very sketchy and bare. I am not, in the circumstances, satisfied beyond all reasonable doubt that the events described by this witness did take place.

[127] For the above reasons, the first accused is found not guilty, he is acquitted and discharged on count 18.

[128] In summary, the judgement of the court is as follows:

(a) COUNT 1

1. The first accused is found guilty of attempting to rape Phiwokuhle Mabundza.
2. The second accused is found not guilty and he is acquitted and discharged.

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(b) COUNT 2

1. The first accused is guilty of rape.
2. The second accused was acquitted and discharged at the close of the case for the Crown.

(c) COUNT 3

1. The first accused is found guilty of an attempt to rape Nonjabulo Matsebula.

2. The second accused is found not guilty and is acquitted and discharged.

(d) COUNT 4

This count was withdrawn by the Crown and both accused were acquitted and discharged at the close of the crown case.

(e) COUNT 5

1. The first Accused is found guilty of rape as charged.
2. The second accused was found not guilty and discharged at the close of the case for the crown.

(f) COUNT 6

1. The first accused is found not guilty and he is acquitted and discharged.
2. The second accused is found guilty of rape.

(g) COUNT 7

1. Both accused are found not guilty and they are acquitted and discharged.

(h) COUNT 8

1. Both are found not guilty and are acquitted and

discharged.

(i) COUNT 9

1. Both Accused are found guilty as charged.

(j) COUNT 10

1. Both Accused are found not guilty and are acquitted and discharged.

(k) COUNT 11

1. Both Accused are found guilty as charged.

(l) COUNT 12

1. Both Accused are found not guilty and are acquitted and discharged.

(m) COUNT 13

1. The first accused is found not guilty and he is acquitted and discharged.

2. The second accused is found guilty as charged.

(n) COUNT 14

1. Both accused found guilty as charged.

(o) COUNT 15

1. This charge was withdrawn by the Crown and both

accused were acquitted and discharged at the close of Crown case.

(p) COUNT 16

1. The first accused is found not guilty and he is acquitted and discharged.
2. The second accused is found guilty as charged.

(q) COUNT 17

1. Both Accused are found guilty as charged.

(r) COUNT 18

1. Both accused are found not guilty and are acquitted and discharged.

**MAMBA J**