



**CHAMBERS OF JUDGE-PRESIDENT F. DIALE KGOMO**  
Northern Cape High Court, Kimberley  
**Private Bag X5043**  
**KIMBERLEY**  
8300

Telephone: 053-807 2707  
Telefoon: 053-807 2707

Fax: 086 507 1476  
E-mail: [glemmetjies@justice.gov.za](mailto:glemmetjies@justice.gov.za)

22 March 2016

**PROVINCIAL COMMISSIONER: NORTHERN CAPE:**

**Major General Peter Shivuri**

Private Bag X5001

**Tel:** 053 839 2841

KIMBERLEY, 8300

**Fax:** 053 833 1275

8300

**E-mail:** [Ncprov.comm.sec@saps.gov.za](mailto:Ncprov.comm.sec@saps.gov.za)

Dear Major General Shivuri,

**REPORT BY KGOMO JP AND MAMOSEBO J:**  
**RE: STATE vs MABINA LUCAS EBITSANG:**  
**CASE NO CA&R 23/2016: KURUMAN CAS 90/02/2014:**  
**INVESTIGATING OFFICER D/CST BOIKANYO.**

1. On 03 March 2016 we dismissed the accused's/petitioner's petition as follows:  
*"The petitioner's leave to appeal against his conviction on two counts (i) contravention of s 17(a) read with sections 1,5,6,7 and 17 of the Domestic Violence Act 116 of 1998 and Rape handed down by the Regional Court, Mr L Mdoda, for the District of Kuruman, on 05 October 2015 is declined."*
2. This unusual approach to you serves to express our deprecation of the manner in which three unnamed police officers (two males and a female) violated the dignity of a rape victim, botched the investigation and put the complainant's (victim's) life at risk in more

than one way. It must be clearly understood that it is not suggested that the investigating officer, D/Cst Boikanyo, is one of the implicated police officers. He/she may assist in identifying them.

3. What gave rise to the apparent dereliction of duties described in para 2 above emanate from the evidence of the complainant "**Ms YY**" (whose identity should not be disclosed for obvious reasons): The relevant portion of her evidence is hereto appended marked "**YY**" and appears at pp 13-18 of the record. This evidence was largely uncontroverted or was correctly accepted by the Regional Magistrate, Mr L Ndoda, as credible.
4. For proper contextualization and to point out an inexcusable omission by the Regional Magistrate, the judgment is also appended hereto marked "**YYA**". It will be noted from "**YYA**" that, inexplicably and disappointingly, the Regional Magistrate (at that level) is silent on the atrocious treatment meted out by the three police officers to the rape survivor. This aspect will be reported to the President of the Regional Court and the Regional Court liaising Judge.
5. The evidence is that these three police officers:
  - 5.1 Merely "rebuked" (meaning reprimanded) the accused even though he had threatened to kill the complainant;
  - 5.2 When the complainant fled to Botswana out of fear for her life he followed her there, apparently entering illegally into that country;
  - 5.3 The complainant's statement was not obtained that night in face of paras 5.1 and 5.2 (above) and her complaint that she was raped;
  - 5.4 From the accused's home she was returned to her parental home where she only stayed with her mother. She could very easily have been eliminated because the complainant says the

- accused phoned her after the rape and before she reported to the police that he would kill her should she press charges;
- 5.5 The failure to obtain a statement outright and to have swaps taken immediately thereafter may have led to the loss of vital genetic material (DNA) if the defence was raised that no sexual intercourse took place;
- 5.6 The anguish and devastation of the complainant of having to sleep in her torn clothes (which she sensibly preserved and were later used as exhibits); she did not or could not wash before medical examination which only took place the next day; and not knowing whether she may have contracted HIV as she had not been put on Anti-Retrovirals outright. The accused had not used a condom. This could all have been avoided if responsibility was taken or the police took their duty seriously.
6. This second or secondary kind of trauma of a complainant should not be allowed to happen again. What is required, perhaps, is not so much to punish those who defaulted but to train or retrain these police officers and others who lack soft skills, sensitivity or good human relations.

We trust that this report would be of some assistance to you.



**F DIALE KGOMO**  
**JUDGE-PRESIDENT**  
 Northern Cape Division



**M C MAMOSEBO**  
**JUDGE**  
 Northern Cape Division

**CC:** The President of the Regional Court: Mr K. Nqadala  
The Acting Director of Public Prosecutions: Adv A. Botha  
The Regional Court Liaising Judge: Judge B. M Pakati

J U D G M E N T

The accused Mr Mabina Lukas Ebitsang aged 50, is charged with violating the terms of the protection order as the first count. The second count is rape and both counts are  
5 alleged to have been committed on the 10<sup>th</sup> of February 2014.

Throughout these proceedings accused was legally represented by Miss Macinda from the Legal Aid Board of South Africa.

After the charges were put to the accused the court  
10 explained to him the minimum sentence provisions as contained in Section 51 of Act 105/1997 and the accused indicated that he understood the explanation. He pleaded not guilty to both counts and his attorney Miss Macinda confirmed the pleas to be in accordance with her instructions.

15 The following were recorded as formal admissions in terms of Section 220 of Act 51/1977.

That in February 2012 a protection order was served on the accused which prohibited him from assaulting or swearing at the complainant and that the said order was still in force.

20 Evidential material that consisted of oral evidence from the state and defence then also some documentary evidence. Exhibit A as documentary evidence was the protection order, Exhibit B was the medical report compiled by Dr Bonokwane N.B. Exhibit C was an extract or a copy of the ID of the  
25 accused.

Summary of evidence.

Keolebogile Maureen Thupi who was the complainant in this case was to following effect.

She and the accused were in a love relationship as from  
5 2009 when she ...(inaudible) the accused, until 2011 when she  
jilted him because of the fact that he did not reveal that he  
was married. Accused did not accept to be jilted according to  
her. He would throw here with things to hit her.

In February 2012 a protection order was issued against  
10 him to prohibit him from assaulting her. Even after the issuing  
of the protection order the accused continued assaulting her  
until she felt she was no longer safe in South Africa and she  
ended up in Botswana. Accused even followed her to  
Botswana, entering that country through illegal ways.

15 On the 10<sup>th</sup> of February 2014 in the evening she was at  
her home and the accused phoned her saying that she should  
meet him at the shops. She refused to meet the accused.  
After a minute the accused had called, he again called her on  
the phone and said if she did not come to the place where he  
20 was, he would follow her and do as he pleases with her and  
end up killing her. When she got to where the accused was,  
he forcefully grabbed her and then threw her to the ground.  
When she tried to scream he tore her dress and took off her  
panties. When she again tried to scream he told her that if  
25 she screamed he would cut her throat with a knife that he had

in his possession. After she had been overpowered by the accused, the accused then inserted his penis into her vagina. After he had finished to roughly have sex with her he stood up and went away. Thereafter complainant took off dust from her  
5 body and then went into her home and she went into her mother's bedroom to wake her up, and then reported to her the incident. At home she was staying with her mother and her brother, but her brother by then had already gone to work as he was doing the night shift. Eventually she phoned the police  
10 and they arrived and took her with them to where the accused lived. Upon arrival at the accused's shack, the police just wanted to rebuke the accused and she told them that they can't do that whilst she was in the condition in which she was. But the police just rebuked the accused and left him at this  
15 place and thereafter took her to her home. That is the complainant. The lady police officer told her to go to the police station the next day, which she did. A statement was taken from her and she was then taken to hospital where she was examined by the doctor. When she went to the police  
20 station she went there with her torn clothes. That was her evidence.

The second witness was Regina Thupi. She was the mother of the complainant. She knew the accused as he had a love relationship with the complainant. According to her in the  
25 past it used to be nice when the accused visited their place

with the complainant. But things changed when the complainant heard that the accused had a wife and she jilted him for that. On the evening of the 10<sup>th</sup> of February 2014 when she returned from the work, she went to bed as she was  
5 tired. At about half past nine at pm whilst she was still asleep, she heard the complainant came into her bedroom and woke her up saying that someone had harassed and raped her, but did not mention the name of the person. When she made the report according to her, complainant was in tears and also  
10 emotionally hurt and her clothes were also torn. According to her, after the complainant had jilted the accused she was living in fear for the accused. And this witness was also afraid of the accused, as the accused would come and harass all of them at their place. He continued harassing them even after  
15 her was issued with a protection order. This harassment only stopped when the accused was incarcerated for this case.

After the state had closed its case, the defence opened its case by calling the accused as its first defence witness. The accused confirmed that there was a protection order  
20 issued against him which was still in force. He also confirmed that there was sexual intercourse between him and the complainant on the day in question. But he denied raping the complainant, stating that sexual intercourse was with the complainant's consent. He also mentioned that he knew about  
25 the issue of broken windows at the complainant's place, but

denied that it was one of the reasons for the issuing of a protection order against him. He said the windows were broken when he was engaged in a fight with one Derrick whom he had found with the complainant and they were fighting over  
5 the complainant. He admitted that he repaired the window panes as testified to by the complainant. He did that after being advised to do so by the police. According to him they broke up with the complainant after she opened a protection order against him, after the incident between him and Derrick.  
10 He denied having an affair with the complainant in 2009. He also denied that he followed the complainant to Botswana. That was his evidence.

Martha Kgatileng was the second defence witness. Her evidence was basically to the effect that complainant and her  
15 husband Majai Mogathile were in a love relationship, because he had found them in her house having sex and that had taken place on the 23<sup>rd</sup> of September 2014. But on the 10<sup>th</sup> of February 2014 during the incident of rape, she was not present. That was her evidence.

20 The last witness for the defence was Tsiamo Marman. He testified to the effect that he was the neighbour of the accused from 2010 and he also knew nothing about the rape incident. And he also testified that he knew the love relationship between complainant and the accused and  
25 according to him he started seeing them in 2010 where



accused was staying. He last saw the complainant in 2012 and again saw her with the accused in September 2013, and saw them again several times. According to him it was in mid September 2013 when he saw them together. According to him  
5 when it was put to him that if the accused had, he says that he had, the complainant had jilted the accused in 2012, his response was that that person would be lying, referring to the accused, because according to him he last saw the complainant in 2013.

10 The totality of evidence reveals that the following facts are not in dispute.

The sexual intercourse took place between the complainant and the accused on the date of the incident and that there was an affair before the incident between them.  
15 What is in issue is whether sexual intercourse took place with complainant's consent. Furthermore it is not in dispute that there was a protection order which was in existence, which prohibited the accused from assaulting the complainant.

In evaluating evidence, court is mindful of the fact that it  
20 is dealing with a criminal case and as such the onus is on the state to prove all the essential elements of the alleged crimes against the accused beyond reasonable doubt. The state must discharge that onus beyond a reasonable doubt. There is no onus on the accused and if he gives an explanation which may  
25 reasonably possibly be true, he cannot be convicted.

It is the duty of the court to carefully consider the totality of the evidence and the probabilities in order to decide if the state has discharged its onus. The concept of reasonable doubt does not mean all doubt and it is not expected of the state to close any conceivable avenue of escape. See in this regard S v ... (inaudible) 1998 (2) SACR 178, Supreme Court of Appeal at ... (inaudible) letters B to D.

The complainant as a witness when she testified before this court, she was emotional at times and the court would adjourn in order to let her to get composed. Although at times she tended to be long winded when answering questions, but she stuck to her version which she gave in chief during cross-examination. There we no inconsistencies or contradictions in her testimony. The court was satisfied with her evidence, despite the fact that she was a single witness on the issue of rape. She satisfied the requirements of Section 208 of the Criminal Procedure Act 51/1977 and the court was satisfied that the truth had been told by her.

When she went to the doctor, in fact, when she went to report the incident to the mother, the mother also saw that she was emotional. She also saw that the clothes were torn. So the question is if the sexual intercourse was with consent, why would the clothes be torn? And the doctor also when she went there to hospital, he also saw that the clothes were torn. And if one were to accept the version of the accused that sexual

Intercourse was with consent of the complainant and he had entered the house as he testified that through the window and also left the complainant, then the question is why would the complainant report to the mother that she had been raped and  
5 thereafter go to call the police. And when she was here in court, it was clear to the court that she was afraid of the accused. The other question is, why was it necessary for the complainant to open a protection order if the accused was not doing anything to her. And according to the application for a  
10 protection order by the complainant that is in her statement there, she mentioned the fact that she had jilted the accused because of the fact that she realised, that the accused was married and the accused started to assault her. It is not as the accused testified that the protection order was only opened  
15 because there was a fight between the accused and a certain boyfriend. That statement which was made when she made an application for a protection order showed consistency on the part of the complainant, that the reason for her to jilt the accused was the fact that he had found out that he was  
20 married. According to complainant even after the protection order was issued, that the threats and the assault were continuing. So the accused was not adhering to the terms of the protection order. And the mother also confirmed that the threats or assault did not stop after the protection order, it  
25 only stopped after the accused was incarcerated for this case.

So the court is happy with her evidence as being credible. Therefore the complainant was a credible honest witness, as well as her mother.

Coming to the accused, the witness, he did not make a  
5 very good impression to this court. When he testified in chief he appeared to be a person who was telling the truth, but when he was being put under cross-examination it was clear that it was a fabrication. A lot of things were never put to the complainant for her to comment on whilst she was testifying  
10 here in court and the accused conceded to those facts, that they were never put to the complainant. He also agreed that they were important and they should have been put to the complainant for her to comment on them. It also came during cross-examination of the accused that he had found the  
15 complainant with one Derrick in bed, but that was never put to the complainant when the complainant was still in court testifying.

The overall impression of this court on the accused was that he was not a good witness and also the two witnesses that  
20 he called, did not take his case any further.

I have also seen his passport which shows that he did not, there's nothing indicating that he had entered Lesotho (*sic*), but we know our borders. A lot of people are in this country illegally and if he did not want to be traced that he had  
25 followed the complainant, he would have done the same thing

and there's no reason for the complainant to say that he followed to Botswana if she was not followed.

So, the court is satisfied that the state succeeded in proving the guilt of the accused beyond any reasonable doubt.

5 I therefore reject the version of the accused as not being reasonable possible true, as well as that version which came from his witnesses. It did not take his case any further.

I am therefore satisfied that firstly the accused breached the terms of the protection order, which order was still in  
10 existence or subsisting and he raped the complainant on the day in question and there was no consent. It's clear that there was no consent.

Therefore stand up please? You are **FOUND GUILTY AS CHARGED ON BOTH COUNTS.**

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---oOo---

MISS MASINDA: May it please the court.

PROSECUTOR: As pleases the court, your worship. State does prove previous convictions.

**PREVIOUS CONVICTIONS ARE PUT TO ACCUSED**

20 COURT: Do you admit your previous convictions?

ACCUSED: Yes, your worship.

**ACCUSED ADMITS HIS PREVIOUS CONVICTIONS**

COURT: The SAP69 form is received as **EXHIBIT D.**

PROSECUTOR: As pleases the court.

25 COURT: Yes, Miss Masinda?

happened.

Okay. With whom are you residing there, you  
and your mother only? --- It is me, my mother as well as  
my brother but then he was not around, he had to report  
5 for night shift.

After telling your mother what transpired?

INTERPRETER: Pardon?

PROSECUTOR: Yes you can go further, after telling  
your mother what transpired what happened? --- After I  
10 had told my mother I further told my mother that there is  
no way that I could remain being in the condition that I  
was, the better thing to do is to contact the police and  
inform or report what had happened.

Did you make a report to the police? ---  
15 Whilst I was on the premises of reporting to the police  
then the accused person Lucas then contacted me again  
telephonically warning me that should I report this to the  
police he will end up killing me and there would be no  
one who would assist me.

20 You said something about asking some help  
from the Court to help, what? --- The plea that I was  
making with the Court was that whenever the accused  
person is outside then my life is not placid because I  
even attempted to go to Botswana but then he followed  
25 me up to Botswana and he makes my life miserable.

Are you all right ma'am, should we stop or get you some water? --- Yes please may I have some water.

COURT ADJOURNS

COURT RESUMES

PROSECUTOR: Whilst you were trying to get hold of the  
5 police you said that the accused contacted you or called you and said that should you tell anyone of what happened he will kill you. --- Yes.

You may continue from there, what happened, did you end up telling the police? --- Yes I ended up  
10 reporting to the police.

Was it telephonically? --- Yes it was telephonically.

What happened thereafter? --- After I had contacted the police three police officials came, two  
15 males and one female. Then I went to show them where the accused person was staying.

Continue ma'am. --- Then upon arrival at his place Your Worship it was knocked on his shack and then he got out of the shack and whilst outside the police  
20 officials who were in my company wanted to rebuke the accused person and then I told them that it is not possible to just rebuke the accused person. They should look at the condition in which I was.

Continue ma'am. --- After they had rebuked  
25 him Your Worship I was then taken home and these

police officials I do not know their names yet I know them by sight and then the lady police official then told me that I should go to the police station the next day in order to report. Yes.

5           So accused was left at his place, he was not arrested? --- Yes he was not arrested.

          And that was after you pleaded with the police to say they cannot just reprimand him showing them or telling them what he did to you? --- Yes he was just  
10 left.

          And then you said also that you were told by the police that day you should go the next day to the police station to go and report the incident? --- Yes.

          Did you go the following day? --- The next  
15 day I went to the police station and I was assisted by a lady police official and after she had written down or taken my statement she then took me to the hospital.

          So at the hospital what kind of treatment did you get? --- At the hospital I was then examined by a  
20 doctor. He or she then checked me and even asked me some questions whether I was menstruating and then I said no I was not menstruating.

          But you were just treated and discharged or were you admitted? --- No I was just checked and then  
25 allowed to go home.



Now during the time of the struggling and the time when the accused threw you to the ground did you sustain any injuries? --- I was just scratched on the side of my leg.

5 Do you perhaps know as to the state of sobriety of the accused when he raped you? --- He does not take or use any liquor so he was as sober as a magistrate.

COURT: Are you sober, are you suggesting that you are  
10 drunk?

INTERPRETER: No Your Worship.

PROSECUTOR: Now ma'am can you please tell the honourable Court how has this incident affected you? ---  
It has hurt me Your Worship because it has put my life in  
15 tribulation. I cannot live freely as other people live Your  
Worship. Whenever someone passes in the dark then I  
would be afraid and even hide myself.

Can you please tell the honourable Court from the time the accused is in custody up until now, for this  
20 duration of the time that the accused is in custody how is your life; are you living differently from the time when he was out? --- Yes there is a difference Your Worship because as and when he was a free man I would not freely go to the shop but since he has been in custody I  
25 have at least been able to go to the shops.

You have indicated to the honourable Court earlier on in your evidence when you said that when he called you you refused, when he said you should meet you refused but then he said to you if you do not come  
5 he will follow you at home and get you there and end up killing you there. Do you still remember that? --- Yes.

You told the honourable Court that since he used to come at your place you were afraid that indeed he would come there. Now can you just explain to the  
10 honourable Court whenever he came at your place would he find you alone there or he would find you with your mother or your family members? --- Your Worship it once happened that he went to my place of abode going around the house meanwhile my mother was at work and  
15 my elder sister was in my company. He ended up even breaking the window panes and ended up through that particular window pane.

Okay what I want to find out from you ma'am is that whenever accused would come to your place and  
20 find your mother or your sister or your relatives would he respect them and then maybe leave or just talk to you politely or he does not show any respect? --- He had no fear or respect for anyone Your Worship because even if he comes at home and would find my mother or my sister  
25 he would just do as he pleases like for instance it once

happened that he even pushed my sister and my sister fell on her back and I even have a ...(indistinct) on my head where he once hit me with a stick.

Where the rape took place ma'am you said that  
5 he tore your skirt apart and then he also undressed you of your panty. Did you leave those items there after the rape or you took them along? --- I came with them to the police station.

You mentioned that you went to the doctor the  
10 following day. When you went to the doctor you are saying that you were having the very same clothes? --- Yes.

Did you take a bath or you just went like that?  
--- No I did not take a bath, I just went like that.

15 And when the accused raped you did he use a condom? --- No.

You mentioned that he had a knife in his possession but you are unable to give a description of the knife as it was during the night? --- Yes with the aid  
20 of the moon I could see that he had a knife but I am unable to explain how it looked like or its colour.

I have no questions Your Worship, as it pleases the Court. I believe we may adjourn now for lunch.

25 COURT: The Court adjourns.