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

CASE NO: AR195/16

In the matter between:

**NKULULEKO FREEGATE PHAKATHI** **APPELLANT**

vs

**THE STATE** **RESPONDENT**

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**ORDER**

On appeal from The Regional Court Pietermaritzburg:

(a) The appeal be upheld.

(b) The order of the trial court is replaced with the following:

'The appellant is found not guilty and acquitted.'

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**JUDGMENT**

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**D. Pillay J**

**Introduction**

[1] On 19 March 2015 the appellant was sentenced to life imprisonment in terms of Part 1 of Schedule 2 to s 51(1) of the Criminal Law Amendment Act 105 of 1997

for rape of the complainant allegedly committed six years earlier. The state alleged that on 14 August 2009 at Sinathing in KwaZulu-Natal the appellant sexually penetrated the complainant without her consent. The complainant was four years at the time and nine years when she testified. The appellant pleaded not guilty. In explaining his plea he acknowledged that he knew the complainant as his neighbour and that she used to visit and play with other young children at his home; but he denied raping her.

**The state's case**

[2] With the assistance of a facilitator the complainant testified that she was playing with children from the neighbourhood when the appellant called her into his bedroom, told her to undress, then forcefully undressed her before raping her. She cried out in pain. He chased her away. She told her mother Ms Z that the appellant had raped her. Ms Z took her to the hospital where a doctor examined her.

[3] Under cross-examination the complainant clarified that she did not report the rape to her mother on the same day but on the following day because she was afraid.[1] She realised that if she did not tell her mother she would give her a hiding when she eventually did tell her. The defence that was put to the complainant was a bare denial. It was suggested to her that someone in her family was using her to implicate the appellant falsely.[2] Forthrightly she replied that the appellant was lying if he denied raping her. She acknowledged that her family and the appellant's family were not on good terms, that they were always fighting and that her family had once caused the appellant and his father to be arrested.

[4] In re-examination she clarified that the fight was about children from the appellant's homestead throwing stones on top of her home. However these and other altercations she persisted occurred after the appellant had raped her.

[5] Ms Z testified. On 14 August 2009 at about 15h30 the complainant reported to her that she had a rash. Surmising that the complainant was competing for attention

[1] Page 17 line 5-10 of the record.
[2] Page 20 line 20 of the record.

with her younger brother Ms Z applied Vaseline all over her body, including on her thighs, which the complainant said were itchy. Unusually the complainant refused to eat or even drink a water solution. The following morning she complained again about the rash. Ms Z examined her again and saw that there was a rash around her vagina. She also noticed blood there.

[6] She took her to the doctor. Although she knew about the abuse because she had asked the complainant who had 'done this' to her before taking her to the doctor,[3] she did not tell the doctor that the complainant had been raped because the doctor had already stated that the complainant had been abused. The police arrived at the hospital and took Ms Z to the police station to make a statement. There the complainant informed her that it was Buyile's uncle who had raped her without naming which of the three uncles it was.

[7] On returning from the doctor the complainant spotted the appellant. She started running away from him shouting that he was the 'uncle who inserted his black thing into her vagina'. Instantly Ms Z returned to the police station to report that she had identified the perpetrator. The police did not respond to her complaint. The officer attending to her warned her that she would pay a fortune with a cow if she implicated the appellant. Dejected by this response she returned home and her husband followed up to ensure that the matter was prosecuted. In order to get the police to arrest the appellant she falsely reported that he was attacking them with a bush knife. As a result the appellant was arrested on the same day.

[8] She sent the complainant away to Imbali to reside with her grandmother. About a year later when the complainant saw the appellant she ran away from him because she was afraid of him. Subsequent to the rape his family fought with Ms Z for not approaching them personally before going to the police.[4] Prior to the incident they were on good terms with the appellant's family.

[9] Doctor Hall presented the medical evidence for the state. She was not the doctor who had prepared the J88 medical report. The preparing doctor, Dr Van

[3] Page 36 line 15-24 of the record
[4] Page 43 line 10 of the record

Lancial had returned to Belgium to start a family there. She was momentarily out of the country.

[10] The cross-examination of Dr Hall was brief. It turned on whether the excoriation was the same wounds that Ms Z had noticed and what could have caused the wounds around the child's vagina to which Dr Hall replied that

> 'many things … can cause excoriation or wounds around the vagina but it is a very well protected area physiologically, anatomically and there is no wound that … could naturally occur other than an attempt to penetrate with something that could cause the combination of the findings that we have here.'

[11] Such findings included, for instance, the transverse diameter of the hymen being 8 mm for a child of four years, which was abnormal; the normal is up to 5 mm until the age of five to six years.

[12] This concluded the case for the state.

**The defence case**

[13] The appellant testified that the complainant was coached to testify against him because if it had been him then the complainant would have identified him by his name instead of referring to him as Buyi's uncle. On arrest he invited the investigating officer to take a sample of his blood to confirm that he had not raped the complainant. He never carried a bush knife and so did not threaten Ms Z with one.

[14] His legal representative did not put material aspects of his evidence to the state witnesses. For instance it was not put that the complainant or Ms Z knew the appellant by name and could have mentioned it to the police instead of referring to him as Buyi's uncle. It was not put that the complainant's father would coach her whilst they were traveling in a taxi to point the appellant out; and that the appellant's late brother Phumlani was charged for raping S. who was Ms Z's aunt in 2006.[5]

[5] Page 56 line 5-15

[15] He acknowledged that there were no problems between their families until his arrest; the complainant was allowed to play with the children from his household. He worked and resided in Oribi returning home every fortnight. In response to questions from the court the appellant could not say whether the family was living in harmony as he was not staying at home but in the town.

[16] Mr A Phakathi, the appellant's father testified in his defence. He denied that there was a good relationship between their families to the extent that his family borrowed money from the complainant's family; the latter were not employed. He refuted the appellant's evidence that the complainant was allowed to play with the children of the appellant's family. As the appellant did not live with Mr Phakathi he was mistaken about the complainant visiting the children in the Phakathi household. Mr Phakathi would lock the gate to prevent the complainant from entering his property because she encouraged the small children to play with her on the street where there were cars.

[17] The appellant challenged his conviction and sentence on four grounds.

**The appointment of a facilitator**

[18] Ms Barnard for the appellant submitted that the trial court appointed a facilitator without first assessing whether the complainant would be exposed to 'undue mental stress or suffering' by testifying. Ms Barnard correctly conceded that this was not her strongest point. Ms Mshololo for the state drew the court's attention to *Kerkhoff v Minister of Justice and Constitutional Development and Others* 2011 (2) SACR 109 (GNP) at para 5 – 7 which referred to the seminal judgment of the Constitutional Court in *Director* of *Public Prosecutions, Transvaal* v *Minister* of *Justice* and *Constitutional Development* and *Others* 2009 (2) SACR 130 (CC) para 116[6] as follows:

> 'Given the special vulnerability of the child witness, the fairness of the trial accordingly stands to be enhanced rather than impeded by the use of these procedures. In my view, these special procedures should not be seen as justifiable

[6] Also reported at 2009 (4) SA 222; 2009 BCLR 637 (CC).

limitations on the right to a fair trial, but as measures conducive to a trial that is fair to all.'

[19] In *Kerkhoff* the child witnesses ranged between the ages of ten and eleven. The learned judge observed that 'it is very unlikely that a court will conclude that it is not in the interest of the witness to appoint an intermediary' when the witnesses are of such a tender age. I endorse this observation. The mere fact that the complainant is of the tender age of nine years is a sufficient basis for the court to infer that the complainant would be exposed to undue mental stress or suffering unless an intermediary was appointed to facilitate her testimony. Upon a reading of s 170(A) of the Criminal Procedure Act 51 of 1977 ('CPA') it is the court who must be satisfied that the witness would be subjected to undue mental stress or suffering, not the litigants or their representatives. However, before granting the application, the court must hear the defence on this issue.

[20] In *S v Mathebula* 1996 (2) SACR 231 (T) the full bench criticised the trial court for acceding to the state's application for the appointment of an intermediary without giving the unrepresented accused an opportunity of addressing the court. In this case the defence representative declined the opportunity to challenge both the intermediary and the competence of the complainant to testify. Ms Msholoo referred the court to *S v Sydow* 2003 (2) SACR 302 (C) regarding the admissibility of sworn testimony of a translator or interpreter; and *K v The Regional Magistrate NO and Others* 1996 (1) SACR 434 (E) at 436B – E in which the full court found that there were 'sound reasons' for using intermediaries to enable child witnesses to 'participate properly in the system'. Both cases inform my judgment.

[21] Furthermore nothing in the record in this case suggested that the intermediary contaminated or distorted the evidence of the child in any way. Additionally as the defence counsel would have understood isiZulu, if the intermediary misinterpreted or miscommunicated any evidence to or from the complainant he would have been alive to it and could have objected then and there.

[22] The appellant's objection to the use of a facilitator is unfounded.

**J88: Inadmissible hearsay**

[23] Ms Barnard contended that the J88 medical report should be rejected because Dr Van Lancial who compiled it did not testify. It is hearsay. The prosecution ought to have applied specifically for the J88 to be admitted as hearsay after explaining why Dr Van Lancial could not testify personally. Ms Mshololo turned to s 222 of the CPA read with s 34(1)(b) of the Civil Proceedings Evidence Act 25 of 1965 ('CPEA') to have the J88 admitted in evidence on the basis that the person who made the statement was outside the Republic, and it was not reasonably practicable to secure her attendance.[7]

[24] For documentary evidence to be admitted in criminal proceedings under s 222 of the Criminal Procedure Act 51 of 1977 (CPA) read with s 33 – 38 of the CPEA the document must first be authenticated. If it is an original document then it is admissible on its mere production provided that the person who made the statement is called to testify as a witness, unless it is not reasonably practical to secure that person's attendance.[8] If the presiding officer is satisfied that undue delay or expense would be caused, she may admit the document as evidence in the proceedings, 'notwithstanding that the person who made the statement is available but is not called as a witness' and notwithstanding that the original is not produced but a copy of the original is proved to be a true copy.[9]

[25] Notwithstanding the admission of documentary evidence under s 34, s 35 nevertheless requires the presiding officer to estimate the weight to be attached to the document having regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, whether it was made contemporaneously with the occurrence and whether or not the person who prepared the document had any incentive to conceal or misrepresent facts.[10] This second hurdle relates to not only the weight to be attached to the admissibility of the document but also the admissibility of its contents.

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[7] *Le Roux* v Pieterse NO and Others 2013 (1) SACR 277 (ECG).
[8] s 34(1)(b)
[9] s 34(2)
[10] s 35 of the CPEA

[26] When seeking to admit documents into evidence then the first hurdle to overcome is to prove the authenticity of the document. Thereafter its content has to be proved as true. Even if s 222 enables a party to have a document admitted as evidence that party will nevertheless have to overcome the rule against the admission of hearsay in s 3(1) of the Law of Evidence Amendment Act.

[27] In this case the admissibility of the J88 was not debated in the trial court. Whether it was reasonably practical to secure the attendance of Dr Van Lancial was not canvased nor was the originality of the document in issue. However, s 34(2) allows the state to overcome the first hurdle of proving the authenticity of the document. Furthermore, Dr Hall attested to its authorship. As for the truth of the contents of the J88, that must still be filtered through s 3 of the Law of Evidence Amendment Act.

[28] As a general rule hearsay is inadmissible unless certain requirements are met.[11] Subsection (a) requires the parties to agree to the admission of hearsay. Ideally in this case the trial court ought to have enquired whether the appellant consented to the admission of the J88. In the absence of consent the state should have applied formally setting out fully the reasons why hearsay should be admitted.[12] However, in S v *Molimi* 2008 (2) SACR 76 (CC) the omission by the trial court to rule clearly on the admission of hearsay to enable the accused to appreciate fully its evidentiary ambit was held not to be unfair because the admission of the co-accused's extra-curial statements was in the interests of justice. Thus notwithstanding sub-sec (a), sub-sec (c) enables the court to admit hearsay in the interest of justice after considering the 7 factors in sub-sec (c).

[29] Even if hearsay is admitted its probative value depends on *inter alia*, the nature of the proceedings and the evidence, the purpose for which it is tendered and importantly, the prejudice to the accused.[13] These criteria apply equally when considering not only whether hearsay should be admitted but also its probative value

[11] S 3(1) of the Law of Evidence Amendment Act 45 of 1988; Hoffmann and Zeffert *The Law of Evidence* (2003) at 369 -370; *S v Molimi* 2006 (2) SACR 8 (SCA) para 14 – 24.
[12] Hoffmann and Zeffert *The Law of Evidence* (2003) at 369 -380.
[13] S 3(1) of the Law of Evidence Amendment Act 45 of 1988.

after it is admitted. Hence s 3(1) is an application of a rule of law, not an application of judicial discretion. A misapplication of the rule is therefore appealable.[14]

[30] The nature of the proceedings being criminal, the onus to prove the guilt of the accused beyond a reasonable doubt rests on the state. These are factors that weigh heavily against both the weight to be attached to the decision to admit the hearsay and to its evidential value once admitted.[15] If the J88 were 'decisive or even significant' in convicting an accused the court should hesitate to admit it unless there are 'compelling justifications' to do so.[16]

[31] In *S* v *ML* 2016 (2) SCR 160 (SCA) the Supreme Court of Appeal (per Swain JA) reiterated its dissatisfaction with the 'growing trend' of prosecutors failing to call the medical experts who examined the complainant and compiled the medical report in sexual assault cases.[17] In the case of child complainants whose evidence must be treated with caution and for which some corroboration is required to account for the risks of relying on a single and child witness to found a conviction, the medical evidence is vital. In *S* v *ML* the doctor concluded that sexual penetration had occurred; however other observations in the report were inconsistent with such conclusion. For instance the complainant of nine years bore no fresh tears or scaring and her vagina admitted the passage of only a little finger. Furthermore the evidence of the complainant's mother conflicted with that of the child. The doctor's evidence was also required to explain why the J88 was dated 2 June 2011 when the mother's evidence was that she took the complainant to the doctor on 27 May 2011, two days after the incident.[18]

[32] In *NS v The State* [2015] ZASCA 139 para 8, 14, 15, the issue was whether the sexual intercourse which the accused admitted having had with the complainant was consensual. Notwithstanding unsatisfactory aspects of the complainant's evidence, the lower courts found corroboration for rape in the J88, which was handed in by consent. Swain JA found that calling the forensic nurse to testify was

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[14] Hoffmann and Zeffert *The Law of Evidence* (2003) at 369 citing *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and another* 1997 (1) SA 1 (A) at 27D-E.
[15] *S v Ndlovu and others* 2002 (2) SACR 325 (SCA) para 16 at 337b-d.
[16] *S v Ndlovu* supra para 16 at 337b-d.
[17] *S* v *Madiba* 2015 (1) SACR 485 (SCA) para 8; *NS v S* [2015] ZASCA 139 para15.
[18] *S* v *ML* para 6-10

'vital' to 'exclude any reasonable possibility that the physical evidence was equally consistent with consensual sexual intercourse.' The five-bench appeal in the SCA concluded that 'for the magistrate to rely upon the bald and cryptic conclusion in the J88 form to corroborate the unsatisfactory evidence of the complainant was unjustified.'

[33] In *S* v *Madiba* 2015 (1) SACR 485 (SCA) (per Swain AJA) the Supreme Court of Appeal lamented the failure by the state to call the doctor who performed the post-mortem to attest to the report which was tendered in terms of s 212(4) of the CPA as constituting proof of its contents. Nevertheless the court found that the report, which recorded that a large amount of blood was found in the vulva, was consistent with the evidence of eyewitnesses who saw the deceased. Additionally the appellant was found to be mendacious and his counsel conceded that there was no basis to interfere with the conviction of rape; the court accordingly dismissed the appeal against the convictions of attempted rape and rape.

[34] The full bench decision in *Le Roux v Pieterse NO and Others* 2013 (1) SACR 277 (ECG) distinguished between the tendering of a J88 as testimonial and circumstantial value. Similarly to this case, the doctor who compiled the J88 was abroad but in that instance having emigrated; securing her attendance was not reasonably practicable; therefore she was unavailable to testify. Another doctor testified about the contents of the J88. The court admitted the J88 under s 34(1) CPEA for its circumstantial value. Had the reporting doctor testified she would have reiterated the recordings that she had made of her observations of the condition of the complainant as she found her. [19]

[35] In contrast, in *Sibulali v Minister of Police* 2016 JDR 1165 (ECM) the court admitted the J88 provisionally but rejected it finally when the claimant in a police assault action for damages failed to secure the testimony of the doctor who was relatively nearby in Lusikisiki, which could have been done easily if the claimant's attorney had made the effort. Additionally, it emerged that the doctor had not recorded the injuries that the claimant attested to. Her evidence that the doctor did

[19] *Le Roux* v Pieterse NO and Others 2013 (1) 277 (ECG) para 14.

not examine her but merely recorded what she had said was therefore not born out by the J88.

[36] It seems to me from a review of these cases that the admissibility and probative value of the J88 must be decided in each case on its own merits having regard to all the circumstances itemised in s 3(1) of the Law of Evidence Amendment Act including, the quality and clarity of the J88, whether a medical expert is available to clarify and to draw inferences from the observations in the J88 to assist the court, whether the accused is legally represented, and the consistency or otherwise of all other evidence in relation to the J88.

[37] In this case, Doctor Hall volunteered that examining and reporting on sexual assault upon a small child is a very long procedure of two to three hours. The same doctors have to be on duty in ICU. Given the doctors' busy day filling in forms is the least important task. Whilst measurements and findings would be correct, spelling, handwriting and terminology could be improved upon. These conditions under which doctors function must be factored into the assessment before medical reports are rejected and medical personnel are castigated unfairly. At the same time doctors must be aware of the vital value of their reports, which are often the only corroboration of sexual abuse.

[38] In contrast to *S* v *ML* in which the medical report was simply handed in without objection by the defence in terms of s 212(4) of the CPA and accompanied by an affidavit by the reporting doctor,[20] in this case a doctor other than the one who examined and reported on the complainant testified about the contents of the J88. The quality of the J88 is sufficiently clear and detailed. It is possible for another doctor to draw inferences from the examining and reporting doctor's observations. So the failure to call Dr Van Lancial is not fatal to both the admissibility and contents of the J88.

[39] Consequently, I accept the J88 as an accurate record of the examining and reporting doctor's observations and that the testifying doctor could draw inferences

[20] *S* v *ML* supra n17.

from the J88. A vital question for cross-examination of the testifying doctor would have been whether the injuries could have been caused other than by sexual penetration. Furthermore as Ms Z attested to seeing a rash, which the complainant said was itchy, could the injuries have arisen as a result of the child scratching herself? But no one asked these questions in the trial court.

[40] The appellant was legally represented. His legal aid counsel ought to have advised him of the consequences of s 3(1) of the Law of Evidence Amendment Act.[21] He was also not ambushed by the hearsay because if the J88 were not disclosed timeously his representative would have objected. However assuming that the appellant was not advised fully, the trial court had a duty to consider and rule on the admissibility of the hearsay at the end of the state case so that the accused appreciated its full evidentiary ambit.[22] The trial court's omission to so rule or even engage with the issue of hearsay is an irregularity that impaired the appellant's right to a fair trial.

[41] So even though the J88 is admissible as a document, and the probative value of its contents carries some weight, at least to the extent that it evidences some unusual and possibly sexual interference with the complainant, the irregularity occludes the admission of the J88 as evidence.

[42] Undoubtedly, the admission of the J88 was prejudicial to the appellant as it proved one element of the charge of rape against him. Considering that the complainant was a child, the prejudice was greater as he faced a term of life imprisonment if convicted. Even though his defence was that the complainant identified him falsely, the state bore the onus of proving all the elements of the crime. Admitting the J88 as proof that the appellant was sexually penetrated was therefore prejudicial to the appellant. If I am wrong on what might be considered a procedural formality, the evidence of Ms Z must also be considered.

[43] Most devastating for the state's case are the contradictions in the evidence of Ms Z. She testified in chief that the complainant had not only told her that Buyile's

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[21] *S v Ndlovu* supra para 16 at 337f-h.
[22] *S v Ndlovu* supra paras 18 – 19 at 338b-i.

uncle had penetrated her but also that the complainant had pointed to the person who had done that to her[23] before she took the complainant to the doctor. In essence then she knew the identity of the perpetrator before she went to the doctor and the police. Yet her further testimony was that it was when they returned from the doctor that the complainant spotted the appellant; that is when she pointed him out. Thereafter Ms Z returned to the police station to give the police the name of the appellant as the suspect.

[44] After the magistrate warned Ms Z that even though she understood isiZulu, she was having difficulty understanding Ms Z and asked her to clarify how it came about that the complainant identified the appellant. Ms Z responded then that in the morning the complainant saw the appellant doing his washing. She ran back to the house to identify her assailant to Ms Z.

[45] On the record therefore there are two versions as to when Ms Z learnt of the identity of the suspect. One version is that it was before she took the child to the doctor and the other version is that it was when she returned from the doctor. If she knew the identity of the suspect before she went to the doctor then when the police arrived to interview her whilst she was still at the hospital she would have known who the suspect was and disclosed it to the police then and there. There would have been no need to return to the police station.

[46] According to the J88 the consultation was at 17h00. Dr Hall testified that it took about two hours to complete a report. Whether the time reflects the beginning or the end of the examination of the complainant, or whether it has any connection at all with the timing of examination of the complainant, is a matter that Dr Van Lancial had to attest to, not Dr Hall. Irrespective of this missing detail the state does not offer any explanation for the delay from the morning when the complainant allegedly identified her attacker to the time reflected on the J88.

[47] On her version she caused the appellant to be arrested on the same day that she returned to the police station to identify him. What day that was is not apparent

[23] Page 36 line 15-25 of the record.

from the record. The appellant's first appearance in the district court was 17 September 2009. Inferentially he would have been arrested not more than two court days before that. This does not support any of the state's versions as to when the complainant named the appellant as her assailant. If there was an explanation for the month long delay from 14 August 2009 it was not tendered.

[48] There are other features of the state's case that are disturbing. The offence was allegedly committed on 14 August 2009; however the appellant was summoned to court for trial as late as 16 May 2013 in the regional magistrates court. He was released on warning to return to court the following month. At some point the charges were withdrawn for reasons not disclosed to us. The trial eventually commenced on 6 November 2014 and concluded on 20 March 2015. There is no explanation from the police about these delays in the prosecution.

[49] Ms Z testified that she did not disclose to the doctor that the complainant had been abused. However, the doctor recorded that she did disclose that the complainant had been sexually abused.

[50] Although samples were taken from the complainant for DNA testing there is no evidence of what the results of the tests were if there were tests at all. Nor is there any explanation about why the police did not take up the appellant's offer to subject his blood for DNA testing

[51] An innocent accused facing a charge of rape faces great difficulty in saying anything more in his defence other than denying the charges. No onus rests on the appellant to prove a motive for being falsely implicated. Usually the search for a motive is little more than conjecture after the fact. The state bears the onus of proving all the elements of the charge. In this instance it failed to provide clear and convincing evidence of the identity of the perpetrator. Furthermore Ms Z's evidence cannot be relied on in view of the contradictions. That leaves the evidence of the complainant only. Even if one were to accept her evidence that she was raped and relies on the J88 to corroborate her claim that she was raped, the identity of the perpetrator remains in issue. As a single witness and a child at that her evidence when treated cautiously is not sufficient to enable the state to overcome its burden of

establishing proof beyond a reasonable doubt that the appellant raped the complainant.

**Order**

[52] Accordingly I propose the following order:

(a) The appeal be upheld.

(b) The order of the trial court is replaced with the following:

'The appellant is found not guilty and acquitted.'

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**D. Pillay J**

**I agree**

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**Masipa J**

**It is so ordered.**

## APPEARANCES

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|---|---|
| Counsel for the appellant | : Advocate D. Barnard |
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| Counsel for the State | : Advocate Z.G Msholoolo |
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Date of hearing: 25 October 2016

Date of Judgment: 11 November 2016