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

CRIMINAL APPEAL NO: AR 398/2017

In the matter between:

LINDOKUHLE KHUMALO Appellant

and

THE STATE Respondent

Coram: KOEN, VAHED JJ et BARNARD AJ
Heard: 17 MAY 2019
Delivered: 29 JULY 2019

ORDER

On appeal from the Regional Court, sitting at Inkanyezi.

1. The appeal against conviction is dismissed and the conviction by the court *a quo* is confirmed.
2. The appeal against sentence succeeds. The sentence of life imprisonment imposed by the court *a quo* is set aside and substituted with a sentence of twenty (20) years imprisonment, antedated to 25 August 2015.

JUDGMENT

Koen J (Barnard AJ concurring)

[1] The appellant was convicted in the court *a quo* of the rape of an 8 year old boy,[1] hereafter refer to as 'S', and sentenced to life imprisonment. The present appeal arises from the application of s 10 of the Judicial Matters Amendment Act 42 of 2013 which provides the appellant with a right of appeal against his conviction and sentence without requiring the leave of the court *a quo*.[2]

[2] The trial court was faced with two mutually contradictory and conflicting versions:

(a) The State's version was that on Friday, 3 May 2013 and at the home of the appellant, the appellant penetrated the anus of the complainant with his penis;

(b) The appellant denied any such incident. His version was that he saw S come past his (the appellant's) room on that day and saw him going to the main door of the Khumalo residence where he, the appellant, resides. The appellant then went to the main residence and locked the door, as S allegedly had previously stolen an adaptor and charger from that home and he wanted to prevent any similar incident.

[3] It is not in dispute that the appellant is known to S and that he knew him by name prior to the day in question.

[4] S testified that although he was at the time a grade 2 pupil, he did not attend school on that day, but that he had remained at home. He was suffering from a stomach ache and his mother was going to give him glucose. His stomach was painful and itching. Another thing that would happen was that when he went to the toilet, he would not be able to 'pass ...stool'. When he felt better at around 14h00 he

[1] The evidence of his mother revealed that he was born on 7 December 2004. The rape was alleged to have occurred on 3 May 2013.

[2] See s 309 of the Criminal Procedure Act 51 of 1977.

decided to go and visit his friend, Sibonelo, a younger brother of the appellant, at the Khumalo's homestead. He came across Nkosinathi near the gate, greeted him and then they parted ways. Thereafter the appellant called him as he was entering the area near the appellant's homestead. S thought that the appellant wanted to send him on an errand; he thought that he would have to get cigarettes, as he knew the appellant as a smoker. At that stage he had not yet found Sibonelo.

[5] S asked the appellant whether Sibonelo was present. The appellant told him that Sibonelo was not yet back. The appellant then asked him to enter the house and after he had entered the house the appellant closed the door and told him to climb on top of the bed. The appellant covered S with a duvet or a comforter. The appellant smeared Vaseline on S's buttocks and then some more Vaseline onto his penis and thereafter penetrated S anally. S described that he cried. The appellant told him that he should go out of his room but that he should not report the incident to anyone. S hurried home to report the incident to his mother.

[6] S said that he found his mother inside the house and she was busy 'putting some polish'. He reported to her that the appellant had raped him. They both then went to another house and called out for a granny, who turned out not to be present. One Thandeka was however present. They thereafter proceeded to the home of the Khumalos (that is the appellant's home) where they found the appellant, Sibonelo and one Nosipho. At that stage, at the direction of his mother, S was required to repeat what he had reported earlier to her in the presence of the appellant. He did so. The appellant denied the accusation of rape.

[7] Thereafter the matter was reported to the police and S was taken to a hospital where he was examined by a doctor (who turned out to be Dr Buthelezi whose J88 was made available to the defence). Present at the hospital were S, his mother and the appellant's mother, Siphiwe Khumalo.

[8] S's mother testified before he did. Her evidence of what was reported to her by S was consistent in all material respects with S's subsequent testimony. She had been at her home with S earlier that morning. When S came to report the rape she was seated at the Xulu homestead, neighbouring her homestead. Her evidence as to

how S presented himself to her is significant. She described that 'his penis was actually hanging outside... and he came shouting, mother, mother!' S then went on to say that the appellant had raped him. He appeared to her 'to be very frightened'. She 'grabbed him by his hand and exited the Xulu homestead with him.' On inspection she noticed that his penis appeared to be 'swollen and also a bit wet'. From a glance 'it appeared to [her] like it was being stroked up and downwards.' She formed the impression from S's dishevelled state that he had been 'dressing himself up as he was travelling'.

[9] S's mother knows the appellant as he grew up 'in front' of her. S explained to her that he had gone to look for his friend. At the Khumalo home he was called by the appellant who asked him to enter the house. The appellant then pulled him inside the house, and having done so, threw him on top of a bed and covered him with a blanket. Some Vaseline was thereafter smeared on his (it seems the appellant's) penis. The appellant then inserted his penis into S's anus. After having violated him the appellant told him that 'if you tell people I am going to slaughter you'. S then made his escape.

[10] S's mother took him to a homestead above hers where she called out for a granny who lives there, but one Thandeke emerged. She and S's mother examined S's anus during which they also noticed some faeces (Dr Buthelezi who subsequently examined S also found some faeces on his scrotum). S's mother also noticed 'tears on his anus...they looked more like cuts'. She, S and the appellant's mother subsequently went to the Eshowe hospital where S was examined in their presence by a doctor. She testified that she had no problems with the appellant before the incident and said she treated him like her own child.

[11] During cross-examination S's mother confirmed that S did not go to school on 3 May 2012 because 'he had stomach ache' and that she prepared and offered him glucose to drink. She further confirmed that when reporting to her, S talked like he was scared and very shocked. She expressed surprise at the accusation that S had allegedly previously stolen an adapter and charger, expressing her disbelief that he would do so because of his young age. Significantly it was put to her that a

neighbour of the appellant, Mrs Luthuli was in her garden busy cleaning up when S was at the Khumalo residence. S's mother had no knowledge of that.

[12] Five months after S's mother had testified initially, when the trial resumed, she was recalled because of new information which had come to light, allegedly on 26 May 2014 (that is some two and half months after she had testified) from the brother of the appellant, Sibonelo. This information was that on Wednesday, 1 May 2013, that is two days before the incident, S had been on his way home in the company of Sizwe Mpungose, Thabane Mpungose, Olethu Xulu, Njabulo Ngema and Sibonelo Khumalo at about 14h30. On their way home they passed some guava trees and picked and ate a few green guavas. They then went home, changed and returned and ate some more green guavas. S's mother had no knowledge thereof. It was suggested that the green guavas made S constipated. She replied that 'he was not constipated, he had a runny tummy'. On 2 May 2013, the next day, S was alleged to have told these companions who were with him the previous day that he wanted to show them something. He took them to his homestead and showed them faeces and a stick next to the toilet, the faeces having traces of blood on them. He demonstrated that he took a short stick, plus minus 12 inches long, and had pushed it up his anus to relieve the pressure. S's mother replied that she had no knowledge thereof. In response to a question by the court she said that S had never told her that he was constipated before the incident or that he asked her for anything to assist with constipation.

[13] The same information was put to S. He denied eating any of the green guavas and showing any people faeces and a stick next to the toilet. He denied that he ever told anyone that he pushed a stick up his anus in order to relieve the pressure of alleged constipation. When probed as to why his stomach was aching, he said that he had 'been eating beef.' It was suggested that S did not want to disclose to his mother that he was constipated as he did not want her to administer an enema. He said that he would tell his mother if he was constipated. S for the first time mentioned during cross examination that the appellant had also touched his, S's, penis.

[14] Certain alleged 'contradictions' between S's evidence and what was recorded in a statement he made to the police, were also referred to. That statement was

however not read back to him at the time it was recorded. It was only read to him on the day he testified. There were certain differences but it must be remembered that at the time of testifying he was only 9 years of age.

[15] Dr Buthelezi testified with reference to the J88 which he completed, that he examined S at 19h30 on 3 May 2013. He found tears at 6 and 3 o'clock on the anus, with a haematoma under the tear at 6 o'clock indicating an injury secondary to penetration. He concluded that in his professional opinion something actually did penetrate his anus. Judging from the injuries, it did not seem to him to be a sharp object because that would have caused lacerations and damage. In his view it might have been a blunt object that caused the penetration. He disputed that it could be a finger because of reflex dilatation and the presence of the tears. Asked whether it could have been a twig, branch or stick that caused the injuries he said that a stick 'probably would have caused more damage in relation to the actual injuries'. Specifically, he was asked whether it was possible that the tears in the anus at 3 o'clock and 6 o'clock could have been caused by inserting a stick up the anus to relieve pressure caused by constipation. His response was that 'the tears, it's possible that may have happened, but the reflex dilatation and the funnelling is not possible'.

[16] Dr Buthelezi explained that positive reflex dilatation happens
'when you let the muscles surrounding the abdomen and the sphincter relax. Most of the time it is a sympathetic response, when you put the person in a relaxed position, which is usually all fours, then you look into the rim of the anus. If there has been previous penetration, or anything that might have happened, it actually dilates and the muscles relax, and the anus, the anal ...[indistinct] opens up into the rectum'.

[17] Asked whether that indicates penetration or previous penetration Dr Buthelezi answered in the affirmative. The learned magistrate also asked him to clarify what he meant by 'funnelling' and he responded as follows:
'funnelling means from the external sphincter to the internal sphincter. The external sphincter will dilate and the internal sphincter will actually be much lesser in terms of the diameter and in terms of the dilation compared to the external sphincter, or into the anal ring'.

[18] Asked what that would be indicative of he said that it is 'an indication of also penetration as well'. An internal examination of S's anus could not be done as it was too painful.

[19] Dr Buthelezi was also asked to comment on the faeces with blood on the stick allegedly pointed out on 2 May 2013. He responded that

'you cannot see traces of blood if it has been an hour or even longer because the blood actually changes its colour, it doesn't remain red for a couple of - if it is exposed in the open air, it actually changes from being red to dark brown, then eventually it ends up being dark. So you cannot come back two hours later and say that was blood, so it is not possible to identify blood from there if it is exposed, sitting outside with ...'

[20] According to the J88, samples were taken by Dr Buthelezi and handed to Constable Mpungose. No details were provided during the evidence of Dr Buthelezi as to the location on S's anatomy from which these samples were sourced. The samples were only referred to in passing when the learned magistrate at the conclusion of Dr Buthelezi's evidence asked 'What happened to the DNA?' No evidence had been adduced by the State of any DNA evaluation having been performed. The prosecutor responded that 'it didn't come back from 'Toti' and then conveyed that the samples had been forwarded to the Amanzimtoti laboratory of the police for examination, that the prosecution had traced 'it', but that 'they [the police] said they are still handling it and eventually didn't respond'.

[21] The appellant testified that he was in grade 8 and 21 years old. He denied having interfered with S in any way. He confirmed that S and his mother came to his home at a time when he was sleeping, that S's mother then inquired why he raped her child, that he said he did not rape S, and that S then did not respond but cried. S and his mother then left. He also left with amongst others Nkosinathi to visit a friend. He denied that he uses Vaseline.

[22] The appellant's mother testified that S's mother and others arrived at their home accusing the appellant of having raped S. She later accompanied S and his mother to the hospital. She denied that her family used Vaseline. According to her the appellant did not go to school on 3 May 2013. On 1 May 2013 she did not go to

school to work in her temporary job, because the children were not at school. 1 May is of course a public holiday annually when Workers' Day is celebrated.

[23] Nkosinathi Khumalo testified that on 3 May 2013 he was at home with the appellant. It had been raining that morning. When it was 'about to be daytime' friends came to visit and they sat together with these friends and 'were playing music...'. This contrasts with the appellant's evidence that only Nkosinathi was with him on 3 May 2013. They subsequently left to attend a traditional function at a certain Xulu homestead and at the gate to the Khumalo homestead came across S who asked them whether Sibonelo was at home. They left S there and proceeded on their way.

[24] Sibonelo Khumalo, the younger brother of the appellant testified that on 1 May 2013 he was walking home alone from school. He attended school on that day as the whole of his grade 7 class had been called to go to school. S and other learners had not attended school because it was a public holiday. He came across Sizwe Mpungose, Olethu Xulu, Thabane Mpungose, Njabulo Ngema and S on his way home. They accompanied him home where he changed out of his uniform and they then left together to go and eat some guavas which were not ready for harvesting yet. They all ate those guavas. They all went to school the next day. After school they went straight home and then decided to go and play with wire cars. S asked them to accompany him to collect his wire car and he then told them that there was 'a certain vicinity where he decided to go and pass some stools there' which he pointed out to them. Sibonelo continued that '...what we witnessed there, we saw were faeces, as well as a stick and some blood.' S told them that he had been constipated and 'used the stick to release the pressure from his stomach as he did not want an enema to be administered on him by his mother, therefore he didn't tell his mother'.

[25] On 3 May 2013 Sibonelo went to S's home to collect him on his way to school but was told that he had a running stomach and therefore was not going to school. He denied that they used Vaseline at his home. He also denied that the appellant smokes. From his cross-examination it emerged that in 2013 Siswe Mpungose was doing grade 4, Orleto Xulu grade 1, Thabani Mpungose grade 2, Njabulo Ngema grade 3 and S grade 2. He, Sibonelo, was in grade 7. Asked to describe the blood

on the faeces, he said it was 'starting to change its colour'. What he saw 'looked like, if one would look at the tube of a red pen, when you are looking at the tube of the red pen, it looked exactly like that.' He confirmed that it was 'blood red' and there was a stick. The stool had hardened but it was mixed with guavas. He confirmed from past personal experience that stool left exposed would on the subsequent day be dry and the colour would have changed. He then said that what S pointed to as his faeces, had changed and hardened but that one could still see that it was blood although it 'had started to change, it was becoming black.'

[26] Sibonelo continued that on 3 May 2013 when the accusation was made against his brother, the appellant, he did not say anything about what S had pointed out to them the day before. They were called to S's house on the Saturday and according to him he wanted 'to speak' there, but S's mother chased them from their home. When the investigator arrived home he also wanted 'to speak' at that stage but the investigator chased them. Right after the investigator had left their premises, he however told his 'people' without identifying any names. He however denied discussing his evidence with the appellant.

[27] The defence also called Constable Mnyaka regarding the statement he recorded in respect of S. His evidence did not take the matter any further. The defence also adduced the evidence of the appellant's girlfriend, Sabatheni Zulu. She had visited the appellant on 1 May 2013 but left on the Thursday morning, 2 May 2013. She did not see anybody from the appellant's homestead attending school on the public holiday, 1 May.

[28] The defence also called Constable Mandla Mpungose who took a statement from S's mother in which she mentioned the appellant as the perpetrator of the rape on her son, on the day of the incident. Constable Mpungose also received the samples collected from S's body by Dr Buthelezi and registered them in the SAP 13 register under reference number 414/2013. These samples were thereafter placed in a safe. She did not see the samples again thereafter. No report with the results of any tests carried out on the samples had however been forthcoming at the time the trial commenced.

[29] It appears that it was only after the defence case had been concluded and when the defence counsel requested the results of any testing of the samples, that the prosecutor in turn requested any results from the investigating officer. The investigating officer obtained the results and produced them after she returned from maternity leave. The issue of the results of the tests conducted on the samples was formally raised when the closing arguments were to be addressed to the court, on 23 March 2015.

[30] The prosecutor confirmed that all the evidence had been adduced without any results in respect of the testing thereof being available or known. She explained that:
'The kit was sent to Pretoria, and when the defence requested last time we were in court your worship, I got from the investigating officer the report, if I may read to court? But it doesn't take the case any further'.
The court then inquired whether there was 'a result' to which the prosecutor responded that "It's a preliminary examination if I may correct that' i.e. whether there was a result.

[31] The learned magistrate remarked that
'. . . the issue is always that there is an indication that a sexual assault kit was taken, that the DNA should be - if it is of no use to the State, then it should be obviously be made available to the defence so that they can use it, because the result is always of use to either the State or defence. So I think that is the issue here.'

[32] The learned magistrate then enquired whether there was a 'conclusion' and was told by the prosecutor that the report recorded 'we received the samples' but that 'no further DNA had been done', and that 'there is no DNA result'.

[33] The court entertained an application to re-open the defence case. A relevant consideration in deciding whether to grant leave to re-open a case to adduce further evidence, rightly identified as such by the learned magistrate, is the materiality and relevance of any such further evidence to be received if the case was re-opened. In that regard, the learned magistrate remarked:
'The degree of the materiality of the evidence – I am not, or I have not been appraised and I did not ask for it, what the results are, or what is contained in the letter, but I have been told

that there is a conclusion, However, either conclusion, or a conclusion will either assist the State or the defence. Or if it's inconclusive it might not, it will only be a neutral factor.'
The application to re-open the case was thereafter granted.

[34] A Ms Jadu, employed by the Forensic Services Laboratories at Amanzimtoti, who holds a Bio-technology diploma, majoring in micro-biology from the Durban Institute of Technology and has been attached to the biology section of the Forensic Science Laboratory since 3 January 2013 then testified. She received the samples on 24 June 2013 and tested them the following day. These samples were marked 10D7AA6598XX and included 4 swabs namely, a rectal swab, a perianal swab, a perineum swab and an oral swab. The rectal and perianal swabs revealed that no possible semen was detected. The oral swab was not tested. In respect of the perineum swab her examination revealed 'possible semen detected' (my emphasis). After testing the samples the docket was sent back to the administrative section of the forensic sciences laboratory. Ms Jadu thereafter introduced a report contained in the docket in her possession, as exhibit 'E'. It is a report from the 'Head: Forensic Science Laboratory' in Pretoria dated 28 February 2014, some eight months after Ms Jadu had tested the perineum swab and detected what might possibly be semen. This report records:

'RAPE: ESHOWE CAS 57/05/13

1. The samples with respect to the above mentioned case had been received and analysed by the laboratory.
2. No male DNA was obtained from the exhibits (10D7AA6598XX).
3. No further DNA analysis will be carried out in the above mentioned case.
4. You are welcome to contact the undersigned should you have any questions in this regard, by quoting the above mentioned lab number.'

[35] Ms Jadu was aware of the conclusions recorded in this report, but cautioned that the correctness of the evaluation expressed, '...is out of my scope, it is done at a separate unit other than to the preliminary testing unit that I work in.' She confirmed however that the contents of the report meant that although she
'came to the conclusion that there is possible semen on the perineum on one of the swabs, the other person who did the other testing could not get DNA or could not get male DNA from that sample'.

[36] When asked what that would mean she stated that

'[I]t could mean that the sample was maybe taken some days after the incident; it could also mean that the culprit has a low sperm count or a condition of some sort that would not allow enough to be extracted. It could mean a lot.'

Specifically further, it did not exclude a particular person from the scene.

[37] Where there is a conflict of fact between the versions of the State and the defence it has been held that the '. . . proper approach . . . is for the court to apply its mind not only to the merits and demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt.'[3]

[38] The onus is on the State to prove the guilt of the appellant beyond a reasonable doubt. There is no onus on the appellant to prove his innocence. Further the verdict of the court must account for all the evidence. If the version of the appellant is reasonably possibly true, then he must get the benefit of any doubt. The State is however also not required to negate every conceivable defence. Furthermore, the complainant in this matter was a single child witness in a sexual crime. His evidence therefore had to be approached with much caution. A court must always be aware of the dangers of possible suggestion by others when it comes to evaluating the evidence of children. All of the above are trite principles of our law. The trial court was alive to all these considerations.

[39] S gave his evidence in a clear manner without hesitation, particularly having regard to the fact that he was only 9 years old at the time. There were certain differences between his evidence and his statement to the police, which had only been read to him on the morning that he testified, and not when it was recorded. These are not surprising having regard to the fact that he was only nine years of age at the time of testifying. There were also other contradictions between S's evidence and the evidence of his mother. These relate for example to his recollection that he was wearing red pants on that day, whereas his mother said that they were blue, that S had testified that he reported what had happened to him to his mother at their

[3] S v Singh 1975 (1) 155 (N) at 158.

home, whereas she said she had been at the Xaba homestead. These discrepancies are on peripheral and non-material matters. Having regard to S and his mother's evidence in their totality, S's evidence as to being raped by the appellant was clear and satisfactory in every material respect. He was traumatised by the event as evidenced by the description of his appearance provided by his mother. He rushed to her and reported his experience at the first available opportunity. She was the person one would expect him to report to.

[40] Her evidence confirmed what he said he had told her, in every material respect. That is of course not corroboration for his version, but successfully rebuts any notion that his version is a subsequent fabrication.

[41] As against that evidence, is the bare denial of the appellant. The evidence of witnesses, like Mrs Luthuli who was working in the neighbouring garden, was not adduced by the defence. Nkululeko's evidence did not take the matter any further. Sibonelo had a clear interest in wanting to see his brother exonerated. Accordingly, his evidence too had to be approached with caution.

[42] The physical examination of S by Dr Buthelezi revealed findings consistent with the allegations made by the complainant. His examination confirmed and pointed to some recent penetration of S's anus. His opinion was that such penetration was with a blunt instrument, rather than a stick which he considered to be unlikely. That S was raped was established. The appellant could not dispute that S was penetrated anally.

[43] The appellant is well known to S. Accordingly there is no possibility that he would mistake the appellant for someone else. If the appellant was not the perpetrator then S must have lied and falsely implicated the appellant when he stated that it was the appellant who did this to him. There is however no known reason disclosed that any of the witnesses were aware of, why S would do so. Indeed the contrary is the case. S and his family and the appellant and his family have all lived in the same area without any past acrimony.

[44] One might be critical of the doctor's reasons for concluding that the injuries were not caused by a stick. He referred to the concept of positive reflex dilation and funnelling. He had however qualified in 2003 and by 3 May 2013, in his own words, had examined rape victims amongst his patients. The aforesaid reasons informing his conclusion were at a factual level found by the learned magistrate to be persuasive, at the very least insofar as not being inconsistent with S's version. There is no basis for this court on appeal to interfere with that finding. Dr Buthelezi was of the view that the penetration had not been with a stick.

[45] The version that S had inflicted the injuries found by the doctor on himself is so improbable that it cannot be reasonably possibly true. On this version S invited a whole group of his friends to show them where he had relieved his constipation allegedly by pushing a stick up his anus and he pointed to the stick. The stick still had faeces and blood, red like in a red pen, on it. None of these friends was however called to independently verify this tale. The faeces would have been exposed to the elements for some time (at least the duration of a school day and probably longer). Sibonelo even described the faeces as dry. Yet the blood on the stick still showed up red according to him, contrary to human experience and the scientific fact confirmed by Dr Buthelezi that blood exposed for a short while would become dark in colour (Sibonelo only changed his evidence later while testifying to state that the blood was darker).

[46] S testified that if he was constipated he would tell his mother. Indeed she knew he had a sore stomach and she had administered glucose and he had remained at home on the Friday. The J88 would have been available to the defence from the outset of the trial, or at the very least there is nothing to suggest that it was not available. S's mother testified on 13 March 2014 that he had a sore tummy. Surprisingly, the event regarding the stick is only raised with her in cross-examination some months later after this information had apparently only come to light on 26 May 2014, some two and a half months after she had testified.

[47] If this version is to be accorded any credibility, then S penetrated himself with the stick before the close of school on the Thursday. He then stayed at home on the morning of the Friday, 3 May 2013, and when his stomach felt better he proceeded

to the appellant's home to look for his friend Sibonelo. When unsuccessful in meeting up with Sibonelo he then rushed from there, self-created a dishevelled appearance, exposed his penis outside his shorts, and feigned an anxious mental state, whilst rushing to where his mother was, to relate a fabricated story that he had been raped by the appellant, a person known to him and with whom he had no quarrel, for no apparent reason, after also having indulged in some form of conduct to cause his penis to appear swollen and wet. That version is so utterly improbable that it renders the appellant's version not remotely possibly true.

[48] Sibonelo clearly had a motive to be untruthful, as his older brother's liberty is at stake. His protestations to the contrary notwithstanding, it is highly improbable where the appellant had been confronted with the accusation by S on 3 May 2013 (of which Sibonelo became aware on that day) and the appellant's mother having accompanied S and his brother to the hospital and hence becoming aware of the injury to S, that Sibonelo would not earlier have alerted all to the knowledge he had of S, allegedly having confessed to having penetrated his own anus with a stick.

[49] On the aforesaid assessment of the evidence, the case against the appellant was overwhelming and the conviction therefore sound.

[50] Regarding the absence of the 'DNA evidence' or result until just before the end of the trial, it is of course always desirable that where samples are taken from a complainant and sent for analysis, that the results of the analysis, like any other real evidence which might impact on the issues in the trial, should be known before the commencement of the trial. The relevance and materiality of the results can then be assessed properly by the respective parties before an accused is even required to plead. That is part of proper preparation which is particularly important in a rape case. The following words of Nugent JA in *S v Vilakazi*[4] are particularly apposite when he said:

'[21] The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls

[4] *S v Vilikazi* 2012 (6) SA 353 (SCA).

for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone . . .

[22] The case that is before us is characterised by superficiality from beginning to end with the result that it exhibits several disturbing features. Nothing was done to enquire into material matters before the trial commenced. The complainant's evidence was presented with little care for completeness and accuracy. The evidence was subjected to little analysis.'

In this matter, both the prosecution and the defence were at fault in not insisting that the results of any examination of the samples taken were not available before the trial commenced.

[51] Often laboratory test results are not available at the commencement of a trial, seemingly due to large volumes of samples being submitted for analysis or the laboratories not coping with the volumes required to be analysed, or the results simply being lost, or not filed in the case dockets, or misfiled. That is unsatisfactory.

[52] One can only imagine the result in an appeal of this nature if a swab taken from a complainant tested positive for semen, if DNA could be detected in that sample and if it matched, within acceptable statistical parameters, the DNA from a sample obtained from the appellant. The guilt of the person implicated by such evidence would then probably be established beyond all doubt, rather than just a reasonable doubt. A plea of guilty would probably also be more likely to be proffered, which would save a complainant the secondary trauma which comes from having to testify and relive the experience. If no DNA can be found and/or no DNA comparison is possible, then it does not mean that the accused might not be implicated beyond a reasonable doubt by other evidence. Conversely if the results from any DNA analysis excludes the accused. But all of the above presupposes a DNA evaluation being possible and producing a result.

[53] In the present matter the failure to have had the 'DNA evidence' available from the outset and during the trial has had no material effect on the outcome of the trial. According to the only source of such evidence, being the Forensic Laboratory, no DNA evaluation was possible as 'no male DNA was obtained'. Inconclusive results from samples sent for DNA analysis and comparison, are not uncommon.

[54] In *S v SB*[5] it was remarked as follows:

'Evidence of DNA profiling may be of great significance in a given case. It is important, however, that evidence of DNA profiling be viewed in proper perspective in each case.'

It however remains circumstantial evidence. The weight thereof depends on a number of factors including *inter alia* as set out in para 18 the 'probability of such a match or inclusion in the particular circumstances' and 'other evidence in the case'.

[55] It was held further[6] that

'If the STR profile of an accused person in fact differs from the profile retrieved from the sample taken at the scene, even in respect of only one allele, the accused person must be excluded as a source of the crime- scene DNA. However, the converse is not true. Because only a limited number of STR loci are analysed, an STR profile cannot identify a person. Therefore the weight to be attached to evidence of an STR profile match or inclusion in the first place depends on the probability of such a match or inclusion occurring in a particular population. Without such evidence the STR profile match or inclusion means no more than that the accused person cannot be excluded as a source of the crime-scene DNA.' (references omitted)

The essential component of DNA evidence is usually presented in the form of statistical analysis of a population data base.[7] The important point is that the results of these calculations are not absolute.

[56] In *S v SB* the learned judge of appeal continued:

'[23] This brings into play the other evidence in a case. I cannot conceive of a criminal case where there is absolutely no other relevant evidence or evidentiary material. This may range, from direct eyewitness evidence implicating the accused, to circumstantial evidence as mundane as the proximity of the home of the accused to the scene of the crime. This may of course also include evidence pointing to the innocence of the accused. In the final

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[5] *S v SB* 2014 (1) SACR 66 (SCA) para 17.
[6] *S v SB* 2014 (1) SACR 66 (SCA) para 20.
[7] *S v SB* 2014 (1) SACR 66 (SCA) para 21. The more *loci* included in the profile, the less chance there is of another person adventitiously fitting the profile. Secondly, statistical calculations of this nature generally make use of the product rule. This rule postulates that the probability of several things occurring together is the product of their separate probabilities. It calculates the numerical probability that a particular profile may occur in a population or, in its alternative form, the numerical probability that a person randomly chosen from that population will possess the same genetic profile.

analysis this evidence determines whether the guilt of the accused has been proved beyond reasonable doubt or not.'

[57] There could be a variety of reasons why DNA is not found in a particular sample. As was said in *S v SB* para 27:

'A more enriched sample in this context simply means that it contains a greater quantity of the DNA than the less enriched sample.'

Every sample that gets to a laboratory gets subjected to a presumptive test. However that will depend on the swabs presented. The only confirmation to be employed is an extraction protocol for the particular body fluid. The results that it will yield thereafter will be confirmation that indeed that particular body fluid has been extracted. In a case where the swabs are bloody, the main aim is to extract the DNA from the semen as it is a sexual assault kit and the target is to get DNA from the sperm cells. Those swabs will not be subjected to preliminary testing, but to a method that isolates DNA from sperm cells. It has been remarked that the highest concentration of DNA is not found in semen but in blood.

[58] It was for example concluded in *S v Saunders*[8] that 'it therefore depends on the amount of sperm cells found in the semen to get a DNA – for example, one might have a couple of sperm cells but not yield a DNA result.'

[59] DNA is subject to degradation and may degrade within a very short time.

[60] Merely because the *actus reus* of a particular offence might have involved some friction or contact between the bodies of the complainant and an accused, does not irrefutably mean that DNA will definitely present itself in a particular sample taken from the body of one and remain preserved and in a sufficiently enriched form up to the time of analysis.[9] The absence of DNA in a sample subjected to comparison might be explained on a variety of grounds, on which one can probably only speculate. These might include that the sample was not taken properly, or that

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[8] *S v Saunders* [2018] ZAWCAC 147 para 71.

[9] The appellant's criticism in this regard seems to stem from an assumption that if there has been friction between two human bodies that it is 'within the realm of ordinary human experience that one would find DNA present.' There is however no evidence before this court of any such scientific act. Indeed our case law has suggested various reasons why DNA might not necessarily be present.

the DNA had degraded due to the time that had elapsed from when it was taken until it was examined, or whatever. It might be an interesting curiosity why in a particular matter no male DNA can be detected, but even the scientist analysing the sample will probably not be able to conclude conclusively why no DNA is found in what he/she analysed. What is however decisive in the professional opinion of such analyst is the *de facto* scientific finding that no DNA of any sort is detected.

[61] In this case the contents of the report dated 28 February 2014 afforded no basis to have ordered the reopening of the defence case. If the learned had been told, as I believe she should, that the report recorded that 'no male DNA was obtained from the exhibits (10D7AA6598XX)' I doubt whether the application to reopen the case would have been granted. Having been told that there was a result, the learned magistrate however allowed the case to be reopened, whether rightly or wrongly, probably more *ex abudante cautela*, and the defendant had the opportunity to lead further evidence.

[62] Any possible prejudice to the appellant due to the results of the DNA examination only becoming available late, could accordingly be avoided by the defence adducing whatever further evidence was considered necessary. The defence called Ms Jadu to testify. Her evidence did not take the matter any further. She could not even confirm that the perineum swab definitely contained semen. At best it possibly contained semen. The official position from the docket in her possession was that the Forensic Science Laboratory had concluded that 'no male DNA was obtained from the exhibits' and that 'no further DNA analysis will be carried out in the abovementioned case'. If the defence was not happy with the evidence as it stood and wanted to interrogate any aspect further and satisfy whatever curiosity it may have in the belief that it might yield some result beneficial to the appellant (as difficult as it is to envisage what that may be where 'no male DNA was obtained from the exhibits') then it was their prerogative to lead further evidence of the author of the report, or even to recall Dr Buthelezi.

[63] It has been suggested that the appellant did not have a fair trial because the report recording that no male DNA was obtained from the exhibits had not been made available from the outset. I repeat that it is desirable that all reports should be

available to all parties at the outset of a trial. The opportunity was however presented to call whatever further evidence the defence might have considered necessary. The defence did not do so. It also appears that the defence would have been no different, even if the report was in the possession of the defence from the outset – and that is not speculation. If the defence would have been different and/or certain other avenues of questioning explored with witnesses for example Dr Buthelezi, then I would have expected the appellant to have pointed to these during argument. No such possible lines of questioning were pointed to. The high water mark of the criticism appears to be that Dr Buthelezi might then have been asked how it is possible that a perineum swab taken after anal intercourse in the area of the perineum would not leave some samples which would reveal DNA. There might however be various possible answers, including the size of the sample, in the case of semen (if indeed there was semen present), a low sperm count from the donor, DNA degradation and the like. Speculating on these possible reasons might be interesting, but in the final analysis, a court had to decide a matter on what evidence is available, and what is relevant and material. No DNA evidence exists. Accordingly, the appellant cannot complain that he was denied a constitutionally fair trial.

[64] The appeal against conviction accordingly falls to be dismissed.

[65] As regards sentence, although the prescribed minimum sentence pursuant to the provisions of Act 105 of 1997 is one of life imprisonment unless there are substantial and compelling circumstances present, it is as well to recall the words of Nugent JA in *S v Vilakazi* (*supra*) para 54. The learned judge referred to the 'recurrent theme in [*S v Malgas* 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA)] that of the factors traditionally taken into account in sentencing "none is excluded at the outset from consideration in the sentencing process"'. In deciding whether the prescribed sentence of life imprisonment would indeed be proportionate in that case, regard was had *inter alia* to the fact that there was no extraneous violence and no physical injury caused other than the physical injury inherent in the offence. There was also very little upon which to measure the emotional impact of the offence upon the complainant, although it is undoubtedly so that the range of emotional responses that rape might evoke would be considerable. Emotional distress and damage that

accompanies rape might be extensive even if not manifested overtly. Similar considerations apply in this appeal.

[66] Regard must also be had to the personal circumstances of the appellant, namely that he was relatively young, being 20 years old at the time of the commission of the offence. He was also a first offender. The learned magistrate indeed recorded that he would accept that the appellant had 'prospects of reformation and correction' and that he had been employed, this being indicative of a stable personality and showing that he can be rehabilitated and reformed.

[67] As in *S v Vilakazi* (*supra*),[10] a substantial sentence but not the maximum sentence of life imprisonment seems to me appropriate as it will bring home to the appellant 'the gravity of his offence and to exact sufficient retribution for his crime. . . [but that to] ...make him pay for it with the remainder of his life would seem to me to be grossly disproportionate'. The prescribed minimum sentence of life imprisonment is not proportionate in each case, and certainly not in the present.

[68] A sentence of twenty (20) years imprisonment antedated to the date of sentencing, namely 25 August 2015 would be appropriate.

[69] The following order is granted:

1. The appeal against conviction is dismissed and the conviction by the court *a quo* is confirmed.
2. The appeal against sentence succeeds. The sentence of life imprisonment imposed by the court *a quo* is set aside and substituted with a sentence of twenty (20) years imprisonment, antedated to 25 August 2015.

KOEN J

BARNARD AJ

[10] *S v Vilikazi* 2012 (6) SA 353 (SCA) para 59.

Vahed J (dissenting)

[70] I have read the carefully crafted and ably-reasoned judgment prepared by my colleague, *Koen* J, and in which my colleague, *Barnard* AJ, concurs. Regrettably, I am unable to agree with the conclusion that the conviction must stand. To my mind the case, viewed holistically, throws up sufficient doubt so as to render the conviction unsafe. That doubt, as we have been cautioned from time immemorial, must redound to the appellant's benefit, entitling him to an acquittal.

[72] As this is a minority judgment, I will endeavour to be brief in setting out my reasons for my dissent, but if I am unsuccessful in that regard, beg the reader's forgiveness. The subject matter is not easy.

[73] The facts have been set out in my colleague's judgment and, in large part, I will content myself to work with them as set out there. Where however I see the facts differently, or interpret them differently, I will deal with those facts in this judgment.

[74] By way of introduction I wish to make a few observations in general.

[75] Firstly, I regard the conduct of the prosecutor in the court *a quo* to have been unacceptable and falling below the standard expected of her. I say this in regard to her treatment of the DNA evidence (which I will deal with in some detail later). Knowing full well that samples had been taken for testing and had been submitted to the forensic laboratory she chose to commence the trial without knowing the result of that process of analysis. In that regard she completely ignored

the dictates of the Code of Conduct for Members of the National Prosecuting Authority. Conduct rule D1 (d) & (g) required her to "... perform [her] duties fairly, consistently and expeditiously and... In the institution of criminal proceedings, proceed when a case is well founded upon evidence reasonably believed to be reliable and admissible, and not continue in the absence of such evidence...[and]...as soon as reasonably possible, disclose to the accused person relevant prejudicial and beneficial information, in accordance with the law and the requirements of a fair trial...". (my emphasis). Whatever the outcome, to allow the DNA evidence to feature in this case in the manner that it did (and it almost never featured) was wholly unacceptable.

[76] In my view it is high time we insisted on scrupulous adherence to the standard expected of prosecutors. Far too often is the bar lowered because the outcome is justified by other means. It is unacceptable for conduct that is in conflict with the prosecutorial code of conduct, and which falls short of the accepted standard, to be excused by observations of what is always desirable, or what is preferable, made in passing when accepting such lesser conduct. The bar, once set, must be maintained for to lose sight of it places the conduct of criminal trials on a slippery slope. Once we find ourselves at a position far down that slope, it might be difficult to ascend once more to stable ground.

[77] Having said that of the prosecution in the court below, I am also critical of the quality of the defence mounted by the appellant's legal representatives both in the court below and even more so on appeal before us. In that regard, the less said the better. In the court below it is not clear when the appellant's attorney became

aware of the fact that certain specimens had been sent off for DNA analysis. One must assume that the defence, from the outset, was in possession of the J88 form completed by the doctor who examined the complainant, but to conclude from an examination of that form that specimens had indeed been sent off would have been difficult, although a cautious defence lawyer would have interrogated the information on the form. However, it seems clear from the record that when he testified during the State case the doctor confirmed that specimens had indeed been taken and handed to a police official during the course of the complainant's examination by him. Why the issue was only left to be explored until after until all the evidence had been led and the court below was about to receive closing argument is not adequately explained on the record. In my view adequate defence representation would have ensured that the moment the possibility of a report concerning DNA analysis existed that report ought to have been resolutely pursued, even if that meant a pause in the proceedings at that stage. As I said earlier, the less I say about representation, the better.

[78] It is clear from my colleague's treatment of the facts that the trial commenced with evidence being led first from the complainant's mother, Mrs Z Makhoba, who can conveniently be called the source of the first report. I have certain issues with her evidence.

[79] It is clear that there are discrepancies between her evidence in chief and during cross examination, and between her evidence as a whole and her statement made to the police at the time of the alleged offence. I am acutely mindful of the criticisms often made about the quality of police statements. I share those criticisms

but there are occasions when discrepancies cannot be wished away as being irrelevant purely on the grounds of inefficient statement taking and/or poor witnesses recall.

[80] Mrs Makhoba's description of the complainant as he came running towards her after the alleged rape was, in my view, a significant detail. His clothing was in disarray and his penis was "hanging out". In paragraph 8 of his judgment my colleague also regards this aspect of her evidence as significant. However, this aspect is not contained in her police statement.

[81] Mrs Makhoba's and Ms Thandeka Mnguni's examination of the complainant's penis and anus (and the presence of faeces) is also significant. All of this too is absent from her statement.

[82] During her evidence in chief Mrs Makhoba did not mention that she confronted the appellant at all. This only emerged during her cross-examination when the defence attorney was taking her through her police statement.

[83] In paragraph 12 of his judgment my colleague records that a period of approximately five months elapsed between Mrs Makhoba's initial evidence and her being recalled. In the same paragraph he refers to the "new information" that came to light "...allegedly on 26 May 2014 (that is some two and half months after she had testified) from the..." appellant's brother. Later in his judgment my colleague rejects the "new information" and the brother's evidence. It is however, convenient to deal with one aspect of this now. I have no doubt that my colleague intended to lay no

blame for that delay with the appellant or the defence attorney. However, the manner in which the matter is dealt with in paragraph 12 is unfortunate because the subliminal message conveyed is that the delay and the "concoction" of the evidence (which are then carried through as a theme) are all wrapped up together.

[84] The facts that emerge from a consideration of the record as a whole place matters in proper perspective. Mrs Makhoba testified initially on 13 March 2014. When she finished it was discovered that the intermediary, through whom the complainant's evidence was to be led, was not present. Although there is some suggestion that it was too late for further evidence to be taken, it seems that that view was changed because the matter stood down to see if the doctor was available to testify. He was not. On that basis the matter was then adjourned to 26 May 2014. During discussion on record (and from the magistrate's trial notes) on 13 March 2014 it is clear that it was not possible to convene any sooner than 26 May 2014.

[85] The magistrate's trial notes indicate that on 26 May 2014 the prosecutor was late because she had been involved in a motor collision and, more importantly, the intermediary was involved in a case in another court and had been excused. The matter was then postponed to 14 July 2014, on which day it was postponed again because the prosecutor was in hospital. The matter was postponed to 13 August 2014, when the trial resumed with the application to recall Mrs Makhoba.

[86] The date, 26 May 2014, is very significant. From the record it seems that everyone (except the prosecutor and the intermediary) was present at court. It is on

that date that the record reveals that the "new information" came to light. This is what the defence attorney said to the court on 13 August 2014:

> "Your Worship, on the last occasion I completed what I thought was the cross-examination of Mrs Zama Makhoba. On 26 May 2014, certain new information came to light, which compels me to bring an application to the Honourable Court to recall the witness Zama Makhoba. I will have to put the new facts to her just for the record, so that the State cannot, at a later stage, say that these facts were not put to the witness."

[87] After hearing an ill-founded and irrelevant objection from the prosecutor the learned magistrate enquired of the defence attorney as to "...why the new facts only came to light at this stage?". The response was as follows:

> "Yes, Your Worship. I consulted with the brother of the accused. I didn't think that I would have to call him as a witness, but due to the facts that he gave me, I will have to call him as a witness. And it is based on those facts that had only come to light on 26 May this year that I will have to recall Mrs Zama Makhoba, just merely to put the facts to her. That's all I want to do."

[88] That was how, some five months after she initially testified, Mrs Makhoba came to be recalled.

[89] I will deal with the import of all of this later.

[90] My next issue concerns the failure to call Ms Thandeke Mnguni as a witness. She would have been of significant relevance and assistance to the State case. She was pertinently mentioned in Mrs Makhoba's statement, yet she was not called as a witness. There was no indication or suggestion that she was not available to testify.

[91] I turn now to deal with the DNA issue. I have already expressed my dissatisfaction with the manner in which the DNA issue surfaced and was dealt with in the court below. I do not need to repeat myself but in order to place my assessment of the DNA issue in proper context I need to state that, as my point of departure, I regard the contents of the letter from the head of the forensic science laboratory in Pretoria, dated 28 February 2014, as highly significant, controversial, and unacceptable at face value. Having said that, proper pre-trial treatment of the DNA issue would have given the lawyers a better opportunity for preparation and, consequently, could have made a significant difference during the cross-examination of the doctor who examined the complainant.

[92] In *Bokolo v S* 2014 (1) SACR 66 (SCA) the Supreme Court of Appeal recorded the valuable assistance derived from the work *DNA in the Courtroom: Principles and Practice* by Prof Lirieka Meintjies-Van der Walt (Juta, 2010). On the subject of pre-trial disclosure, at page 28, the learned author says the following:

> "Traditional arguments in favour of prosecution disclosure acquire even greater importance in the field of DNA expert evidence. They include:
>
> - Achievement of equal preparedness; contribution to facilities available to defence preparation; awareness of potential witnesses required to meet the prosecution's case; potential of miscarriages of justice in the absence of disclosure; assistance in the search for truth by allowing defence scrutiny of the investigative process.
> - Identification of discrepancies that appear in contemporaneous notes, but not in the final laboratory report. Discovery of these documents could also serve as a quality control measure, as experts are likely to be more careful when they have to document what they do and when they know other experts are likely to review their findings. If the scientific reports were more comprehensive, incorporating much of the material in the bench notes, there would be no need to seek for the discovery of the work notes."

[93] Later, at page 34, she endorses portions of a checklist of items to be disclosed by prosecutors referred to by Michaelis et al in *A Litigator's Guide to DNA: From the Laboratory to the Courtroom* (2008). These include "... All documents related to the portion of evidence that was actually used in the analysis, information on procedures actually used to minimise the contamination, the raw data from the fragment analyser, ... the analyst's complete case file which includes ... other reports of the performance of standard quality controls and any bench notes made during the processing of the evidence, ... all records on the accreditation of the laboratory and its personnel, all documents that certify the validity of the reference samples used in the analysis, ... a list of samples that were tested just before and after the sample in question, and, internal audit documents".

[94] My colleague has dealt with the evidence received from the analyst, Ms Jadu, employed at the Forensic Services Laboratories at Amanzimtoti. Her qualifications and expertise need to be placed in proper perspective. Whilst it is correct that she recorded that she had a *Diploma* in Biotechnology, majoring in microbiology, is unclear what that qualification really means. None of that was tested in court below. It is all very well to say that the "... abovementioned course is molecular and cellular biology, which is relevant to DNA", but what that qualified her to do was unclear. I say this because she said that she had been with the Forensic Science Laboratory since 3 January 2013 and that she had undergone "... in-house training within the Forensic Science Laboratory with reference to the opening of parcels containing biological evidential material, the preliminary testing of body fluids thereof, and DNA technology". I pause to observe that while her evidence was that she had been with the laboratory since 3 January 2013, the affidavit that she

purported to read from, i.e. the affidavit deposed to by her in terms of section 212 of the Criminal Procedure Act, 1977, indicates, in the very paragraph she was reading from, that she had been with the laboratory since 3 January 2012. It is thus unclear whether, at the time she subjected the samples to preliminary testing (i.e. 25 June 2013), she had less than 6 months' work experience with the laboratory or less than 18 months' work experience with the laboratory. Whichever period of work experience with the laboratory one chooses to accept, either period included the in-house training she referred to, the duration of which remains unspecified. None of this was properly explored at the trial and is highly unsatisfactory. One thing however seems abundantly clear. It is this. She was trained in, and subjected the sample to, preliminary testing (my emphasis).

[95] Another aspect which emerges from Ms Jadu's evidence is that, whether she was employed at the Forensic Science Laboratory for a period of approximately 18 months or a period of approximately 6 months aside, she went on to state in her evidence that she had "... 11 years of experience in the biological sciences". That statement, whatever it meant, was also not explored. What is clear, however, is that the 11 years of experience (whatever they mean and whether they include her diploma studies or not) in significant proportion pre-date her employment with the laboratory and pre-date her in-house training "...with reference to the opening of parcels containing biological evidential material, the preliminary testing of body fluids thereof, and DNA technology", whatever that might have meant.

[96] I deal with Ms Jadu thus, not to demean her or to undermine the importance of her work, but crucially, to place it in proper context. As she said

herself, she is involved only in preliminary testing, samples thereafter being sent higher up the chain of command, complexity and refinement, so to speak. Reading her evidence as a whole and in context makes it abundantly clear that once, at a preliminary level, she detected the presence of semen (possibly) on a sample it was sent to another department (which she refers to in evidence as "the DNA section") for more refined testing. She very clearly said that the DNA section "... [had] their own procedures and their own operating manners (sic) that they work with, so I am only *au fait* with my scope of testing and my study. I can only refer to what I've worked with". She was in no way in a position to proffer an opinion on what was done outside of her scope and notwithstanding the prosecutor indicating that she was not "... trying to collar [Ms Jadu] to give an opinion..." she persisted in doing precisely that. Ms Jadu's views on what the letter of 28 February 2014 meant are irrelevant and were, in any event, views she was not qualified to offer.

[97] The upshot of all of that, for this case, means that after the preliminary testing is done at the local laboratory, the specimen is then sent to the laboratory in Pretoria for further and more refined testing. What was done during that further and more refined testing remains an unknown in this case. All we have is a letter from the head of the Forensic Science Laboratory in Pretoria reporting as my colleague has reflected in paragraph 34 of his judgment.

[98] We do not know:

a. when the sample analysed on a preliminary basis in Amanzimtoti reached Pretoria, and in what state;

b. when that sample was analysed in Pretoria;

c. precisely what analysis was conducted on that sample;

d. the identity of and the qualifications held by the person who subjected that sample to analysis;

e. if the correct sample was analysed competently, and the proper outcome of "no male DNA" obtained, why the preliminary testing rendered a false positive;

f. the other relevant information referred to in paragraph 23 above.

[99] Now here lies the importance of adequate and proper pre-trial disclosure. Had this been done a proper opportunity would have been available to the defence to explore the invitation extended in paragraph 4 of the letter in question.

[100] It is not appropriate for me to speculate in fine detail how all of this information, if made available at the proper time, could have impacted on the appellant's trial. One probability is this: a proper challenge and request for an explanation as to the false positive could have a different result.

[101] Having said all of that I must also conclude this aspect with the observation that the letter from the Forensic Science Laboratory in Pretoria is, in its own terms, problematical and misleading. Paragraph 2 of the letter says that "[no] male DNA was obtained from the exhibits...". One must assume that by the use of the word "exhibits" (in the plural form) reference was being made to all 4 swabs referred to by Ms Jadu. Although the oral swab was not tested locally there is nothing to suggest that it was not subjected to proper testing at the central laboratory

in Pretoria. How that oral swab could have produced a negative result for male DNA cried out for further investigation, given that it was taken from a male person.

[102] All in all, my view is that the manner in which the DNA testing was treated in the court below was highly unsatisfactory and prejudicial to the appellant.

[103] I turn now to deal with the rejection of the defence's theory of the case. Wrapped up in that rejection is the rejection of the evidence proffered by the appellant's brother and his recount of the manner in which the complainant had dealt with his (i.e. the complainant's) constipation a day or two before the alleged rape.

[104] In rejecting the evidence of the appellant's brother my colleague, in his analysis finds that he had a motive to be untruthful. He finds the version of the complainant using the stick and penetrating himself as to be so improbable that that version could not reasonably possibly be true and that therefore the appellant's brother, untruthful.

[105] My colleague, in paragraph 45 of his judgment, also highlights the evidence relating to the chemical changes that faeces and blood undergoes when exposed to the elements. The appellant's brother was not a perfect witness (just as the complainant and his mother were not perfect witnesses). However, to be fair to him, he did describe (perhaps belatedly) how faeces changes colour and how the blood that he saw had turned black.

[106] To reject the appellant's brother is to credit him with remarkable foresight and with clairvoyant skills. As my colleague correctly points out, the suggestion that the complainant had used the stick in the manner described arose for the first time when Mrs Makhoba had been recalled for further cross-examination. At that point the defence case casts its version in stone with the suggestion that the complainant had suffered from constipation. It is important to realise that up until that point there was nothing to suggest, either in the evidence that had come before then or in the documents, that the complainant had suffered from constipation. All anyone knew up until that point was that, according to Mrs Makhoba, the complainant had had a stomach ache and that she "... had prepared glucose for him...". That single bit of information as to why complainant stayed home from school that day was obtained in passing during the first session of cross examination. To suggest that that was sufficient for the appellant's brother to concoct the version that the complainant had been constipated and thus had to use the stick upon himself is, in my book, a bridge too far. Of course, we know that the complainant did indeed suffer from constipation because that is what he said himself during his evidence. The theory that he did not tell his mother because he feared that she would give him an enema rings true, but he had to tell her something about his tummy ache. Thus, she thought that he had diarrhoea. It then makes perfect sense when she says that she was going to administer a home remedy of glucose: a perfectly natural reaction to diarrhoea as an electrolyte substitution to prevent dehydration. But the truth of the matter is that he was constipated, a fact known at the time to his friends, the appellant's brother amongst them.

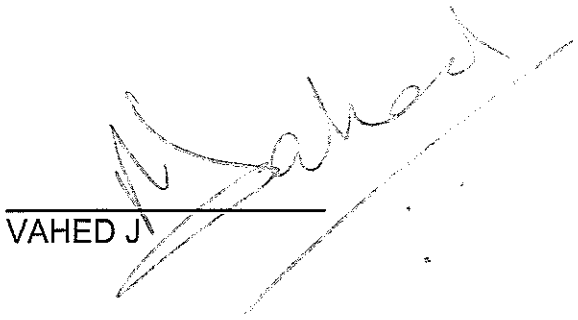
[107] Once it is accepted that there is a perfectly reasonable basis for the version offered up by the appellant's brother than all else falls into place. It must be remembered that the evidence tendered by the appellant's brother became known in a perfectly reasonable manner. As I have set out earlier, everyone was at court on the day when the trial was expected to be continued, but for reasons unconnected with the appellant or the defence, it was not. Expecting not to have to lead his evidence the defence attorney consults with the appellant's brother but then discovers facts which compel him, not only to lead his evidence, but also to have complainant's mother recalled.

[108] Seen in that context, the doctor's evidence is also understandable. Here we have no forensic giant, but a simple general practitioner who, somehow, becomes elevated to proffer opinions of a forensic nature out of the blue. Properly examined, he does not categorically exclude any method by which the injuries on the complainant could have been sustained. Obviously, he chooses to hold the line which he prefers.

[109] There are valid criticisms that are made against both sides of the case, but to reject one side completely, and out of hand, in preference for the other does not conveniently fit the facts of this case.

[110] In my view serious and valid doubts arise and these must redound to the appellant's benefit.

[111] For those reasons I would hold that the conviction is unsafe and would accordingly have upheld the appeal and directed that the finding of the court below be replaced with one of a not guilty finding.



VAHED J

Appearances

For the Appellant	N C GASARATI – 073 169 2408
Instructed by:	CHRIS G ATTORNEYS
	Ref.: CG82/16
	Tel.: 035 772 2028
For the Respondent:	M MTHEMBU
Instructed by:	DIRECTOR OF PUBLIC PROSECUTIONS
	PIETERMARITZBURG
	Ref.: M MTHEMBU
	Tel.: 033 8454400