IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION,

PIETERMARITZBURG

Case No: AR106/2020

In the matter between:

LUTHULI **APPELLANT**

vs

THE STATE **RESPONDENT**

ORDER

The following order is granted:

1. The appeal is allowed and the conviction and sentence on both counts is set aside.

JUDGMENT

Mossop AJ (D. Pillay J concurring)

Introduction

[1] The appellant stood trial before the Ixopo Regional Court on charges of housebreaking with the intent to rape and rape. He pleaded not guilty but he was convicted as charged. On the charge of housebreaking with intent to rape, he was sentenced to 3 years imprisonment and on the charge of rape he was sentenced to life imprisonment by virtue of the fact that the victim of the rape was raped more than once. Both sentences were ordered to run concurrently with each other.

Leave to appeal

[2] By virtue of the sentence imposed on the count of rape, the appellant has an automatic right of appeal on that count in terms of the provisions of section 309B of the Criminal Procedure Act 51 of 1977.

[3] On 2 August 2019, the appellant applied for leave to appeal against his conviction and sentence on the count of housebreaking with intent to rape, which application was granted by the court a quo.

[4] This appeal is accordingly before us in respect of conviction and sentence on both counts.

The appellant's defence

[5] The appellant was legally represented and when he pleaded his legal representative indicated that while the appellant elected not to disclose his defence, he was prepared to state that the defence would be challenging the DNA evidence that the State proposed to lead. The prosecutor enquired from the defence about precisely what aspects of the DNA evidence would be challenged in order that he might arrange to call the necessary witnesses. In response, the appellants' legal representative made the following statement:

> ‘Your Worship everything, the chain in fact no swabs were taken from the accused and the accused is contending that basically that match or the samples that were taken were not his DNA it was basically matched with that of the complainant.
>
> So he’s challenging everything from the so-called obtaining of the swab from him, nothing in fact links him that’s his contention that nothing links him in this particular matter.
>
> So we are challenging each and every single thing of the DNA. In fact the point is nothing was taken, no blood samples was taken from him, no semen was found on the complainant. Whatever was - whatever match there is a match with someone else, not with him at all.’

The State was accordingly fully apprised of the defence’s contentions.

The evidence of the offence

[6] The evidence adduced by the State was that the complainant lived at Ophepheni and was 53 years. On an undisclosed night, (which according to the charge sheet was 6 September 2015) she was asleep when she was awoken by a noise. She switched on her cell phone light to see what had disturbed her. The dwelling was otherwise in total darkness. She heard the door to her dwelling being struck and it then opened. A person entered the room. The complainant got off her bed but was grabbed, assaulted, then thrown onto her bed, and slapped. Her assailant then inserted his penis into her vagina and raped her.

[7] When her assailant was finished, the complainant managed to get up and tried to flee. As she ran towards the kitchen (which appears to have been in a separate structure apart from her sleeping area), she was pursued by her assailant who caught her outside, threw her to the ground and attempted to strangle her. She was then raped outside on the ground for a second time.

[8] The complainant confirmed that her assailant had ejaculated whilst raping her, but it is not clear whether this occurred as a consequence of the first act of rape or the second, or both.

[9] The complainant was unable to identify the person that had violated her. She explained that it was simply too dark. Strangely, however, she testified that:

> 'I was not able to see the person, but when the person was throttling me in my neck I was saying that leave me alone Thabani, leave me alone Thabani saying that repeatedly.'

[10] The appellant's first name is Thabani.

[11] The complainant was ultimately removed to hospital where she was attended to and examined by a Dr. Mjali, who noted that she had tears to her posterior fourchette. There was no bleeding from her vagina but the doctor noted a whitish discharge emanating from it. The doctor took a DNA sample from the complainant to which I shall revert later in this judgment.

[12] It was not in issue that the complainant had been assaulted. The medical examination that she underwent revealed that she suffered physical injuries to her face, which was cut swollen and bruised, her chest, which had a large bruise on it and her right hand which had an abrasion on it and was swollen. The medical examination also did not exclude that she had been raped.

[13] The complainant was a good witness who was fair in her evidence. Had she been mendacious, she could easily have said that it was the appellant that had raped her but she refrained from doing so.

[14] There is no reason to disbelieve the complainant when she states that she was raped. It was not actively disputed by the defence that she had suffered this grave indignity. The essential issue was the identity of the person who raped her.

No direct evidence implicating the appellant

[15] There was thus no direct evidence implicating the appellant in this offence. The State proceeded against him solely on the basis of DNA evidence that it acquired.

[16] Given the challenge referred to earlier by the defence regarding that DNA evidence and given that it is the only evidence that allegedly links the appellant to the offence, it is accordingly necessary to carefully scrutinize that evidence in fine detail.

[17] Two DNA samples were obtained by the South African Police Services: the sample from the complainant extracted by Dr. Mjali and the comparative sample extracted from the appellant some 17 days after the complainant was attacked and violated.

[18] No evidence was led as to why a sample was sought from the appellant other than the complainant testifying that she had called out the name ‘Thabani’ during her ordeal.

[19] In my view, it will be helpful to deal with each of those samples separately in order to avoid confusion

The DNA sample taken from the complainant

[20] As stated, a sample was taken from the complainant by Dr Mjali after the attack on her.

[21] Dr. Mjali testified that she received a sealed DNA sample kit with the outside seal having the number 14D1AC2334JJ. The doctor stated in her evidence that this seal number was recorded at the top of the J88 form that she completed.

[22] A perusal of the J88 form, received by the court a quo as exhibit ‘A’, reflects that the serial number of the seal that she received actually had the number 14D1AC2334. The last two letters of the sequence to which Dr. Mjali testified, namely ’*JJ*’, did not form part of the serial number that she recorded on the J88 form. Each subsequent witness that testified regarding this sample confirmed the seal number without the letters ‘*JJ*’. It appears that the doctor was mistaken in her evidence, particularly in view of the fact that she completed the J88 form contemporaneously with her examination of the complainant.

[23] Dr. Mjali testified that after obtaining the DNA sample, she resealed the kit with a new seal which had the number PAD001307586. She handed that sealed kit to Sergeant B. P. Edwards.

[24] Sergeant Edwards was never called to testify. Yet her sworn statement appears in the record, marked as exhibit ‘D’. There is no record of it ever being handed in as an exhibit. The exhibit ‘D’ to which reference is made in the record is a receipt from the Forensic Science Laboratory. This failure was never addressed at any stage and remains unexplained.

[25] Constable G. Magubane testified that he received the exhibit from Sergeant Edwards and was requested by her to take it to the Forensic Science Laboratory at Amanzimtoti. He stated that the external seal had the number PA300062554. This was not the same seal number referred to by Dr. Mjali. Inside the bag (which was transparent) with that seal number were bags bearing seal numbers PAD001307586 and 14D1AC2334. These accord with the numbers referred to by Dr. Mjali. How the seal number PA300062554 came to be applied is unexplained by the State.

[26] Constable Magubane handed the bag in at the Forensic Science Laboratory. Warrant Officer Samantha Joan van der Bijl, who is employed at the Forensic Science Laboratory testified that she received a bag with seal number PA3000625554, within which was an inner bag with seal number PAD001307586 and kit number

14D1AC2334. She later interpreted the results of the tests run on the samples taken from the complainant and the appellant.

The DNA sample taken from the appellant

[27] Doctor Nancy Martinez Curbelo who works at the Thuthuzela Care Centre at the Port Shepstone Hospital was requested to take a buccal swab from the appellant on 23 September 2015.

[28] Dr. Curbelo testified that the kit that she received had two seal numbers. The first was 13DBAB4661. The second seal number was PA5002254909. Her section 212 statement was received by the court as exhibit 'C'. This was the second exhibit 'C' received by the court: the first was a statement by Constable Gigaba. The court a quo appears to have lost track of the numbering of the exhibits that it received. On exhibit 'C', Dr. Curbelo recorded that the DNA kit had the seal number 13DBAB4661 and that after taking the sample she sealed the kit with seal number PA5002254909.

[29] The seal number PA5002254909 is never mentioned again by any of the State's witnesses. What became of the bag with that seal number is accordingly a mystery. The State made absolutely no attempt to clarify this aspect and the court itself asked no questions in this regard. Indeed, it seems to have gone completely unnoticed.

[30] Dr. Curbelo stated that she handed over the sealed bag to Constable Gigaba. Constable Gigaba testified that he received the exhibit from Dr. Curbelo and that the seal number on it was 13DBAB4661. He made no reference whatsoever to the seal number PA5002254909. He was not asked any questions in this respect by the State to clarify the position. He took the exhibit back to his office and placed it in a steel filing cabinet that he locked. When he was to send the sample through to the Forensic Science Laboratory, he packed it in another bag with seal number PA5000262423G.

[31] A number of statements were received by the court a quo from Constable Gigaba. One related to the receipt by him of the sample from Dr. Curbelo. The statement makes no reference to the seal number PA5002254909. It only references seal number 13DBAB4661.

[32] Constable Gigaba handed the sample to Sergeant Pillay for conveyance to the Forensic Science Laboratory. Sergeant Pillay testified that he had taken a bag with evidence seal number PA5000262423G to the Forensic Science Laboratory for which he received a receipt. The receipt was received as an exhibit by the court a quo as exhibit 'D'.

[33] The receipt recorded that what was received by the Forensic Science Laboratory bore evidence seal number PA5000262423G.

[34] Warrant Officer van der Bijl testified that she received an evidence bag with seal number PA5000262423G with kit number 13DBAB4661. The results of the analysis of the sample in this bag were compared with results of the analysis of the sample taken from the complainant.

The findings of warrant Officer van der Bijl

[35] Warrant Officer van der Bijl found that the two samples matched and that the most conservative occurrence of such a match was 1 in 21 million trillion people.

[36] The essential questions, however, are:

(a) firstly, whether the sample taken from the complainant was in fact the same sample that was tested;

(b) secondly, whether the sample taken from the appellant was in fact the same sample that was tested; and

(c) thirdly, and only if the answer to both questions is ‘yes’, whether on comparing both samples the only reasonable inference to be drawn is that the sample taken from the complainant was that of the appellant.

The evidence of the appellant

[37] The appellant testified in his defence. He indicated that the complainant was his neighbour and that she had previously incorrectly blamed him for the loss of an electric cable. Her unfounded allegations in this regard had caused their relationship to deteriorate. He could not recall specifically where he was on 6 September 2015, being the date of the attack on the complainant. He explained that he had gone to the complainant’s home on numerous occasions but that the last time that he had been there was in 2013.

[38] The appellant was asked by his legal representative why the complainant would charge him with rape. The appellant thought that it was because of the incident over the missing electrical cable.

[39] It is important to note that the complainant at no stage accused him of rape. As previously stated, how the appellant came to be charged was never disclosed. However that happened, the complainant at no stage testified that he was the rapist.

[40] A desultory attempt at cross-examining the appellant was embarked upon by the prosecutor: his cross-examination consists of little more than a page of the record.

Evaluation

[41] The conviction of the appellant on both counts rested solely on the acceptability of the DNA evidence. That evidence either placed him at the scene or it did not. It was that very evidence that was specifically challenged by the defence. In such circumstances, it is reasonable to anticipate that the State would have ensured that its

evidence in this regard was properly presented in the court below and was beyond reproach. In my view, the evidence led was not beyond reproach.

[42] During the course of her judgment, the Learned Regional Magistrate made passing reference to the matter of *S v Sandile Bokolo*. The matter is in fact *Bokolo* v S[1]. In that matter, the Supreme Court of Appeal, per van der Merwe AJA, held that DNA evidence is circumstantial evidence the weight of which depends on a number of factors. Those factors include:

> '(i) the establishment of the chain evidence, i.e. that the respective samples were properly taken and safeguarded until they were tested in the laboratory;
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> (ii) the proper functioning of the machines and equipment used to produce the electropherograms;
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> (iii) the acceptability of the interpretation of the electropherograms;
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> (iv) the probability of such a match or inclusion in the particular circumstances;
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> (v) the other evidence in the case.'[2]

[43] The significance of the *Bokolo* judgment is that the collection, preservation and handling of the DNA material is very important. The probative value of DNA profiling in any particular case will depend on a number of different factors which must be assessed in the context of the facts of that case. Firstly, an important factor will be whether the samples were properly taken so that they were not contaminated or otherwise compromised. Also, the samples must be shown not to have been tampered with before they were tested in the laboratory.[3]

[44] I am not satisfied that the evidence adduced passes muster.

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[1] 2014 (1) SACR 66 (SCA).
[2] At paragraph 18.
[3] *Nkwanyana* v *S* (AR108/16) [2016] ZAKZPHC 82 (27 September 2016) at para 22.

[45] Considering the sample taken from the complainant, the evidence of Sergeant Edwards was not led yet her statement forms part of the record whilst there is no record of it being accepted during the trial as an exhibit. It ought not have been considered. This accordingly results in a break in the chain of evidence.

[46] The break in the chain of evidence is not an insignificant break. Whilst the sample was in Sergeant Edwards' possession, the seal number changed. How and why this occurred was not explained. There may well be an innocent explanation for this but there must, at the very least, be an explanation. None was offered by the State.

[47] As regards the sample taken from the appellant, Dr. Curbelo testified that the seal that she applied was PA50002254909. This seal number was not referred to by any other witness. Dr. Curbelo took the sample on 23 September 2015 and deposed to her statement in terms of section 212(4) of the Criminal Procedure Act on the same day. It is inconceivable that in such circumstances she recorded the incorrect seal number. What became of it? No explanation was advanced by the State.

[48] In my view, the State did not establish that the chain of evidence was intact and could be relied upon with any degree of confidence.

Conclusion

[49] The State ought to have properly considered the evidence that it intended leading and ought to have ensured that the chain of evidence was consistent and complete. It failed to do so. It appears that there was a general lack of attention to detail all round in the presentation of its evidence against the appellant. The appellant was barely cross-examined.

[50] The answer to the first two questions posed above is 'No'. Without reliable evidence that the samples purportedly taken from the complainant and appellant were in fact taken from them, the results of comparing the samples is equally unreliable. Consequently, the answer to the third question is that without reliable evidence of the

source whence the samples tested were obtained, the State failed to meet the test for the reliability of circumstantial evidence, namely, that the inference to be drawn from such evidence is the only reasonable inference. Accordingly, I find that the State failed prove beyond a reasonable doubt that the DNA sample taken from the complainant was the appellant's.

[51] In the circumstances, it would be unsafe to allow the appellant's conviction and sentence on both counts to stand.

[52] I would accordingly propose that the appeal be allowed and that the conviction and sentence on both counts be set aside.

Mossop AJ

Acting Judge of the High Court of KwaZulu-Natal

I agree and it is so ordered.

D. Pillay J

Judge of the High Court of KwaZulu-Natal

APPEARANCES

NB: The country is in lockdown level 3 due to Covid-19.

With the consent of the parties, the matter was dealt with on the papers and judgment was handed down electronically and emailed the parties.

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Date of Hearing	:	29 January 2021
Date of Judgment	:	