IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: A542/09

VUYANI NDEVU **APPELLANT**

vs

THE STATE **RESPONDENT**

JUDGMENT DELIVERED ON THE 12th OF FEBRUARY 2010

LOUW, J:

[1] The appellant in this appeal, who was represented throughout by a legal representative, appeared in the Parow regional court on one count of raping the child "E D" during October 2004 when she was six years old. At the commencement of the trial on 7 June 2007, some two years and eight months after the events of October 2004, the appellant pleaded not guilty and, save for admitting that the complainant was 6 years old in October 2004, the appellant gave no explanation of his plea and made no further admissions.

[2] The complainant who was by now 8 years old, gave evidence through an intermediary in terms of the provisions of section 170A of the Criminal Procedure Act, 51 of 1977 (the CPA).

[3] The magistrate questioned the complainant before the commencement of her testimony and was not convinced that the complainant would understand the oath. After posing a number of further questions to establish whether the complainant was able to distinguish between lies and the truth, the magistrate, acting in terms of the provisions of section 164 of the CPA, admonished the complainant to speak the truth, the whole truth and nothing but the truth. I do not agree with the submission by Mr Stamper, who appeared on behalf of the appellant on appeal that the procedure followed by the magistrate before admonishing the complainant fell short of the statutory requirements as interpreted by our courts and that the testimony of the complainant did not constitute evidence. In view of the conclusion to which I have come in regard to the outcome of the appeal against the conviction, it is not necessary to say anything further on this point raised by Mr Stamper.

[4] In all, the complainant, her mother Ms Lindi Mphuti, an adult friend of her mother's Ms Nomile Bobotyane and Dr Emmunuel Mensah who had examined the complainant at approximately 22h30 on 14 October 2004 at the Karl Bremer Hospital Rape Centre, gave evidence on behalf of the state. Dr Mensah handed in the report he prepared pursuant to his examination of the complainant (the J88). Finally, at the end of the state case, a forensic report indicating that a swab taken by Dr Mensah at the time of his examination of the complainant showed that the complainant had been infected with

the sexually transmitted disease gonorrhoea, was placed before the court with the concurrence of the appellant who admitted the contents of the report.

[5] The appellant testified that he did not rape the complainant. He raised an alibi, foreshadowed in the cross-examination of the complainant, stating that he was at work and that he could not have been the person who had sexually assaulted the complainant.

[6] The appellant was convicted by the regional magistrate on the charge of rape in a judgment delivered on 17 October 2006. After his conviction, the matter was in view of the age of the complainant, referred to this court for sentence in terms of the provisions of section 52 of Act 105 of 1997.

[7] The matter came before Hlophe, JP on 13 September 2007. The state recalled Dr Mensah to give further evidence. After hearing the further evidence of Dr Mensah and argument from counsel for both the state and for the appellant, Hlophe, JP confirmed the conviction, stating that if need be, he would give his reasons in due course. After hearing argument on sentence during which the appellant's counsel placed certain facts concerning the appellant's personal circumstances before the court on an ex parte basis, the appellant was sentenced to 16 years imprisonment.

[8] The appellant applied for leave to appeal against his conviction. On 10 April 2008, the application for leave to appeal was refused. The appellant thereupon applied to the president of the Supreme Court of Appeal for leave to appeal against his conviction. On 22 May 2008, the appellant was granted leave to appeal by the Supreme Court of Appeal.

[9] During the course of the trial it was not disputed that the complainant had been sexually assaulted although the nature of the assault remained in dispute.

[10] On appeal Mr Stamper raised two issues regarding the merits of the conviction. The first concerned the identity of the wrongdoer. He submitted that the evidence did not establish beyond reasonable doubt that it was the appellant who had sexually assaulted the complainant. The second contention was that even if it were found that the appellant was the wrongdoer, the evidence did not establish penetration and that consequently the crime of rape had not been proven. At most, he submitted, the appellant was guilty of attempted rape or indecent assault.

[11] The complainant who was in grade 2 by the time she testified said that she spent two years in grade 1. One day, at a time she was in grade 1 for the first time (which would be during 2004) and while living in Fisantekraal with her mother, father and siblings and while

she was playing with her younger sister Akona, a person whom she knew as Vuyani and who also lived in Fisantekraal, called her and told her he was going to give her some sweets.

[12] The complainant referred throughout her evidence to this person as Vuyani or Boet Vuyani. She was never asked to formally identify the appellant as the person to whom she was so referring. It was common cause at the trial that the appellant frequented the tavern run by her father from their home and that she and the appellant had known one another at the time of the incident and that it was indeed the appellant to whom she was referring when she spoke of Boet Vuyani.

[13] The complainant testified that she went with Vuyani to his house. With her were her younger sister Akona and an even younger boy, Nkululeko, the son of sister Malengelu. At the time of the trial the boy had not yet reached school-going age.

[14] According to the complainant Boet Vuyani took off her panty and undressed himself. He then put the children under blankets and told Akona and Nkululeko to lie down and sleep. They were all lying on their sides under the blankets and Vuyani then put his penis in her vagina to which she referred to as her koeko. When first asked what Vuyani did when he put his penis in her koeko, she said that she could not remember. Asked whether he was lying still or moving,

she said he was moving and demonstrated what Vuyani did. The magistrate described the movements as a "bouncing up and down". When first asked what it felt like to her, the complainant said that she could not remember, but on being asked whether she felt anything, she said that it was painful.

[15] The complainant also described what she remembered of the inside of Vuyani's house. There was no wardrobe and there was one bed. She saw toiletries on a table in front of the bed and there was no kitchen.

[16] The complainant explained that she came out with what had happened to her after her mother noticed that she could not walk properly and also noticed some blood on her pajamas on a Saturday, one day after the incident.

[17] Under cross-examination the complainant stated that the day she was raped, she had been to school. At the time her school day ended at 12 o'clock in the afternoon. After school she would first walk home to take off her school clothes. On the day in question, she was playing with Akona and Nkululeku after school.

[18] In order to understand the import of the complainant's evidence as to when the incident occurred, it is important to bear in mind that the complainant was examined by Dr Mensah on Thursday 14

October 2004. This is also the day on which the appellant was arrested. The only inference to be drawn from the complainant's evidence is that she was raped on a weekday during the week which preceded the week during which she was examined by Dr Mensah and when the appellant was arrested.

[19] It was put to the complainant on behalf of the appellant that it could not have been Boet Vuyani who had raped her because he worked during the day from 12 noon to 1 am the next morning and that the only day he worked from 7 am until 4:30 pm was on the day he was arrested. The complainant at first responded that she had forgotten. When asked what she meant, she said that she had forgotten the truth. When it was put directly to her by the magistrate that Boet Vuyani says that it was not him that had raped her because he was at work at that time, she disagreed with the statement.

[20] The complainant confirmed that her mother had first taken her to two persons, her aunt Nomile and a Duduzile, and that they asked her what had happened to her and that she told them that she did not know. She said that she had forgotten why she had said to these persons that she did not know.

[21] The complainant confirmed that the first person she told about what had happened to her was Nolala's mother Ms Bobotyane. Ms

Boboetyane testified that Ms Mphuti brought the complainant to her on 13 October 2004 (a Wednesday) with a complaint that something was wrong. She examined the child and found a yellowish discharge from her vagina which was painful. On questioning the complainant, who was shy, looked down and at first would not answer but finally, once she had been told that they were not going to hit her, told her that Boet Vuyani had put his penis into her.

[22] The complainant confirmed that she was present when her father confronted Boet Vuyani. She confirmed that when she was first asked by her father whether it was Boet Vuyani who had raped her, she kept quiet and that when her father asked again in a loud voice, as if he was cross, she said yes. She said, when it was put to her by the magistrate, who intervened in the questioning, that "Boet Vuyani says the only reason that you are saying that it is him is because her father scared her into saying so" she answered yes. On further questioning by the magistrate she reiterated that it was Boet Vuyani who did it to her.

[23] In cross-examination the complainant said that during the rape the other two children were asleep and facing away from her while she was facing in their direction. Her back was to Boet Vuyani. On further questioning, she said that she was behind Vuyani. She then said that Vuyani was lying on his side in front of her with his tummy side towards her. He put his penis inside her koek and not on top. It

was painful.

[24] She was again asked in cross-examination to describe Vuyani's house. There was one room only with one door, one window and a small bed. She indicated with her left hand and said that the bed was on the right hand side as you enter through the door. She was asked again to indicate with her hand where the bed was and again indicated towards the left. She also saw a suitcase and some toiletries on a small table. She indicated with her right hand where the window was. There was no furniture close to the window. She did not agree that she had never been inside his house. She also did not agree that the bed was not small but in fact a big double bed. She did agree that the bed was on the right hand side behind the door, but did not agree that there was a kitchen side to the room with a stove, pots and plates. She says that she had forgotten why she did not say anything to Vuyani when he took her clothes off, while knowing it not to be right. In re-examination the complainant says she first told Mrs Bobotyane because she did not want to tell her mother.

[25] The complainant's mother testified that she did their washing on a Monday and on a Thursday. When she was about to do the washing on a Monday, she noticed what to her appeared to be blood on the panties the complainant had worn on 'the Sunday'. She also noticed that the complainant was not walking well. She then called

in her sister-in-law Ms Duduzele "D" who examined the complainant's vagina. They then took her to Ms Bobotyane who also examined her. When questioned by Ms Bobotyane, the complainant told her that Boet Vuyani had put his penis in her. When Ms Bobotyane asked why she did not tell her parents about it, she said that Boet Vuyani bought her chips afterwards and told her not to tell anyone. When it was put to Ms Mphuti that it could not have been the appellant, Ms Mphuti stated that he was lying because, on the Sunday, he was not at work and was near their house. It is clear that Ms Mphuti assumed that the rape must have occurred on the Sunday. This assumption is in direct conflict with the express evidence of the complainant that it happened on a school day. What is clear, however, on the evidence of both daughter and mother is that the rape did not occur during the week the appellant was arrested.

[26] Dr Mensah examined the complainant on Thursday 14 October 2004. His findings were recorded in the J88 as follows:

> Excoriation (linear) on the medical (opposing) edges or the labia majora with purulent discharge. Could be sign of infection probably sexually transmitted. Hymen is still intact **but act could be between the labia,** (my emphasis)

Dr Mensah explained what he meant with the statement that the act could be between the labia as follows:

> What I meant is that you can rub the penis on the beam between the labia without actually attempting to penetrate (indistinct) and if you ejaculate there, that can also lead to infection which is sexually transmitted. He explained the excoriation he found during

the examination as

follows:

Excoriation, as I explained to him earlier on is this redness and it looks as if the skin is also peeling off you know with the redness - underlying redness with some peeling off of the skin - underlying skin. It is the whole peel off but it is just like - well I don't know, a wet skin, when an area is wet for a long time, the kind of peeled off of the skin that accompanies it - the wet area. Dr Mensah further explained that

> The infection could be either due to poor hygiene or could be sexually transmitted, you see now, so that is what, what, what I'm saying. I'm not saying the redness or the excoriation I'm saying is due to the rubbing you know, it does not matter, you don't have' to really insert your penis to be able you know infect if the semen you discharge is you know, contains infected material and touches the area, you can develop the infection. You understand, without necessarily having full penetration. In cross-examination Dr Mensah explained that he found the redness

on the outside edge of the labia

> it's not inside, it's just on the outside

Dr Mensah stated further

I am not saying the redness is due to rubbing against; I said it is more due to the wetness you know. But what I mean is that one could (indistinct - fades) without penetrating and if one comes into contact with the semen, or infected semen, you could still develop a kind of infection As to the blood on the panties Dr Mensah said that

> ... that is what they said, but we did only notice the purulent discharge . . . The panties that we saw had just a purulent discharge . . . yellowish . . . not blood stained . . . otherwise we would have noticed it.

[27] Under cross-examination Dr Mensah said that he found no injuries he would have expected to find if the perpetrator had attempted to penetrate.

[28] Dr Mensah was recalled to testify when the matter came up for sentence in this court. He stated that the purulent discharge would appear 48 - 78 hours (72 hours) after sexual contact with infected semen. It could even be as little as 24 hours, however, depending on the number of organisms inoculated. When the discharge starts, it continues because infection continues until it is treated. The excoriation he found would have developed in 24 - 48 hours before his examination. He further stated that the sexual contact could have been 4 days before his examination. He said that he could conjecture that the sexual act was just between the labia minora. He also stated that ejaculation was not necessary because the transmission of the disease could occur from a purulent discharge of the penis itself.

[29] The only reasonable inference to be drawn from the evidence of Dr Mensah is that the person who had sexually assaulted the complainant is the person who infected her with the gonorrhoea because that is the only way in which the disease could have been transmitted to her.

[30] The appellant testified that he lived in Fisantekraal with his wife

who was still at school in a one room bungalow with double bed behind the door as you enter on the left side, a homemade table, three bicycles, a gas tank, cutlery, pots and a clothing bag. There was one window on the left side. He knew the complainant from being a visitor to her father's tavern. The complainant also knew him because she saw him when he came to visit her father's place. The complainant's father never visited his house and he never saw the complainant at his home.

[31] Turning to his work, the appellant testified that he had been working alternating weekly shifts at the County Fair chicken farm for about one year. One week he worked from Monday to Friday from 3 am in the morning to 1 pm in the afternoon. They would get off work at 1 pm to 2 pm, but sometimes it could get as late as 3 pm if the lorries were late. The next week, starting at 1 pm on the Sunday, he would work from 1 pm in the afternoon to 3 am the next morning.

[32] The appellant was arrested on Thursday 14 October 2004. He testified that during the week of his arrest, he worked the 3 am - 1 pm shift. On the Thursday he was arrested, he had come to work at 3am that morning but was told by his supervisor to wait until 7 am for the employer who gave him instructions to find 10 men to come to work the next day which was the Friday. He worked until 4:25 pm and left work at 4:30 pm. After work, he proceeded to the home of the complainant's father to look for recruits. He was confronted by the complainant's mother with the allegation that he had raped the

complainant. Later that day he was confronted by the complainant's father who had brought the complainant with him. The father asked the complainant in his presence whether it is not correct that it was the appellant who had raped her and then bought her some chips. The complainant did not respond. The father then asked again in a "rough" and "harsh" voice whether it was the appellant. The complainant then agreed that it was the appellant. The appellant then went to the police station of his own accord and he was arrested. The appellant is of the view that the complainant implicated him because of the pressure put on her by her father.

[33] The cross-examination by the prosecutor proceeded on the wrong premise. It was put to the appellant that he had raped the complainant earlier on during the week that he was arrested. This was not in accordance with the evidence of the state. At best for the state, it was uncertain at the commencement of the trial when the rape occurred. The charge sheet simply alleged that it occurred during October 2004. The complainant, however, made it clear that the rape occurred on a school day after she had left school at 12 pm. She would have gone home to change and then played with her sister. It was after one day, on a Saturday, that her mother saw the blood in her clothes. This means, that on the complainant's version, the rape could not have occurred during the week that the appellant was arrested. It must, on her version have occurred during the previous week. During that week the appellant worked from 1 pm in

the afternoon to 3 am the next morning. It was in the context of this evidence of the complainant, that it was put to the complainant in cross-examination that the appellant worked during the day from 12 pm to 1 am the next morning and that he was not at home in the afternoon when she came from school. It was also put to the complainant that the only day he worked from 7 am until 4:30 pm was the day of his arrest. It is true that it was not put to the complainant that the shifts alternated and that one week he worked from 3 am to 1 pm, which in practice, could be up to 3 pm. However, having regard to the complainant's evidence that the incident occurred on a weekday with a weekend in between, it was not necessary to put to her the hours he worked during the week he was arrested.

[34] The evidence of the complainant's mother Ms Mphuti, when seen against the background of the evidence of Dr Mensah, is in line with the complainant's evidence. He testified that the purulent discharge would develop 48 to 72 hours after the sexual contact, although it could be as little as 24 hours. This means that the discharge the complainant's mother saw on the Monday in the clothes worn by the complainant on the previous Sunday, was caused by sexual contact at least 24 hours but up to even 72 hours before the Sunday that she wore the clothes. If this evidence is read with the complainant's evidence, it places the occurrence at sometime during the week preceding the weekend.

[35] The cross-examination of the appellant on the basis that the incident happened during the week that he was arrested, was therefore incorrect and misleading. During cross-examination, the appellant stated that he understood the allegation to be that the incident occurred during the week of his arrest. If he were untruthful he could surely have tried to change his evidence to make that week the week that he worked the 1 pm - 3 am shift. He did not do so. He confirmed under cross-examination that during the week of his arrest he worked the 3 am to 1 pm shift.

[36] Although the appellant was questioned about the hours he worked and why it appeared that some shifts were longer hours than the other, he was not challenged in cross-examination on the fact that he worked the alternating shifts at County Fair. In fact, it appears that his evidence that he worked alternating shifts was confirmed by Ms Mphuti who said that he worked sometimes during the day and sometimes during the night. The appellant was cross-examined on the hours he worked on the day of his arrest 14 October 2004 and when he left work on that day. Apart from the fact that his working hours on the day he was arrested (Thursday 14 October 2004) was really irrelevant, even here the prosecutor (and the court) got it wrong. It was put to him that his evidence was that he had knocked off work at 1 pm on that day and that he later changed his evidence to say that he only knocked of at 4:25 pm. This is not correct. He said that he knocked off on that day at 4:25 or

4:30 and got home at 'something to 5'. He did not say, as the magistrate suggested during the course of his evidence, that he knocked off at 1 pm on the day of his arrest.

[37] The complainant is a young child and a single witness in regard to the question of the identity of the person who had sexually assaulted her. The magistrate found that the complainant created a very good impression and that she appeared to be credible. Her evidence that she was sexually assaulted is corroborated by the evidence of Dr Mensah and the fact that she contracted gonorrhoea. This evidence does, however, not, as was pointed out by the magistrate, corroborate her evidence as to the identity of her assailant.

[38] The complainant first revealed the identity of the appellant as her attacker a number of days after the event to Ms Bobotyane on the Wednesday (13 October 2004). The delay could be explained by the young age of the complainant and her understandable reluctance to speak about what had happened to her. The laying of the complaint does not constitute corroboration for her evidence of identification. It is admissible, however, to show consistency in respect of her allegation of the identity of her attacker. The delay in making the complaint does, however, diminish the value of the evidence of the complaint because it is generally held that a significant delay allows more time for the child to fabricate and to be influenced.

[39] It is common cause that the complainant and the appellant knew one another. One is therefore instinctively inclined to ask why a young child would in these circumstances falsely accuse the appellant of raping her. There were, however, a number of aspects to the complainant's evidence that need to be considered. The first issue is her evidence about whether she had been in the appellant's home before the incident. When asked by the prosecutor whether she had been in the appellant's house before, she said yes, she had gone there because she had been sent there by 'some guy' to call him, but that he was not at home. Immediately thereafter she said that she had never been in his house before she was raped. Now, it is quite possible that the earlier evidence was due to a misunderstanding between the prosecutor and the complainant. However, no effort was made by the prosecutor to clear up what on the face of it appears to be a contradiction. The magistrate found that the complainant's evidence was that although she had been to the appellant's house earlier to call him, she had never before been inside his house. Again, when she was initially asked by the prosecutor who was placed on the blankets, the complainant said that they (the children) were placed on the blankets after the appellant had removed her panty and had undressed himself. When the prosecutor asked who had been put **under** the blanket, she said that he put all three the children **under** the blanket and he himself also got in under the blanket. Again the earlier answer may have been the result of a misunderstanding between the prosecutor and

the complainant and the way in which the question was put by the prosecutor. Again no effort was made by the prosecutor to clear up what on the face of it appears to be a contradiction. As to the position in which she and the appellant lay on the bed, there is confusion. In cross-examination she said the other children were facing away from her and that she was facing towards them. She agreed that that meant that she then had her back to the appellant. She then explained that she was lying behind the appellant only, on further questioning to say that they were facing one another when the appellant put his penis in her vagina. Again, no attempt was made by the prosecutor to clear up what appear to be contradictions in her evidence. Throughout her evidence, the complainant, more than once stated that the appellant had put his penis inside her vagina and that it was painful. She also said and demonstrated that he made a bouncing movement. The allegation that the appellant put his penis inside her vagina is not unequivocally supported by the medical evidence to which I referred earlier. The complainant said that the appellant's bed was on right hand side but indicated with her left hand. It was put to her that the appellant would say that the bed is on the right hand side behind the door. The complainant agreed and said that earlier when she indicated with left hand, she had made a mistake. The magistrate is correct that the appellant later testified that the bed was behind the door on the left side as you enter the room and that this differs from what was put to the complainant. However, the magistrate downplays the apparent

contradiction in the complaint's evidence as to where the bed was. The complainant said on a number of occasions that she could not remember certain important matters. These are the kind of problems that can arise in the evidence of a child. They can probably be ascribed to the fact that the complainant was a very young child who gave evidence more than two years after the event. However, it does illustrate the fact that one must be careful in evaluating the evidence of the child.

[40] Against this background, the magistrate proceeded to consider the appellant's version which she characterised as follows:

His defence rested on a bare denial and an attempt to provide an alibi for himself in terms of his work programme. No evidence was placed before the Court to confirm which shift he had been working when this incident was alleged to have taken place.

The appellant's evidence that he worked shifts was not disputed in cross-examination and was in fact consistent with the evidence of the complainant's mother who said that he worked sometimes during the day and sometimes during the night. While the appellant was asked in cross-examination about the hours he worked during each of the shifts and his working hours on the day he was arrested, his evidence of the hours he worked during the week preceding the week of his arrest was not directly challenged in cross-examination.

[41] The state was aware, from the cross-examination of the

complainant on 7 June 2006 (the day upon which her mother also testified), of the appellant's allegations as to when he worked at the time he was alleged to have raped the complainant. The matter was postponed on a number of occasions after the complainant gave her evidence and it was only four months later, on 11 October 2006 that the state closed its case and when the appellant testified. The state therefore had four months in which to verify and to check the appellant's alibi based on the hours allegedly worked by him. In contrast the appellant was in custody from 14 October 2004 throughout his trial.

[42] It is trite that there is no onus on an accused to prove the alibi raised by him but it is generally required of the accused to raise the issue before or during the state case and to adduce some evidence of the alibi. Depending on the circumstances, the mere word of the accused may be of little value. In this case the prosecutor was apparently under the impression that the evidence by the state witnesses placed the occurrence during the week that the appellant was arrested. Thus, while the evidence for the state was that the incident did not take place during that week the appellant was cross-examined on the wrong assumption and the appellant's evidence regarding his work schedule during the previous week, was not directly chdllenged. It was not put to him that he did not work the hours he claimed to have done during that week or if he did that he could have raped the complainant after she came home from school

and before he reported for work at 1 pm. In cross-examination the appellant gave his supervisor's name and stated that they clocked in and out at work. It cannot in my view be said that in the absence of any evidence to the contrary, the appellant's evidence of the shifts and hours he worked carried little weight.

[43] In rejecting the appellant's evidence that he could not have committed the crime because he was at work, the magistrate reasoned as follows:

> The only date upon which the court can rely in this matter is the date of the examination by the doctor. (Thursday 14 October 2004). The precise time or day that this offence occurred was not clear. It could have been a weekday as "E"remembered or it could have been a Sunday as her mother remembered. Either way the explanation given by Mr Ndevu that it could not have been him because he was working did not stand up under cross-examination and the Court is satisfied that he did not show that he would have been absent either on the Sunday or during the week in which it was alleged to have occurred.

[44] This passage in the judgment is crucial to the magistrate's evaluation of the appellant's evidence. However, it contains misdirections as to the facts and the law.

1. The incident could have occurred on a weekday as "E"remembered or a Sunday as her mother remembered. As pointed out earlier, the state case on the evidence of the

complainant, her mother and the doctor was that in all probability the incident took place on a weekday in the week preceding the week during which the appellant was arrested and when the complainant was examined by the doctor.

2. The explanation given by the appellant did not stand up to cross-examination. As pointed out, the cross-examination of the appellant related to the next week, not the week pointed to by the evidence of the state witnesses. It cannot therefore be said that his explanation 'did not stand up under cross-examination'.

3. The court is satisfied that **the appellant did not show** that he would have been absent either on the Sunday or during the week in which it was alleged to have occurred. Here the magistrate appears to approach the evaluation of the appellant's evidence of the basis that an onus rested on the appellant to show that he was absent. This is wrong in law.

[45] The approach to be adopted by the court has been stated in a passage from the judgment of Nugent, J (as he then was) in **S v Van der Meyden** 1999(1)SACR 447(W) at 450, which has been referred with approval in many subsequent cases[1], as follows

> A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion

1 See for instance, S **v van Aswegen** 2001(2) SACR 97 (SCA) at 101

> which it arrives at must account for all the evidence....
>
> I am not sure that elaboration upon a well-established test is necessarily helpful. On the contrary, it might at times contribute to confusion by diverting the focus of the test. The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[46] In this case, the evidence of the appellant that he was working from 1 pm to 3 am the next morning during the week that the evidence by the state alleges the incident occurred was not accounted for. On the totality of the evidence, the appellant's explanation of where he was during the crucial week has not been shown to be not reasonably possibly true. It is true that if he only started work at 1 pm there may have been enough time, between the time the complainant came home from school and when the appellant started work. This issue was, however, not addressed in evidence and in the cross-examination of the appellant. In my view, on the probabilities there would, in any event not have been

sufficient time. It will be remembered that the complainant's school came out at 12 pm. She would then have walked home and changed. Thereafter she went to play with the sister and young friend. The time all of this took was not explored in evidence. The appellant was also not asked when he would leave to go to work so that he would be in time to start work at 1 pm.

[47] There is another issue. At the end of the state case it was clear that the person who had sexually assaulted the complainant must have been suffering from gonorrhoea, a sexually transmitted disease. The appellant was in custody throughout the trial and since his arrest on 14 October 2004. If he were the perpetrator he would, according to Dr Mensah, have been suffering of gonorrhoea. This matter was not addressed in evidence at all. In fact, it was not even put to the appellant that he was suffering of and had infected the complainant with the illness.

[48] This is a distressing case. A young girl endured a serious sexual assault and was infected with gonorrhoea. She identified her assailant after a number of days. He raised an alibi at the trial. This alibi couldhave been checked by the state who knew where he worked, during the course of the trial before the state closed its case. Since he was required to clock in and out of work, records would most probably have been available to show on what days and during which hours he worked. The assailant infected the

complainant with gonorrhoea. The suspect was in custody from soon after the event. None of this was apparently followed up by the state. The only issue was the identity of the assailant. For this the prosecution ultimately relied on the complainant's evidence and on the cross-examination of the appellant. The complainant was a very young girl who was called upon to testify about events which took place more than two years earlier. The cross-examination, such as it was, was conducted on an incorrect premise.

[49] In my view, having regard to all the evidence, the quality and weight of the evidence on behalf of the state was not so persuasive as to eliminate the possibility that the evidence of the appellant may be true.[2] In my view, the state has not discharged the onus of proving that it was the appellant who sexually assaulted the complainant.

[50] In view of the conclusion to which I have come, it is not necessary to consider Mr Stamper's further submission that penetration had in any event not been established.

[51] In my view the appeal against the conviction must succeed and the conviction and sentence be set aside.

[52] I would therefore make the following order:

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2 S **v van Tellingen** 1992(2)SACR 105 (C) at 106 c-h

(i) The appeal against the conviction is upheld.

(ii) The conviction and sentence is set aside.

W J LOUW, J

I agree

R ALLIE, J

I agree

D H ZONDI, J