IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A363/2011

DATE: 28 OCTOBER 2011

In the matter between:

ANDRIES EDONS Appellant

and

THE STATE Respondent

J U D G M E N T

BLIGNAULT, J:

Appellant was convicted on 15 July 2008 in the Regional Court at Bonnievale on two charges, namely one, that he raped Susanna Frans on 26 February 2006 at Franslaan, Bonnievale and two, that at the same time and place he assaulted her with the intent to do grievous bodily harm by kicking her in the face. He was sentenced to 10 years imprisonment on both charges taken together.

The evidence of the complainant was that appellant entered

her home through a window and assaulted her whilst telling her that he was going to have sex with her. It was about four o'clock in the morning and she had been asleep. He continued to assault her by beating and kicking her in the face. He then took her clothes off as well as his own. Thereafter he had sexual intercourse with her. She told him that she did not want to do it, but he proceeded against her will. Afterwards he left and she was left there with blood streaming out of her mouth.

One Katrina, who stayed in the same yard, heard her screams and came to her window. The complainant told Katrina that she knew the person who had raped her and that his name as Poenas. She had previously worked with him on the same farm. Katrina Reiners also gave evidence. She corroborated the complainant's evidence in regard to the events afterwards, that is the report to her and what the complainant told her. She confirmed also that the complainant told her that it was Poenas that raped her.

Appellant's defence was an alibi, namely that he was asleep at the time of the alleged attack at the house of his mother's neighbours. He admitted that his nickname was Poenas. He called his mother, Ms Aletta Edons and Ms Liena Kapordt to support his alibi defence.

The magistrate accepted the evidence of the state witnesses and rejected that of appellant. The evidence of the two other witnesses, he said, did not substantiate the alibi of appellant. He accordingly convicted appellant and sentenced him as set out above.

A vital aspect of this appeal is the manner in which certain DNA evidence was treated by the magistrate. After the appellant had testified, his Legal Aid attorney informed the court as follows, and I am reading from page 64, line 18:

> "And I just want to put it on record that the accused requests, it is his instructions and I just want to say to the court that he wants a DNA analysis to prove his innocence in this case."

The prosecutor then informed the court that the state had not obtained a certificate of the DNA analysis, but it had been performed by the laboratory.

After appellant had called his other witnesses, the DNA evidence became available in the form of a letter from the Forensic Science Laboratory, which was handed in as an exhibit. It appears in the record. The first four paragraphs, particularly two, three and four, although not entirely clear,

could perhaps be interpreted that it was negative in the sense that it did not link or prove that it was the appellant. Paragraph 5, however, read as follows:

> "The STR profile of the DNA obtained from the vaginal vault swab, ...(indistinct) swab and panty..."

There is an identification number:

> "... is a result of a mixture of DNA and the STR profile of the DNA obtained from the control blood..."

And then the appellant's name is mentioned:

> "... cannot be read into this mixture profile."

Mr Barron, that is the attorney, representing appellant, asked that this letter be read into the record. The magistrate, according to the record, did not read it, he simply asked him:

> "What are the results?"

Mr Barron's response is on the top of page 107:

"It cannot be read into this mixture of profile and first in paragraph 3, the negative result of the test indicates that no male DNA could be isolated from the cervical swab of the complainant."

Now I must say at this point that not only do I not understand paragraph 5 of the certificate, but this statement by Mr Barron is also incomprehensible. I do not understand what he is saying here, but the magistrate apparently understood it, because he said:

"So all in all the result of the DNA result is negative."

Then he asked prosecutor:

"Miss, did you have a look?"

And then it becomes quite important, a bit of evidence:

"I had a look at it, Your Worship. I just indicated earlier to Mr Barron, that I have a problem with the conclusion they have in paragraph 5. I am not a medical expert, Your Worship, and this court is not a medical expert, what the state would like to know

is that now can we say honestly that the accused did not have sexual intercourse with the complainant? I have a big question mark, Your Worship, regarding paragraph 5."

Then the court said:

"Alright, it is a matter for argument then when the defence has closed his case."

And the prosecutor then says with justification:

"But Your Worship, we are not medical experts, we cannot even argue on it if we do not have a medical opinion regarding paragraph 5."

The magistrate then said the following:

"Yes you are going to argue like that when at the end of the defence case."

Now I must just pause at this stage and say that he magistrate's response even at this early stage, already amounts to a misdirection. The prosecutor herself did not understand paragraph 5. There is no indication that the

attorney understood paragraph 5. No indication that the court understood paragraph 5 and when the prosecutor said but we must get medical evidence on paragraph 5, the court said simply no you can argue that.

Obviously the prosecutor, in the absence of evidence, could not take it further in argument, not understanding the DNA, she could not rely on the DNA test to prove or disprove the guilt of the appellant and she relied mainly on the *viva voce*. Mr Barron did refer to the DNA evidenced in his oral argument in the following terms and he says at page 128, about the evidence, he says:

> "It was a request from the accused and it came negative, Your Worship, and although the put all the mixtures of the accused and also of the complainant together, as his blood was also taken, it cannot be read into the mixture profile, Your Worship, on the last conclusion of what was handed in. So in actual effect it turned out negative, Your Worship."

Now all I can say again, this attorney, appointed on a Legal Aid basis, puts together an argument which creates not the impression, he makes it quite clear that he did not understand paragraph 5 of the report and he did not understand the argument put up.

The magistrate did not devote more than three lines in his judgment to the DNA evidence. All that he said at page 170:

> "Thereafter the defence, through the state, handed in a DNA test result, whose results proved to be negative and it was then accepted and marked as Exhibit B. The defence then closed the case for the defendant."

Once again the magistrate here was guilty of a serious misdirection. By it simply stating that it was negative, he did not analyse or consider the implications of paragraph 5, which should have been considered by him. Then he went further and he simply says:

> "... and it was then accepted and marked as Exhibit B."

The point is again, and I repeat, the prosecutor raised her objection and the magistrate said you can go and argue this, and then he says but this certificate was negative and it was accepted. Again this is a vital misdirection.

Then came appellant's notice of application for leave to appeal and that we find at page 194. Now a new attorney comes on to

the scene and we find his proposed grounds of appeal. One of them deals with the DNA analysis and he concentrates on paragraph 5 of the certificate and says:

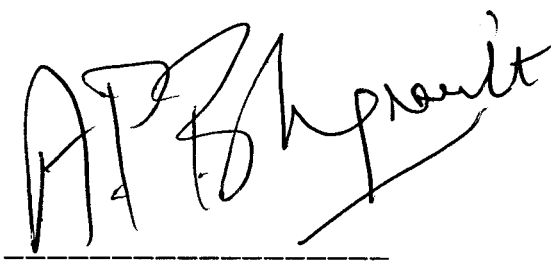
> "Properly interpreted, this means that in those specific areas mentioned, there was a presence of other DNA, apart from that of the complainant. That is not the DNA of the accused. It is the applicant's submission that the results of the DNA analysis expressly exclude him as the perpetrator."

Now here the DNA point was raised in unambiguous and clear terms. The magistrate, however, appears once again not to have understood it. We have not seen his judgment on this application, it did not form part of the record, but we do know that he refused leave to appeal.

I then come to my conclusions in this appeal. It is obvious that the DNA evidence was of crucial importance. In my view, the manner in which the magistrate dealt with the DNA evidence, constituted a gross irregularity. The magistrate obviously did not understand the meaning and import of paragraph 5 of the DNA letter. He ignored the prosecutor's concern that she did not understand the import of paragraph 5. he did not realise that appellant's attorney's address in

respect of this evidence, was meaningless. He failed to deal properly with this evidence in his judgment. He refused leave to appeal when this DNA point was pertinently raised in appellant's application for such leave.

The prejudice to the appellant in this case is manifest. In the circumstances I am of the view that this irregularity, in the circumstances, gave rise to a fundamental failure of justice. **IN THE CIRCUMSTANCES, APPELLANT'S CONVICTION AND SENTENCE CANNOT STAND, BOTH ARE SET ASIDE**.



BLIGNAULT, J

I agree:

MCDOUGALL, AJ