IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No 397/01
Reportable

JOHANNES MYENI ***APPELLANT***

and

THE STATE ***RESPONDENT***

Coram: HARMS, BRAND JJA et HEHER AJA
Heard: 22 MAY 2002
Delivered: 31 MAY 2002

Criminal procedure – appeal – remittal for further evidence – duty of court hearing application.
Criminal procedure – recall of witness for further cross-examination – refusal – when justified.
Criminal procedure – irregularity – policeman interfering with defence witness – effect.
Evidence - s 227 (2) of CPA – adducing evidence or cross-examining complainant on previous sexual experience – duty of court – when permissible.
Evidence – improperly or illegally obtained – when admitted – real evidence – nature and weight to be accorded.

J U D G M E N T

HEHER AJA/…

***HEHER AJA*:**

[1] The appellant, a trade union organiser, aged 36, was tried in May 1997 before a regional magistrate for the rape of his six year old daughter during 1989. He was convicted and sentenced to 10 years imprisonment. He appealed to the Natal Provincial Division of the High Court, applying at the same time for the remittal of the case for the hearing of two further witnesses for the defence. The application succeeded in April 1998.

[2] In January 1999 the trial reopened. Both witnesses eventually testified. An application by the appellant's counsel for the recall of the complainant for further cross-examination was refused by the magistrate. He convicted the appellant as before and imposed the same sentence.

[3] The Natal Provincial Division dismissed a further appeal but granted leave to appeal to this Court. (The judgment of the Court *a quo* is reported *sub nom S v M* at 2000 (2) SACR 474.)

[4] This appeal concerns alleged irregularities and the merits of the conviction. Before discussing the nature of the irregularities and the circumstances in which they arose, it will conduce to a better understanding if I summarise the evidence as it stood when the application to reopen was granted.

[5] For the State, the witnesses had been the complainant, the complainant's maternal grandmother (Mrs Mbatha) and a district surgeon. The appellant and his sisters Zanele and Siphiwe Myeni testified for the defence.

[6] The complainant was thirteen years old when she gave her evidence in 1997. She told the Court that during 1989 she stayed with her father and her aunt Zanele. Her parents were divorced. Her mother lived in Johannesburg. She and her aunt shared a bed. Every night her father would come and take her, often half asleep, to his own room. There he would have

sexual intercourse with her. She, not having an understanding of what was happening, did not protest although she suffered initial bleeding and severe pain. She estimated the period of such abuse at “more or less six months”. She claimed that she complained several times to her aunt Zanele. This occurred from a few weeks after the abuse started. During 1995 the complainant wrote a letter to her grandmother which contained allegations against the appellant. According to the complainant “when my granny read the letter she also cried and I also cried. Then my granny told my elder aunt. Then my granny did not know how to tell my mother and she was scared to tell my mother, so it just kept quiet like that.” During the school holidays of 1996 the complainant saw an advertisement on television about Child Line. She phoned its number and told a lady that she had been raped and that she did not know how to tell her mother. An immediate call was made to the grandmother (whose telephone number the complainant had furnished).

Eventually the complainant's mother was informed. A charge was laid against the appellant. On 31 July 1996 the complainant was examined by the district surgeon of her home district.

[7] The complainant's grandmother confirmed that the complainant had resided with the appellant during 1989. She identified the letter received by her from the complainant in December 1995 when the complainant was in standard 5. She decided not to contact the complainant's mother who lived far away because she was not sure what her reaction would be. The witness also testified about an incident in 1994 when the complainant who was visiting her became ill. She noticed something amiss with her genitalia and examined the complainant. Her evidence was consistent with the contents of the letter which the complainant wrote to the grandmother and suggests that this incident may have provoked the letter. It is significant that the incident and the letter preceded the laying of a charge by a considerable time.

[8] The evidence of the district surgeon played an important role in the conclusion of the trial Court and on appeal. At the time of his examination of the complainant a history was furnished of sexual assaults on more than ten occasions. He conducted an examination that was painful for the complainant. She had no hymen. He found a chronic irritation of the vaginal walls and hypertrophy (enlargement) due to overgrowth of tissue of the lateral wall of the right labia minora, a condition usually attributable to persistent trauma to the same area, which could have been caused by a penis or sexual abuse. With such an injury intercourse would be painful each time it occurred. He said that he was unaware of any sexually transferable disease which could have caused the condition. Pelvic tissue heals easily. Accordingly, he found it difficult to estimate how long the complainant might have been exposed to abuse or when in relation to his examination that might

have occurred. It was possible that it could have happened as long ago as 1989.

[9] The appellant denied any sexual abuse of the complainant by him although he did not dispute, in general terms, that it had taken place; he was very fond of the complainant and would not have abused her. Asked why the complainant should make such allegations, he gave three reasons: first, his separation from the complainant's mother in 1984 which caused friction between their respective families; secondly, in August 1995 he had called the complainant and told her he was making preparations to pay lobola for one Orella Sithole with whom he was then in love, which caused an angry reaction from the complainant. This was the first sign of a change for the worse in her attitude towards him. He told the complainant he was planning to marry in September 1997 and she, as a result, went to stay with her grandmother. Thirdly, the grandmother harped on the break-up of the

marriage whenever they encountered each other. The appellant alleged that the complainant told him that she was influenced by her mother and grandmother to lay the charge. That, he said, was why he had earlier referred to the friction between the families.

The remittal proceedings

[10] Because I have reached the conclusion that inadequate consideration was given to the remittal application and, in consequence, a lengthy and unnecessary prolongation of the trial resulted, it is advisable to refer at some length to those proceedings. In doing so the fate of this appeal will also become clearer.

[11] The appellant gave notice that an application would be made at the hearing of the first appeal in terms of s 316 (3) of the Criminal Procedure Act 51 of 1977 for the setting aside of the conviction and sentence and the

remittal of the matter to the regional magistrate to hear the evidence of Siphamandla Ngema and Eli Khumbuza.

[12] In his founding affidavit the appellant stated that he had been unaware during his trial that the complainant had a boyfriend. When that came to his notice after he was sentenced the appellant made arrangements to contact the boyfriend (Ngema). Ngema duly made an affidavit in which he stated that he and the complainant used to have sexual intercourse. The appellant also attached an affidavit by Ms Khumbuza in which she confirmed that the complainant had tearfully admitted that she was influenced to incriminate him by her mother and grandmother. He stated that Ngema was not know to him until after the trial and Khumbuza was not available to give evidence at it.

[13] Ngema deposed to an affidavit which was used in support of the application in which he said

'1. I am the student doing standard 9 at Gudu High School, Nqutu district. I was born on the 28th April 1979.

2. I know the Complainant Lungile Myeni and his father Johannes Myeni since 1993.

3. In June 1993 when the schools were closed for winter holidays I saw Lungile Myeni at Mondlo Township and I started to proposed her and we fell in love the same month.

4. At that stage Lungile Myeni was not staying in the Mondlo Township but she was staying at Lakeside Oak Street Vryheid. She used to come to Mondlo Township during the week-ends and holidays.

5. In 1993 I had sexual intercourse with Lungile Myeni once in 1993. She came to my home during the absence of my grandmother and my sister who were staying with me.

6. I continued to have sexual intercourse with Lungile Myeni at my home in 1994, 1995, 1996 until she was taken away by her mother to Johannesburg in 1996.

7. I cannot say how many occasions I had sexual intercourse with Lungile Myeni in 1994, 1995, 1996 but it was at intervals of about three months.

8. I was contacted by Mandla Mtambo who is a student at Gudu High School that the Attorneys for Johannes Myeni wanted to take this Affidavit from me and that I should meet Mr Mkhize at Vryheid Magistrate's Court on the 30 October 1997.'

[14] Whether the State opposed the application is not clear. Probably it did not. The judges who granted the order (Jappie J and Moodley AJ) contented themselves with the briefest of reasons, noting that they had read

the application and were satisfied that the affidavit complied with s 316 (3). (The Court *a quo* also seems to have regarded that section as setting out the applicable law.) In fact s 316 did not authorise the relief which was claimed. That section relates to applications for leave to appeal by an accused who has been convicted of an offence before a superior court. The appropriate legislation was either s 22 (a) of the Supreme Court Act 59 of 1959 or s 304 (2) (b) read with sec 309 (3) of the Criminal Procedure Act: *S v Venter* 1990 (2) SACR 291 (NC) 294 c - d. Although s 316 (3) contains a codification, unamended, of the common law requirements for adducing evidence on appeal or on remittal (*S v Nofomela* 1992 (1) SACR 277 (A) 282 f - h, *S v Dampies* 1999 (1) SACR 598 (O), *S v Venter supra* 295 d – g) the law applicable to the application was the common law to which reference will be made below.

[15] The failure of the Court which heard the application to furnish proper reasons had three consequences. First, the Court did not undertake the practical exercise of applying the law to the facts, which might have illuminated the error in placing reliance on s 316. Secondly, the magistrate was left in the dark as to what, in the eyes of the Court, the relevance was of the new evidence and why the Court deemed it to be relevant. Thirdly, and most important, the Court would have been obliged to spell out its reasons for being satisfied that the appellant had indeed made out a case in terms of the applicable law, an exercise which would probably have dispelled any satisfaction.

[16] As to the power of the Court to remit in order to hear further evidence, Corbett JA said in *S v N* 1988 (3) SA 450 (A) at 458 E – 459 A

'It is a power which the Court exercises only in exceptional cases for:

"It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be reopened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty."

(Per Holmes JA in *S v De Jager* 1965 (2) SA 612 (A) at 613B.) The possibility of the fabrication of testimony after conviction is an ever present danger in such matters (see *R v Van Heerden and Another* 1956 (1) SA 366 (A) at 372H – 373A; *S v Nkala* 1964 (1) SA 493 (A) at 497 H; *S v Zondi* 1968 (2) SA 653 (A) at 655F). For these reasons this Court has in a long series of decisions laid down certain basic requirements which must be satisfied before an application for the re-opening of a case and its remittal for the hearing of further evidence can succeed. These were summarized by Holmes JA in *De Jager's* case *supra* (at 613C – D) as follows:

"(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a *prima facie* likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial."

In an appropriate case this Court has the power to relax strict compliance with the requisite of a "reasonably sufficient explanation" (see (a) above), but it is only in rare instances that this power will be exercised *(S v Njaba* 1966 (3) SA 140 (A) at 143H).

A study of the reported decisions of this Court on the subject over the past 40 years shows that in the vast majority of cases relief has been refused: and that where relief has been granted the evidence in question has related to a single critical issue in the case (as to which see eg *R v Carr* 1949 (2) SA 693 (A); *R v Jantjies* 1958 (2) SA 273 (A); *S v Nkala* (*supra*) and *S v Njaba* (*supra*)*).'*

In *S v Nofomela, supra,* (at 284I) Nienaber JA, dealing in an analogous context, with evidential material which a court might properly make the subject of a remittal, pointed out

'One is here dealing with relevance. "Relevancy is based upon a blend of logic and experience lying outside the law" (per Schreiner JA in *R v Matthews and Others* 1960 (1) SA 752 (A) at 758 A – B). Relevance can never be reduced to hard and fast rules and some allowance must be made for unforeseen and extraordinary cases.'

[17] If the considerations mentioned by the learned Judges of Appeal in *S v N* and *S v Nofomela* had been applied to the application several matters of critical importance to the future conduct of the case must surely have become apparent:

(1) The evidence which Khumbuza could give had been known to the appellant at the time of the trial. In fact he had given evidence under cross-examination which related to the very incident which was the subject of her affidavit. (The Court which heard the application was, of course, the appeal court and it could not properly have decided the application without studying the evidence which had been led at the trial.)

(2) The appellant did not set out any factual basis for his allegation that Khumbuza was not available to attend the trial. Nor did she confirm her non-availability. (In fact, when she eventually gave evidence, she admitted that she had been available but attributed the failure to call her as a witness to a conscious decision by the appellant's attorney.)

(3) The Court was faced with the say-so of the appellant that the witness Ngema was not known to him during the trial, without any explanation as to how he became aware of the witness's existence. His mere word was, however, not sufficient to satisfy the first leg of the test which requires an applicant to set out allegations from which an appearance of truth may be derived. (In fact, the explanation given in evidence by Ngema for his contact with the appellant while latter was in custody pending

appeal was suspect in the extreme and could hardly have satisfied the requirement which had been set up at the application stage.) The judges were, it seems, unconscious of the frailty of which this Court warned in *S v N, supra*.

(4) The contemplated evidence of Khumbuza was entirely neutral to the issue of whether the appellant was the person who raped the complainant. (As the evidence and the judgment of the magistrate revealed, that forced intercourse had been inflicted on the complainant was not in issue by the end of the first trial.) She stated that the complainant had been told by her mother and grandmother to lay the charge. So one would expect in the case of a child. She attached no nuance to the allegations. That the complainant said that she was told the appellant was not her natural father could just as well have meant that mother and

grandmother regarded his assault on his daughter as unnatural. The averment was, in any event, irrelevant to the issue.

(5) The proposed evidence of Ngema that he and the complainant had engaged in a sexual relationship in the years 1993 to 1996 had no bearing on whether the appellant raped the complainant in 1989. On the facts available from the appeal record, casual consensual intercourse of the kind deposed to by Ngema was wholly inconsistent with the physical consequences of sexual abuse identified by the district surgeon.

(Points (4) and (5) illustrate that the application failed to demonstrate the material relevance of the evidence of either witness to the identification of the appellant as the assailant.)

(6) The purpose of adducing the evidence of Ngema could only be to attack the credibility or character of the complainant. However,

as Du Toit *et al, Commentary on the Criminal Procedure Act,* 24-100A, note, 'conventional wisdom' in relation to the common law is that -

'the accused may not lead evidence of the complainant's acts of misconduct with other men (see *R v Adamstein* 1937 CPD 331) unless those acts have a relevance to an issue other than by way of character, but such acts may be put to her in cross-examination, since they may be relevant to her credibility. It is true that such evidence will usually be irrelevant to the substantive issues confronting the Court; but not always.'

Faced with that statement of the common law, the Court must necessarily have experienced difficulty in allowing the application to reopen to in order to call Ngema. But the position would have become even clearer if the Court had considered s 227 of the Criminal Procedure Act which, since 1989, has provided that

'(2) Evidence as to sexual intercourse by, or any sexual experience of any female against or in connection with whom any offence of a sexual nature is alleged to have been committed, shall not be adduced, and such female shall not be questioned regarding such sexual intercourse or sexual experience, except with the leave of the Court, which leave shall not be

granted unless the Court is satisfied that such evidence or questioning is relevant: Provided that such evidence may be adduced and such female may be so questioned in respect of the offence which is being tried.

(3) Before an application for leave contemplated in subsection (2) is heard, the Court shall direct that any person whose presence is not necessary may not be present at the proceedings, and the Court may direct that a female referred to in subsection (2) may not be present.'

The members of this Court are not aware of any instance where s 227 (2) has been applied in this country. It seems likely that it is more honoured in the breach than in the observance. Since it requires of the courts that it be applied in the manner in which it was no doubt intended namely to militate against offensive, hostile and irrelevant questioning of complainants without thereby diminishing a full and just investigation of the real issues in the case, it may be as well to make certain comments concerning the proper application of the section.

So-called “rapeshield” legislation, as s 227 (2) is, has been passed in many jurisdictions *inter alia* the United States, the United Kingdom, Canada, New Zealand and the Australian States. Ligertwood, *Australian Evidence*, 3rd ed 165 summarizes what appears to be the common background to such enactments:

‘Cross-examination is normally permitted on grounds of relevance, either to the issues in the case, or to determining the witness’s general creditworthiness. Courts have allowed cross-examination of a victim regarding past sexual history on both grounds. It is worth noting at the outset that, where the cross-examination is of relevance to the issues in the case, matters raised in cross-examination may be taken further by the defence and made the subject of separate and perhaps contradictory evidence called as part of the accused’s case. On the other hand, matters of general creditworthiness are regarded as collateral matters which cannot be pursued beyond cross-examination. The witness’s answer is final.

The difficulty is in determining when sexual experiences are relevant, either to the issues or to the general creditworthiness of the victim. Controversy has arisen because (male) common law judges have allegedly been all too willing to allow the (female) victim’s previous sexual character to be revealed, most often in cross-examination. In consequence, victims wanting to prosecute their assailants have had to be prepared to subject themselves to the ordeal, at both committal and trial, of a long and searching cross-examination on their sexual experiences and attitudes.

Needless to say, the potential humiliation and embarrassment of this ordeal, whereby the victim is effectively also put on trial to defend her moral character, has discouraged victims from prosecuting their assailants. This controversy has led to legislative protection against gratuitous revelation of a victim's character.'

Section 227 (2) is in substantially the same terms as s 2 (1) of the English Sexual Offences (Amendment) Act 1976. In *Rex v Viola* 1982 (3) All ER 73 (CA) at 77 Lord Lane CJ said of s 2

'Having said that, [that it is wrong to speak of the exercise of a discretion in the context] when one considers the purpose which lay behind the passing of the 1976 Act, as expounded by Roskill LJ [in *R v Mills* (1979) 68 Cr App R 327], it is clear that it was aimed primarily at protecting complainants from cross-examination as to credit, from questions which went merely to credit and no more. The result is that generally speaking (I use these words advisedly, of course there will always be exceptions) if the proposed questions merely seek to establish that the complainant has had sexual experience with other men to whom she was not married, so as to suggest that for that reason she ought not to be believed under oath, the judge will exclude the evidence. In the present climate of opinion a jury is unlikely to be influenced by such considerations, nor should it be influenced. In other words questions of this sort going simply to credit will seldom be allowed. That is borne out by the cases to which we have been referred, not only those which I have cited, but other unreported cases which have been before this Court, to which perhaps it is not necessary to make reference.

On the other hand, if the questions are relevant to an issue in the trial in the light of the way the case is being run, for instance relevant to the issue of consent, as opposed merely to credit, they are likely to be admitted, because to exclude a relevant question on an issue in the trial as the trial is being run will usually mean that the jury are prevented from hearing something which, if they did hear it, might cause them to change their minds about the evidence given by the complainant. But, I repeat, we are very far from laying down any hard and fast rule.

Inevitably in this situation, as in so many similar situations in the law, there is a grey area which exists between the two types of relevance, namely relevance to credit and relevance to an issue in the case. On one hand evidence of sexual promiscuity may be so strong or so closely contemporaneous in time to the event in issue as to come near to, or indeed to reach the border between mere credit and an issue in the case. Conversely, the relevance of the evidence to an issue in the case may be so slight as to leave the judge to the conclusion that he is far from satisfied that the exclusion of the evidence or the question from the consideration of the jury would be unfair to the defendant.'

(Although the restriction on the judge giving leave to adduce evidence or ask questions only if he is satisfied that it would be unfair to the defendant to refuse to allow the evidence to be adduced or the question to be asked, is not included in our Act as it was in s 2(2) of the English statute, such a consideration is, no

doubt, a matter to be taken into account in the exercise of a proper judgment on s 227(2).)

The *dictum* of Lord Lane applies with equal force to s 227 (2).

With regard to the learned judge's reference to a 'grey-area" it has subsequently been stressed that although the dividing line between issue and credibility is often extremely fine, the distinction needs to be kept in mind in order to preserve clarity of thought and accuracy of judgment: *R v Funderburk* 90 Cr App R 466; Archbold, *Criminal Pleading Evidence and Practice* 1998 para 20 – 43; *Phipson on Evidence* 15 ed para 19 – 40. There was apparently reason to doubt whether s 2 achieved its aims. See Louise Ellison, *Cross-examination in Rape Trials* 1998 CLR 605. The section has now been replaced by ss 41 – 43 of the *Youth Justice and Criminal Evidence Act* 1999 which further

limits the right to adduce evidence and cross-examine complainant in sexual cases. See *Phipson on Evidence op cit* at para 19 – 29 *et seq.*

In Canada, s 276 of the Criminal Code sets out specific aspects which a court is obliged to take into account in determining admissibility of evidence relating to sexual activity of a complainant. See the discussion in Martin's *Annual Criminal Code* 2000 at CC / 510 *et seq*. These aspects are

'(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law;

(h) any other factor that the judge, provincial court judge or justice considers relevant.'

These are matters which would *mutatis mutandis* be proper for a South African court to consider in judging the admissibility of evidence under s 227 (2) in our constitutional dispensation even in the absence of specific statutory prescriptions. It can be noted that if the trial Court had applied tests of this nature (over and above a plain enquiry as to relevance) the evidence of Ngema could hardly have been admitted.

The South African Law Commission published *Discussion Paper* 102 relating to Project 107, '*Sexual Offences : Process and Procedure*' in December 2001. Chapter 32 concerns '*Evidence of the Previous Sexual History of the Complainant'* and surveys the state of law directed to similar ends as those of

s 227 in many other jurisdictions. In their evaluation the researchers conclude (at 501) that s 227 has to some extent failed of its purpose and that '[t]he unfettered discretion given to presiding officers to determine the admissibility of such evidence on the broad and subjective basis of relevance seems to be a large part of the problem'. Accordingly they propose that s 227 be amended 'to clearly delineate the circumstances under which evidence of previous sexual history may be adduced'. In the draft amendment a subsection is included which provides that a court shall grant an application to adduce evidence of or put questions about previous sexual experience or conduct of a complainant if it is satisfied that such evidence or questioning –

'(a) relates to a specific instance of sexual activity relevant to a fact in issue;

(b) is likely to rebut evidence previously adduced by the prosecution;

(c) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant where it is relevant to a fact in issue; or

(d) is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or

(e) is fundamental to the accused's defence.'

Whether or not the proposal becomes in due course the subject of legislation, the matters identified must, even in the present state of the law, be regarded as considerations of great importance in arriving at a properly-considered judgment on admissibility in terms of s 227 (2). The proposed evidence of Ngema would have not been admitted after due regard to any of these considerations either.

It follows that I agree with Du Toit *et al, op cit* at 24-100B that in deciding whether to allow evidence of such a nature,

'several … policy concerns which militate against admissibility … must be taken to the balance. These include the need to protect witnesses from hurtful, harassing and humiliating attacks, the recognition of a person's right to privacy in the highly sensitive area of sexuality and the realisation

that the exposure of their sexual history may deter many victims of sexual offences from testifying.'

One is here dealing with an issue which requires of a trial Court great sensitivity and about which strongly conflicting views may be held. See eg *Sexual History Evidence – The Ravishment of Section 2* by J Temkin [1993] Crim LR 3. There is a responsibility on practitioners and the courts to uphold the spirit of the legislation. In the case with which we are concerned, all appreciation of the statutory requirements and niceties seems to have escaped the trial Court. The evidence of Ngema served no purpose other than the impermissible one of destroying the complainant's credit.

But, unless Ngema's proposed evidence could be said to be relevant in the sense of tending of itself or in combination with other facts to prove or disprove the identity of the assailant, *R v*

Katz & Another 1946 AD 71 at 78, having regard to logic and common sense, *R v Matthews*, *supra loc cit*, the trial Court would not have been empowered to admit it and the application for remittal had to fail. That it was not relevant in that sense was clear from a reading of Ngema's affidavit with the evidence which had already been led.

[18] For all the reasons set out in the preceding paragraph the matter should have been stopped in its tracks at the application stage.

[19] The fact is that the trial was reopened. Section 227 (2) has, however, an even more fundamental effect on what happened subsequently. The evidence which the defence proposed to adduce from Ngema could only be admitted with the leave of the trial court if that court was satisfied of its relevance. However, when the trial was reopened no application was made to the magistrate under the section and the evidence was led without demur or

apparent consideration of its relevance. Perhaps he felt bound by the remittal, but the decision in terms of s 227 was his alone, notwithstanding any implication which may have flowed from the order or remittal.

Having regard to the force of the prohibition, its purpose, the public policy involved, and the manifest absence of relevance, I consider that the proper approach at this stage would be to rule that the whole of Ngema's testimony was wrongly taken and should regarded as struck from the record. That effectively disposes of a substantial part of the appeal. Since, however, this point has been reached before even touching upon the reasoning of the two previous Courts and the arguments addressed to us in the appeal, it seems fair to give consideration to those aspects.

The irregularities relied on in the appeal.

[20] I propose to deal first with the alleged irregularities which occurred before and during the reopened trial. When the defence led the

evidence of Ngema at the reopened trial the witness testified that on 11 August 1998 he had been arrested at school by Captain Zwane, the investigating officer in the rape case, apparently on a charge of having sexual intercourse with the complainant, a girl under the age of sixteen years. Zwane showed Ngema a copy of his statement which had been used in support of the application and asked him to identify it, which the witness did. Zwane then told the headmaster that bail would be fixed at R4 000. He took the witness to the police station. There he told him that the statement which he had made had been wrong and instructed him to write out another statement. He threatened the witness with 40 years in custody if he did not comply. He did not tell the witness how he was to change the statement. Ngema refused. Zwane then took him to his grandmother. He informed her that he was arresting the witness for the offence of having intercourse with the girl under the age of 14 years (*sic*). He instructed her to come to the police station

before the witness made a statement. She did so. Zwane once again (apparently in her presence) ordered Ngema to make a statement, telling him that he had asked the complainant about the witness and she had denied knowing him. Furthermore, he threatened that if Ngema did not want to tell the truth he would lock him up and thereby prevent him from writing his school examinations. Zwane asked his grandmother whether she had R10 000 for bail. When she replied that she did not, the witness decided to change his statement. Zwane then took down the new statement. The second statement, Ngema said in evidence, was false while the first contained the truth. The statements were handed in as exhibits.

[21] Ngema's evidence concerning the genesis of the second statement was not challenged by the prosecutor in cross-examination. Captain Zwane was not called in rebuttal.

[22] During the course of the evidence of Ngema the prosecutor asked, "Is it correct, Mr Ngema, that you received a letter from the accused?" He received a positive reply from the witness. The prosecutor produced the letter, but, before he could show it to the witness, the appellant's counsel intervened

'No, Your Worship, before the letter is handed [in], may the Court make a ruling whether the letter that was obtained in the circumstances sketched by the accused (*sic*) is admissible as evidence … Whether the letter that was obtained when the IO had arrested the defence witness is admissible as evidence …'

Before taking up the objection, the magistrate allowed the witness to identify the letter and received it as an exhibit. Counsel, asked to clarify the grounds of his objection, said

'My problem, Your Worship, I have outlined it, whether on the evidence that has been sketched by the defence witness … that the defence witness was arrested and interrogated by Zwane, and hence certain exhibits and statements were obtained from him, whether those statements and exhibits are admissible.'

The record continues

'MR MKHIZE It is my submission, Your Worship, that what Captain Zwane did was grossly irregular and any evidence that was obtained from the defence witness was obtained illegally, and that evidence should not be placed on record … (indistinct)

COURT Yes. I cannot see how the evidence was obtained irregularly because the Captain investigated the matter where a person was admitting that he had sexual intercourse with a girl under the age of the prescribed age and he then investigated that matter, and during the course of that investigation certain information came to light. I do not think it is inadmissible. The letter is allowed.

MR MKHIZE Your Worship, I'm not aware of any case that was investigated.

COURT Well … (intervenes)

MR MKHIZE In fact my instruction was that the complainant had not laid any charge against … (intervenes)

COURT Well, he investigated what the – he investigated what is ***prima facie*** an offence, not so?

MR MKHIZE But my understanding is that if … (intervenes)

COURT Yes, sorry, Mr Mkhize. I received a statement by this witness, your client, the defence witness, that an offence ***prima facie*** was committed. He investigated that matter, and he obtained certain information during the course of that investigation. Whether the witness was charged or not is irrelevant at this stage.

MR MKHIZE But I … (intervenes)

COURT At this stage the policeman merely investigated a ***prima facie*** case against him.

MR MKHIZE I … (intervenes)

COURT He has not yet been charged. If he was charged, thereafter the evidence can then become inadmissible at a subsequent trial, but as far as this witness is concerned, it is not inadmissible because it was obtained during an investigation by the investigating officer.

MR MKHIZE But I hold a different view of that. The defence witness was a witness for the defence.

COURT Yes.

MR MKHIZE And if the State or the policeman wanted to interview any witnesses that the defence has disclosed to the State, rules of justice requires that the defence must be alerted and if the defence requires that they should be present, they should be present during the interrogation of their witnesses. My – I don't think that it was – there was a ***prima case*** case or ***prima face*** … (intervenes)

COURT I don't know what he said in his statement. I assume that what he said in his statement that was before the High Court was that he admitted that he had sexual intercourse with the complainant.

MR MKHIZE Your Worship … (intervenes)

COURT At that stage – I haven't – no statement was handed in here as far as I can remember.

MR MKHIZE Yes, they were handed in.

COURT Was it handed in?

MR MKHIZE Yes

COURT Not in this trial. Not in this trial.

MR MKHIZE Your Worship, last time … (intervenes)

COURT I don't have any statement to that effect.

MR MKHIZE I handed in the application … (indistinct) that was done in the High Court.

COURT I haven't got it here. Sorry. It was not formally … (intervenes)

MR MKHIZE And on the .. (intervenes)

COURT It was not handed to me. It was not handed to me. It was not formally handed to me. It does not form part of these proceedings before me.

MR MKHIZE As the Court pleases, Your Worship. May I hand in the … (intervenes)

COURT Well, no, Mr Mkhize, you're now trying to confuse the issues. I'm now dealing with your objection. Your objection is over-ruled.

MR MKHIZE As the Court pleases.

COURT You can then, if you want to – or you should have, when you led this witness' evidence, handed in all those statements because it was obtained during the – the objection is over-ruled. Yes, continue, please.

PROSECUTOR Read – can you please read the contents of that statement into the record?

COURT Can I just make one further point clear to your, Mr Mkhize, and that is that the admissibility of this document pertains to your client, or otherwise, not to the witness. How the policeman obtained this evidence is irrelevant at this stage. Okay. Yes, very well. Can you continue, please? Read it into the record.'

[23] The ruling on the admissibility of the letter was made somewhat summarily. It was provisional and could have been reversed by the magistrate if good reason were adduced later in the trial. Unfortunately, the defence counsel (aside from the incorrect statement that the evidence had shown that "certain exhibits" had been obtained from the witness by Zwane in the course of interrogation) made no attempt to place any facts before the magistrate concerning the procurement of the letter by the State, whether by agreement with the prosecutor or in re-examination of the witness.

[24] After the conclusion of the evidence of the witness Ngema, the record (which was reconstructed, the relevant tape having gone astray) reflects that the appellant's counsel made an application that the complainant be re-called for further cross-examination. He apparently used as grounds for this application the new evidence which had been led since the complainant had testified and in respect of which no questions had been put to her during

her original evidence, and the need to clarify various issues which had arisen during the course of the additional evidence. There is some indication that he intended to cross-examine generally. Be that as it may, the magistrate refused the application for the surprising reason that "nothing new has come to light".

[25] The evidence of Ms Khumbuza given at the reopened trial does not require careful analysis. In essence she confirmed the substance of her affidavit. The words which she attributed to the complainant when the appellant asked her why she had laid a charge against him were "My mother and my grandmother said I must lay a charge against you, and you are not my father". The magistrate found, rightly, in the view of the Court *a quo*, and in my assessment, that the evidence of Khumbuza was entirely neutral. It is therefore unnecessary to say more about it in the context of this appeal.

[26] The evidence of the witness Ngema was, by contrast, anything but neutral, albeit that it was also irrelevant. In substance it reflected his affidavit, although it contained some discrepancies which are not of consequence to the appeal. After the magistrate overruled his counsel's objections to the admissibility of the letter received by the witness from the accused, the accused was cross-examined by the prosecutor. The circumstances of its receipt and its content were explored.

[27] It was the submission of appellant's counsel that the trial of his client was unfair by reason of one or a combination of the following irregularities:

1. The arrest, detention and interrogation of Ngema by the investigating officer and the coercion on him to change his statement.
2. The admission by the trial court of the statement obtained by the investigating officer from the defence witness as a result of threats.
3. The admission by the trial court of the letter found in the possession of the witness obtained during or in consequence of an illegal interrogation.

4. The refusal of the magistrate to allow the complainant to be recalled for further cross-examination at the close of new evidence.

The effect of the irregularities was, counsel submitted, mortal to the State case. *S v Ramalope* 1995 (1) SACR 616 (A) 621 g – 622 b. Should the Court find that the irregularities were insufficient to vitiate the proceedings, the evidence untainted by the irregularities fell short of proving guilt beyond a reasonable doubt. There was accordingly a failure of justice. *S v Felthun* 1999 (1) SACR 481 (SCA) 485i - 486a and the authorities there cited.

[28] It will be convenient to deal with the first two grounds of irregularity together. The overall conduct of the investigating officer towards the witness Ngema represented a gross and reprehensible departure from the standards of fairness which the common law recognises and the Constitution guarantees to an accused person. The conduct of the policeman leaves little doubt that the arrest of the witness, lawful though it may have been, was a stratagem in the process of intimidating him with the object of procuring at

least a retraction of his statement. The freedom of witnesses from interference, whatever side they may take, is a keystone in the temple of justice. Without it the structure would disintegrate. The police, above all, should preserve its integrity as their own function would become frustrated by its violation. No authority is needed for this insistence. Indeed there seems to be no case directly in point in this country, but some guidance may be obtained from *R v Manda* 1951 (3) SA 158 (A), a much weaker case on the facts than the present. Schreiner JA said (at 166 H – 167 C)

'At the preparatory examination the appellant was asked if he wished to have any witnesses subpoenaed under the provisions of sec. 244 (2) of Act 31 of 1917. He gave the names of three witnesses and in the case of two of these the police then took statements from them which were available to the Crown for cross-examination. This should not have been done. It is of course in general the duty of the police to collect all the available evidence that may throw light on the commission of an offence and this Court would certainly not wish to raise obstacles to the due fulfilment of that duty. But statements should not be taken from persons whose ability to give relevant evidence is only discovered as a result of an application by an accused person for the assistance provided by sec. 244 (2). That section is an important aid in the proper administration of justice and accused persons should not be deterred from resorting to it at the stage of the preparatory examination through fear that their witnesses will go into the box handicapped by their having given statements to the police which may not necessarily contain full and accurate accounts of the evidence that they are prepared to give.'

See also *Madumise v Motorvoertuigassuransiefonds* 1983 (4) SA 207 (O) and *S v Mangcola* 1987 (1) SA 507 (C).

[29] The behaviour of Captain Zwane in this case appears to have been so at odds with his duty that one must express the hope that the authorities will embark on an appropriate enquiry if they have not already done so. The degree of undermining of the witness which occurred, if one were to assume that his evidence was material to the fate of the prosecution, was such as would, in the absence of very strong countervailing features, substantially nullify the accused's right to a fair trial by its severe violation of his right to adduce and challenge evidence. In the light of this very obvious irregularity the magistrate was surprisingly muted. However, the magistrate did not again refer to the statement or the contradictions between it and the statement in the remittal application. His finding that Ngema was a deliberate liar, set up to pull a red herring across the record, derives from

problems with his evidence unrelated to Captain Zwane's machinations (save in relation to the letter which the witness received from the accused and to which I refer below). This was also the approach adopted by the Court *a quo*. The two previous courts were justified in the approach which they adopted.

[30] Turning to the third irregularity, no foundation was laid by counsel in support of his objection to the admission of the letter received by Ngema from the accused. Albeit that the magistrate ruled, somewhat summarily, that the letter was obtained in the course of an investigation into the offence of a statutory rape and was therefore admissible, his ruling was interlocutory and always open to challenge by the defence after laying a proper basis. But, as I have pointed out before, defence counsel did not seek to lead the witness in re-examination on the circumstances in which the State obtained possession of the letter and the ruling stood. The magistrate did not refer to the matter in his judgment. He did (with justification) use the letter to

establish the origin of Ngema's witness statement. This was instrumental in fragmenting the witness's credibility, and, if the letter was improperly admitted, must have had a substantial negative impact on the fairness of the trial. The Court *a quo* gave no separate attention to the admissibility of the letter. It seems to have assumed that it was tainted by the improper interrogation. After a review of the authorities the Court concluded that it had a discretion to exclude evidence improperly obtained, referring to s 35 (5) of the Constitution, *Lawrie v Muir* 1950 SC (J) 19 at 26, *Kuruma, Son of Kaniu v Reginam* [1955] 1 All ER 236 at 239, *S v Mushimba and Others* 1977 (2) SA 829 (A) at 840 B, *S v Hammer and Others* 1994 (2) SACR 496 (C), *S v Motloutsi* 1996 (1) SA 584 (C) and *S v Naidoo and Another* 1998 (1) SACR 479 (N). To these may be added *S v Mkhize* 1999 (2) SACR 632 (W) and a thought-provoking article '*Exclusion of Evidence Illegally or Improperly obtained'* by G L Davies in the Australian Law Journal, Vol 76

(2002) 170. There is no doubt that such a discretion exists based, at common law upon a proper balancing of the competing interests so clearly identified in *S v Hammer, supra*, and under the Constitution, upon the question of whether admission would or would not offend the constitutional guarantee of the right to a trial conducted in accordance with notions of basic fairness and justice inherent in civilized systems of criminal administration. *Key v Attorney-General, Cape Provincial Division and Another* 1996 (4) SA 187 (CC) at paras [11] to [13]. In the words of section 35 (3), evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. I have already referred to the dearth of evidence explaining how the State came into possession of the letter. That it was obtained in violation of a constitutional right of the witness is, in the circumstances, no more than speculation.

[31] Real evidence which is procured by illegal or improper means is generally more readily admitted than evidence so obtained which depends upon the say-so of a witness (see eg *R v Jacoy* (1988) 38 CRR 290 at 298) the reason being that it usually possesses an objective reliability. It does not "conscript the accused against himself" in the manner of a confessional statement (*R v Holford* [2001] 1 NZLR 385 (CA) 390). The letter in this case can be classified as real evidence of a documentary nature (notwithstanding the doubts which the Court *a quo* expressed). Real evidence is an object which, upon proper identification, becomes, of itself, evidence (such as a knife, photograph, voice recording, letter or even the appearance of a witness in the witness-box). Schmidt, *Bewysreg* 4 ed 326, Hoffman, *The South African Law of Evidence* 4 ed 404, *Cross & Tapper on Evidence* 8 ed 48. The letter was identified as having been written by the appellant. It was produced and admissible as an object for examination by the magistrate in

order to establish that it provided the origin of the evidence given by the witness, irrespective of the truth of its contents. It predated the threat and owed nothing to it. Its reliability was beyond question. There cannot be the slightest doubt that it contained an attempt by the appellant to suborn the witness and that it was the very genesis of his witness statement and subsequent evidence. Its value as evidential material in the context of this case was substantial. No privilege attached to the communication or its possession by the witness. The constitutional rights of the appellant could not conceivably have been infringed no matter how it came into possession of the authorities. By sending the letter the appellant exposed it to the vagaries of fortune with the inherent risk that it would fall into (what he would have regarded) as the wrong hands or that the addressee would disclose its contents to the authorities. Whatever steps may be justified against the police arising from the manner of its procurement, that it was improperly obtained from the

third party does not in the circumstances of this case bear adversely on the fairness of the trial of the appellant. In so far as there exists a residual common law power in the court to exercise a discretion to exclude evidence improperly obtained, the facts to underpin such an exercise are absent. More particularly, one is unable to find that any conduct of Captain Zwane was consciously directed to finding or obtaining possession of the letter. Nor can it be suggested that the admission of the letter provides tacit approval or encouragement of improper conduct by the police. I find therefore that the Court *a quo* erred in excluding reliance on the letter sent by the appellant to Ngema. Its admission destroys the credibility of the witness and reflects badly on the appellant.

[32] The final ground of irregularity relied upon relates to the refusal of the magistrate to recall the complainant for further cross-examination. The evidence of Ngema related to matters peculiarly within the knowledge of the

witness and the complainant. In most circumstances there could be no question of disbelieving the witness or finding his evidence false unless the salient features of his testimony had been put to the complainant and rebutted by her in a manner so satisfactory as to enable the court to make a finding beyond a reasonable doubt. Compare *S v M* 1970 (3) SA 20 (RAD), where the facts were comparable to those of the present case and the court held that a failure of justice had occurred and, finding that it would not be proper to remit the case for a second time to the magistrate, quashed the conviction. The distinguishing feature of that case is, however, the finding (at 24A) that the story told by the crucial witness called in the remitted proceedings did not appear on the record to be so inherently improbable as to justify its rejection out of hand as false beyond a reasonable doubt. In the present case the magistrate did find that the witness was so plainly dishonest that it was unnecessary to trouble the complainant further and the Court *a quo* agreed. It

followed that there was no need to recall the complainant for further cross-examination. The record fully justifies that finding. I also agree with the conclusion with the conclusion of the Court *a quo* that there was not the remotest possibility that the complainant would have agreed that she had a relationship with the witness. Indeed the witness himself conceded as much. An alternative approach would have been to apply s 227 (2) of the Criminal Procedure Act: leave to recall the complainant for questioning about Ngema's allegations could not have been granted unless the court was satisfied that the questioning would be relevant; the court could not have been satisfied on that matter and the application to recall the complainant had to fail - even if the complainant had been recalled and had admitted the relationship with Ngema it would have taken the accused's case no further; if she had denied it, there was no way of testing her veracity since she could not

be cross-examined on her denial. It follows that the magistrate did not misdirect himself in refusing to recall the witness.

[33] One other consideration bears mention in relation to the possible recall of the witness. The magistrate was there to ensure that justice was done in the broadest possible sense. That involved not only fairness towards the accused but also towards witnesses, especially a vulnerable witness like the complainant. When her recall was sought it would, I think, have been a proper consideration to weigh in the balance that the complainant should not be subjected a second time to the indignity of having her private life laid bare unless there was a real prospect that the interests of justice would be served by her recall.

Failure of justice?

[34] One may now consider whether a failure of justice resulted from the one irregularity which has been identified.

[35] As I have been at pains to show, all the new evidence was, at the time of the first appeal, demonstrably irrelevant to the real issue. During the second stage of the trial nothing was placed before the magistrate which enhanced its value. That stage was discrete in the sense that it followed the original conviction and, being irrelevant, the evidence stood independent of the foundation of the conviction. In these circumstances a substantial irregularity in relation to the second stage would only in the most exceptional circumstances influence the preceding stage and thereby effect a failure of justice. No such circumstances arose in this instance.

[36] In any event, the evidence of Ngema was flawed by very serious improbabilities. He told of occasional consensual intercourse, but, even allowing for the extreme youth of the complainant, such occurrences were inconsistent with the trauma to her private parts which was described by the district surgeon. If consensual intercourse was not the cause then the injuries

must have been present before or in the course of such relationship as Ngema may have had with the complainant. But her physical condition, both as observed by her grandmother and in the sensitiveness of her organs on examination by Dr Gumbi, was wholly inimical to willing participation by either party. The age of the complainant in 1993 militates strongly against the likelihood of an acceptance by her of the proposal of love just as it renders far-fetched an objection by the complainant that she was already engaged in a 'love affair'. The explanation offered by Ngema for discussing his affair with the accused in jail was also fanciful. There was no apparent connection between the detention of the appellant and the affair (if it occurred) and, even if there had been, it is unlikely that the witness would have thought it necessary or expedient to disclose it in the interests of the appellant to whom he owed nothing. One is bound to conclude that no true explanation was furnished for the contact made between the appellant and the witness. The

witness was also shown directly to have been dishonest concerning whether his relationship with the complainant extended into 1996.

[37] The improbabilities to which I have referred are in their totality only consistent with a untruthful witness. The result is that, even in the absence of the letter, the witness added no strength to the case of the appellant. With the assistance of the letter the already strong suspicion that he was procured by the appellant to give false evidence becomes a certainty. Accordingly no failure of justice flowed from Captain Zwane's improper interference with the defence witness.

The merits of the conviction

[38] On the facts of this case there is no room for *bona fide* error or an over-vivid imagination. The rape of the complainant is a given. The only question relates to the identity of the assailant. Likewise the necessary implication from the facts is that the complainant either spoke the truth or

deliberately and falsely implicated her father in the crime. The magistrate had the benefit of observing the complainant. He found her to be both intelligent and honest. The record reflects the correctness of that impression. While no onus rests upon an accused person in respect of the motive of a complainant, the appellant in this case did offer three reasons for the enmity of his daughter. None of them bears examination. There is no indication of vindictiveness in her testimony, indeed it appears from the evidence of Khumbuza that the complainant, confronted by her father, was openly distressed at having to accuse him. It is so that, taken on its own, no grounds existed for the rejection of the appellant's evidence. But the right approach was not to take it in isolation but rather to examine it in the context of the whole case in order to determine whether it could stand. Judged in this light, the appellant has failed to establish that the courts below erred in their conclusion that the case had been proved beyond a reasonable doubt.

[39] The appeal is accordingly dismissed.

J A HEHER
ACTING JUDGE OF APPEAL

CONCUR:

HARMS JA
BRAND JA