REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

In the matter between: Case No: CA 73/2011

AZOLA ADAMS **Appellant**

And

THE STATE **Respondent**

Coram: **Chetty, Dawood and Goosen JJ**

Date Heard: **4 June 2012**

Date Delivered: **25 June 2012**

Summary: ***Criminal Law*** *– Rape – Multiple counts – Complainants all young women – forced at knifepoint into shack and raped – Appellant positively identified – DNA evidence conclusive*
Sentence *– Life imprisonment only appropriate sentence –* ***Appeal*** *against conviction and sentence dismissed*

JUDGMENT

Chetty, J

[1] During the early morning of 26 September 2009, three young ladies, Ms *Yonela Magushana*, Ms *Vuyokazi Bobotyane* and Ms *Andiswa Xolo* aged 14, 18

and 16 respectively were accosted whilst walking along a street in Mlungisi township, Queenstown, by two young men, one of whom brandished a knife and commandeered them into a shack along the side of the road. It is not in dispute that all three were raped in the shack and that the appellant and his erstwhile co-accused, Mr *Tobela Mchitheka,* were subsequently arrested. In due course they were arraigned for trial before Hartle J on three counts of rape in contravention of section 3, read with sections 1, 56(1), 58, 59, 60 and 68(2) of the **Criminal Law (Sexual Offences and Related Matters) Amendment Act**[1]. The appellant pleaded not guilty to each of the charges preferred against him and raised an alibi defence. After the adduction of evidence from the complainants, other witnesses called by the state and the appellant himself, the court below convicted the appellant on counts 1, 2 and 3 and sentenced him to imprisonment for life in respect of each count. This appeal, with leave of the court below, is directed against the convictions and sentences imposed in respect of each of the counts as aforesaid.

[2] The conviction was assailed on two distinct bases – firstly, on the ground that the evidence adduced identifying the appellant as one of the assailants was so unreliable as to warrant its rejection and secondly, that the DNA evidence merited a similar fate. In argument before us, appellant's counsel felt constrained to make no submissions from the bar *qua* the conviction, relying entirely on the argument advanced in the heads and concentrated on the appropriateness of the sentences imposed. Counsel's reticence is readily understandable – there is no

[1] Act No, 32 of 2007

basis, save for one aspect which I shall in due course revert to, upon which the judgment of the court below can be faulted. The appellant was positively identified by all three complainants, albeit, in the case of Mss *Xolo* and *Magushana*, during a dock identification. Nonetheless, during the protracted time they spent with him and his cohort in the confines of the shack, they had ample time to make a positive identification. It is also common cause that they saw him at the police station following his arrest later the same evening. Ms *Bobotyane's* evidence that she attended the same school as the appellant was confirmed by him. Her testimony concerning her knowledge of the appellant's history was convincing and the trial court's factual finding that the appellant was one of their assailants is, to repeat, not open to attack.

[3] The DNA evidence, so counsel proclaimed in her heads, should have been disregarded, given the fact that firstly, neither the appellant nor his co-accused's legal representative were afforded the opportunity to object to the handing in of the forensic affidavit, exhibit H, pursuant to the provisions of section 212 of the **Criminal Procedure Act**[2] (the Act) and, secondly, the unsatisfactory features in the "chain evidence". The argument advanced is untenable. The DNA report compiled by Colonel *Charlene Otto* was introduced as evidence by Mr *Mdolomba* during the concluding stages of the state's case utilizing the mechanism sanctioned by section 212(4)(a) of the Act. It provides as follows –

[2] Act No, 51 of 1977

> "(4)(a) Whenever any fact established by any examination or process requiring any skill –
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> (i) in biology, chemistry, physics, astronomy, geography or geology;
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> (ii) in mathematics, applied mathematics or mathematical statistics or in the analysis of statistics;
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> (iii) in computer science or any discipline of engineering;
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> (iv) in anatomy or in human behavioural sciences;
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> (v) in biochemistry, in metallurgy, in microscopy, in any branch of pathology or in toxicology; or
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> (vi) in ballistics, in the identification of finger prints or palm prints or in the examination of disputed documents,
>
> is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State or a provincial administration or is in the service of or is attached to the South African Institute for Medical Research or any university in the Republic or any other body designated by the Minister for the purposes of this subsection by notice in the *Gazette*, or that he or she has established such fact by means of such an examination or process, shall upon its mere production at such proceedings be *prima facie* proof of such fact: Provided that the person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall *mutatis mutandis* apply with reference to such certificate."

[4] Prior to the contents of the report being read into the record, the learned judge enquired from the parties whether the report was being handed in with the consent of all concerned. Mr *Mdolomba's* retort, that the statement was being handed in pursuant to the provisions of section 212(4)(a), elicited no response

from either of the defence representatives. It scarcely behoves the appellant to now contend that he was not afforded an opportunity to "respond", whatever that might mean. Section 212 explicitly provides for the reception of affidavits and certificates on production by the state as *prima facie* proof of their contents and although the section thereby facilitates the production of evidence, it does of course not relieve the prosecution of proving its case beyond a reasonable doubt. To meet the challenge posed by section 212, counsel for the appellant urged us to attach no weight whatsoever to the *Otto* report by reason of an alleged hiatus in the so-called chain of evidence.

[5] In her seminal work, ***DNA in the Courtroom, Principles and Practice***, the learned author[3] correctly refers to the chain evidence as the chain of custody and categorises it as follows –

> "The chain of custody requirement has two objectives:
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> (a) The first is to lay a proper foundation connecting the evidence to the accused or to a place or object that is relevant to the case.
>
> (b) The second purpose of the chain of custody for physical evidence is to ensure that the object is what its proponent claims it to be.
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> These are accomplished by ruling out any tampering with, and substantial alteration or substitution of, the evidence. If the

[3] Lirieka Meintjies-van der Walt

> substance analysed for the presence of DNA has been tampered with or altered in a substantial way, it becomes, in effect a substance different from the one originally seized and its relevance to the case disappears. Alterations performed as a result of testing of the substance, of course, do not affect the chain of custody.
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> In most cases, the critical links in the chain of custody are those from the time the evidence was obtained to the time it was scientifically analysed, since the latter is the time at which the integrity of the evidence is of paramount importance. The chain of custody is the means of verifying the authenticity and legal integrity of trace or sample evidence by establishing where the evidence has been and who handled it prior to the trial.
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> Through either evidence or admissions by the defence, the prosecution will have to show that the evidence has been kept safe, without tampering, prior to bringing it to trial. Any person who had contact with the evidence must also be accounted for."

[6] To establish this chain of custody, the state called Dr *John Kaba*, who *inter alia*, packed the swabs obtained from the complainants and Ms *Magushana's* panty, into the crime kit which he sealed and handed to Warrant Officer *Mzwanele Clive Fongqo*. The latter's evidence was clear. He took all the exhibits,

resealed them and forwarded same to the forensic laboratory for analysis where it was received by Sergeant *Dlamini*. He in turn handed it to those entrusted with its onward transmission to Colonel *Otto*. The latter opened the sealed bag, analysed the specimens and established the connectivity with the appellant. Consequently, the trial court's finding hereanent cannot be faulted. Save for an entirely speculative assault on the integrity of the chain of custody evidence and DNA results, there was nothing to gainsay the state's evidence. Consequently *prima facie* proof became conclusive proof. As Diemont JA explained in **S v Veldthuizen**[4], -

> "As used in this section they mean that the judicial officer will accept the evidence as *prima facie* proof of the issue and, in the absence of other credible evidence, that that *prima facie* proof will become conclusive proof. (*Ex parte Minister of Justice: In re R v Jacobson & Levy* 1931 AD 466 at 478 and *R v Abel* 1948 (1) SA 654 (A) at 661.) In deciding whether there is credible evidence which casts doubt on the *prima facie* evidence adduced the court must be satisfied on the evidence as a whole that the State has discharged the *onus* which rests on it of proving the guilt of the appellant."

These two disparate sources of evidence established the falsity of the appellant's testimony and upon a conspectus of the entire body of evidence the trial court correctly found that his guilt had been established beyond a reasonable doubt. The appeal against the conviction must accordingly fail.

[4] 1982 (3) SA 413 at 416G-H

[7] The ordained sentence in respect of each the rape convictions was one of life imprisonment absent a finding that there were substantial and compelling circumstances which militated against its imposition. It was submitted that either singularly or cumulatively, the appellant's youthfulness, rudimentary level of education, state of inebriation and the fact the rapes could not be categorised as the worst imaginable, were circumstances which justified the imposition of a lower sentence. An Appellate Court's power to interfere with a sentence imposed by a lower court is not unlimited. Absent recognised grounds warranting such interference, the sentence imposed stands. This is precisely the type of case where appellate intervention is not justified.

[8] With contemptuous arrogance the appellant, brandishing a knife to subdue any resistance by the three young women, commandeered them into a shack where he raped each in turn. Whatever role the alleged intake of alcohol may have had is speculative and does not appear to have affected the appellant in any meaningful manner. The complainants were subjected to a frightening ordeal and the sentences imposed are wholly appropriate given the nature of the crimes and the method of execution.

[9] In the course of her judgment the learned judge, in the concluding stages of her analysis and evaluation of the evidence, added the following –

> "Lastly there is the assertion of accused no. 1 put during cross-examination which places accused no. 2 on the scene and confirms at least the fact of sexual intercourse with all three

> girls. (I digress to add though that if the assertions were all that stood against accused no. 2 the court would be hesitant to accept it because accused no. 2 was not afforded an opportunity to test accused no. 1's case under cross-examination.)"

The assertion made by the erstwhile accused no 1's legal representative is not evidence against the appellant. An assertion, which amounts to an admission deliberately and specifically made by a cross-examiner, may only be used against the party on whose behalf such assertion is made. It is analogous to the situation where a confession is admissible only against its maker and no one else. The learned judge's remarks in any event appear to have been made in passing and do not impact deleteriously on the correctness of the conviction.

[10] In the result the following order will issue –

> **The appeal against the convictions and attendant sentences is dismissed.**

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D. CHETTY
JUDGE OF THE HIGH COURT

Dawood J,

I agree.

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F. B. A DAWOOD
JUDGE OF THE HIGH COURT

Goosen J,

I agree

_____
G. GOOSEN
JUDGE OF THE HIGH COURT

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