REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

In the matter between: Case No: CA & R 378/2011

NCEBA RULULU **Appellant**

And

THE STATE **Respondent**

Coram: **Chetty and Goosen JJ**

Date Heard: **6 June 2012**

Date Delivered: **25 June 2012**

Summary: ***Criminal Law*** *– Rape – Appeal against convictions – Appellant convicted on two counts of rape – Trial court finding appellant guilty on second count on basis of common purpose – Conviction set aside – DNA test results - Affidavit in terms of section 212(4) of* ***Criminal Procedure Act*** *– Prima facie evidence – Meaning of – Discretion in terms of section 212(12) – When to be exercised – Appeal dismissed*

JUDGMENT

Chetty, J

[1] The appellant was arraigned for trial in the Regional Court, Port Elizabeth on two counts of rape in contravention of section 3, read with sections 1, 36(1), 37, 58, 59, 60, 61 and 68(2) of the **Criminal Law (Sexual Offences and Related Matters) Amendment Act**[1], and further read with the provisions of the minimum sentencing regime postulated by the **Criminal Law Amendment Act**[2]. He was duly convicted and sentenced to imprisonment for life on each count. This appeal, with leave granted on petition, is directed against the convictions only. The learned judges in granting the appellant leave added the rider to the order made that –

> "THAT leave to appeal against conviction be and is hereby granted, with regard to the appeal against conviction argument will be required inter alia, on the apparent failure of the Court a quo to recognize that it had a discretion in terms of section 212(12) of Act 51 of 1977 to call W/O Boltman, the deponent to the section 212(4) affidavit (Exhibit B) in the light of the accused's objection thereto; and the effect, if any, thereof. See too: S v Kwezi 2007 (2) SACR 612 (E)."

[2] In argument before us, counsel were *ad idem* that the appellant's conviction on the second count of rape should be set aside. The magistrate's reasoning for convicting the appellant on the second count is convoluted and nonsensical. He ought not to have been convicted on the second count and the conviction must accordingly be set aside. The correctness of the conviction on the first count is assailed on two grounds, *viz* the unreliability of the evidence

[1] Act No, 32 of 2007
[2] Act No, 38 of 2007

identifying the appellant as the rapist and secondly, the trial court's misdirection in finding that the DNA evidence corroborated the complainant's evidence that the appellant had indeed raped her.

[3] The dispute concerning the DNA evidence relates not to the chain of custody but to the results. The appellant's attorney articulated the appellant's attitude to the introduction of the DNA report as evidence as follows –

> "MS CAMPBELL Your Worship that is why I, or maybe I should have put it more clearly then. He does not have a problem with the drawing of the blood and the sealing of the sample that was taken, but he has a problem with the result and this issue about the investigating officer who said something at the bail application. So it is not necessary at the end of the day to call all the other chain witnesses, only the Laboratory analyst and the investigating officer.
> COURT Which means the chain evidence, DNA, must be admitted in terms of section 220 Act 51 of 1977 because that is (interrupted)
> MS CAMPBELL If that can be confirmed with the accused Your Worship.
> COURT You did interpret that for them, did you?
> INTERPRETER Yes, I did.
> COURT Do you confirm what your attorney says that you have no problem with the chain of evidence resulting drawing of blood, sealing of the documents, the only thing that you have a problem about is what the results of the DNA are and what was said by the policeman also? No, no, no, just answer what you are asked then."

[4] Although section 212(12) of the **Criminal Procedure Act**[3] (the Act) vests a court with a discretion to order the adduction of *viva voce* evidence from the deponent to the affidavit tendered in terms of section 212(4), it follows as a matter of common sense that a court will only exercise such discretion upon proper and not spurious grounds. The mere intimation by the appellant that the DNA test results are wrong is wholly insufficient to trigger the operation of section 212(12). As adumbrated hereinbefore, the chain of custody evidence was admitted in terms of section 220. Although it does not appear, from the magistrate's convoluted riposte to the prosecutions' contention that the affidavit was properly before court, that he was aware of the provisions of section 212(12), the failure to have called Warrant Officer *Ridwaan Boltman* (*Boltman*) to testify does not inure to the appellant's benefit. Boltman's evidence would have been superfluous.

[5] The affidavit encapsulating the DNA test result, deposed to by *Boltman* was handed in pursuant to the provisions of section 212(4)(a) of the Act which provides as follows –

> "(4)(a) Whenever any fact established by any examination or process requiring any skill –
> (i) in biology, chemistry, physics, astronomy, geography or geology;
> (ii) in mathematics, applied mathematics or mathematical statistics or in the analysis of statistics;
> (iii) in computer science or any discipline of engineering;

[3] Act No, 51 of 1977

(iv) in anatomy or in human behavioural sciences;

(v) in biochemistry, in metallurgy, in microscopy, in any branch of pathology or in toxicology; or

(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."

[6] In his affidavit, Boltman states the following –

" 1.

I am an **Warrant Officer**, number **5379729-9** in the South African Police Service, attached to the Biology Unit of the Forensic Science Laboratory as a **Forensic Analyst** and a **Reporting Officer**, and I am in the service of the State.

2.

2.1 I am in possession of a B.Sc-degree, majoring in Genetics, Biochemistry and Microbiology obtained from the University of Stellenbosch. Included as part

of the abovementioned course is molecular and cellular biology which is relevant to DNA.

2.2 I have been attached to the Biology Unit of the Forensic Science Laboratory since 2004. Since that time I have received training in DNA techniques and body fluid identification. I have eleven years experience in the biology sciences.

3.

3.1 During the course of my official duties on 2010-04-23, I received the sealed case file and thereafter evaluated and interpreted the DNA results of the crime scene and reference samples, pertaining o **KWAZAKELE Cas 262/07/2008 (Lab 136294/09 and Lab 19594/10)**, by a process requiring competency in Biology.

3.2 The following conclusion(s) can be made from the DNA analyses on the exhibits:

3.2.1 The DNA result of swab “A” Vulva (07D1AD7310GE) and toilet paper “A-E” matches DNA result of the reference sample “A-C” (N. Rululu, 05D3BB0409MX) and;

3.2.2 The most conservative occurrence for the DNA result swab “A” Vulva (07D1AD7310GE) and toilet paper “A-E” that can be calculated is I person in every 5 trillion people.

3.2.3 The control blood sample “A-D” (T. Ndabambi, 05D3BB0419MX) is excluded as donor of the DNA on the swab “A” Vulva (07D1AD7310GE) and toilet paper “A-E” and condom “A-B”.

3.2.4 The unknown DNA-profile obtained from condom "A-B" indicates the involvement of a further unknown, unidentified male donor of genetic material.

4.

The docket and its contents as mentioned in paragraph 3 was in my safekeeping for the duration of the investigation from the date of receival until the completion of my analysis.

5.

I know and understand the contents of this declaration.
I confirm that the contents of this affirmation are true."

[7] Analysis of the aforegoing affidavit demonstrates compliance with the prescripts of section 212(4)(a). It constituted *prima facie* proof that the DNA results of the swab matched the appellant. The words "*prima facie* evidence" in the context of section 212 was explained by Diemont JA in **S v Veldthuizen**[4] as follows –

> "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."

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

[8] During his evidence in chief the appellant was asked to furnish an explanation for the DNA test results. He proffered the explanation –

> "I will not be able to explain because first of all there is nothing I did. I am also surprised that Smith is not here and according to him, he did go to my room and found my condom and then I realised that he is talking about another incident which happened there at Emakaleni, and now I do not know what exactly. That is all."

During his cross-examination he, notwithstanding the admissions made by his legal representative and confirmed by himself in terms of section 220 of the Act, suggested that Detective *Smith* could have obtained a condom containing his semen elsewhere. The transcript reveals that the appellant's evidence was properly rejected as false and on a conspectus of the totality of the evidence there was no credible evidence which cast doubt on the *prima facie* evidence.

[9] In the result therefore the following orders will issue –

1. **The appeal against the conviction on count 1 is dismissed.**
2. **The appeal against the conviction on count 2 is allowed and the conviction and sentence thereanent set aside.**

_____

D. CHETTY

JUDGE OF THE HIGH COURT

Goosen J,

I agree.

_____

G. GOOSEN

JUDGE OF THE HIGH COURT

On behalf of the Appellant: *Mr Solani, 69 High Street, Grahamstown, Tel: (046) 622 9350*

On behalf of the State:	*Adv Zantsi, National Director of Public Prosecutions, Grahamstown, Tel: (046) 602 3000*