Editorial Note: Certain details have been redacted from this document in compliance with the law.

HIGH COURT OF SOUTH AFRICA

[NORTHERN CAPE HIGH COURT, KIMBERLEY]

Case No: **CA&R 83/15**

Heard: **15-06-2016**

Delivered: **09-09-2016**

In the matter between:

TEBOGO VERNON STEWARD **Appellant**

v

THE STATE **Respondent**

Coram: Kgomo JP; Olivier J et Phatshoane J

FULL BENCH APPEAL - JUDGMENT

Kgomo JP et Phatshoane J

ORDER:

The appeal is upheld. The conviction and sentence are set aside.

INTRODUCTION.

1. This appeal was heard by Olivier and Phatshoane JJ on 14 March 2016 and were unable to agree on the outcome and other crucial aspects. The Judge President has in terms of s 14(3) of the Superior Court Act, No 10 of 2013, therefore constituted this full bench to re-hear the appeal. We (Kgomo JP and Phatshoane J) have read the judgment of Olivier J and are concerned that he is unjustifiably hypercritical of the evidence of the complainant and her mother, when the problem lies elsewhere. There are also a number of investigative, prosecutorial and adjudicative lapses that require remedial action lest the administration of justice degenerate into disrepute. As for the outcome we are now all agreed that the appeal must be upheld for the reasons that follow.

2. The Regional Magistrate, Mr Clarke, sitting in Kimberley, convicted the appellant, a 47 year old man, on two counts of rape and acquitted him on the kidnapping charge on 21 August 2015. He was found to have had penetrative sexual intercourse vaginally and anally with Ms J, a 16 year old girl, without her consent. He was sentenced to 15 years imprisonment on each count which he was ordered to serve concurrently. The appeal to this Court on both the conviction and sentence is with leave of the court a quo. Only the conviction merits our attention in that the appeal on sentence has been abandoned, sensibly so.

THE WANTON DELAY.

3. Before embarking on the merits of the case a deeply troubling issue must be addressed. It concerns the wanton delay to finalise the trial. Section 35(3)(d) of the Constitution of the Republic of South Africa Act, 108 of 1996, enjoins that an accused person’s trial be commenced with and concluded without undue delay.

4. The charges arose from an incident that occurred on 06 April 2012. It took a series of postponements before any evidence, that of the complainant and her mother, was eventually adduced on 08 May 2013, almost a year later. Between the latter date and 24 April 2015, some two years later, followed at least 13 postponements. On this last-mentioned date only the evidence of Dr Ignase Chika, who examined the complainant on 07 April 2012, was adduced. At that stage a fourth prosecutor, Ms Faniyo, had taken over the prosecution and unexpectedly or even inexplicably closed the state case at that point. This precipitous step, as will emerge later, caused immeasurable complications.

5. The defence, not to be outdone by the state, meanwhile employed three legal representatives consecutively with the initial attorney, Mr Ishmail, resuming the last stretch. Several postponements (from 24 April 2015) were once more squeezed out mainly by the defence. The appellant and one of his witnesses, Mr Oduetse Thomas Ntsie, testified on 09 July 2015 and the last defence witness, Mr Kagisho Desmond Sereo, did so on 05 August 2015. Judgment was delivered on 21 August 2015.

6. Some of the postponements were totally unjustified and amounted to delaying tactics and an abuse of the process of court. Going into the reasons or lack thereof for these shenanigans would be unhelpful and encumber the judgment needlessly. However, the presiding officer should have directed the proceedings before him with a firmer, but fair, hand. Such an approach would obviate uncalled for applications for permanent stays of prosecution. See **Bothma v Els** 2010 (2) SA 622 (CC); and **Sanderson v Attorney-General, Eastern Cape** 1998 (2) SA 38 (CC). Needless enquiries in terms of s 342A of the Criminal Procedure Act (CPA), 51 of 1977, into inordinate delays into disposing of or completing cases would also be avoided. See **S v Thenga** 2012 (2) SACR 628 (NCK) and cases cited therein particularly **S v Maredi** 2000 (1) SACR 611 (T) and **S v Jackson & Others** 2008 (2) SACR 274 (C). What happened in this case is strongly deprecated and should not

be repeated. Those who are culpable should account to the bodies to which they belong.

THE PLEA-EXPLANATION.

7. In light thereof that we differ, with respect, with the assessment and approach of Olivier J it has become necessary to underpin our stand liberally with quotations from the recorded evidence; starting with the plea-explanation, which went as follows:

7.1 On 06 April 2012 the appellant was in the company of his two friends Tom Ntsie and Kagisho Sereo at his home, [...], Kimberley, from 09h00 in the morning to 22h00 in the evening when they moved to Park's Tavern where they remained drinking liquor until around 01h00, the morning of 07 April 2012.

7.2 At 01h00 that morning (of 07 April 2012) he left in the company of a ladyfriend, whose name he could not recall, with whom he had also been drinking. This lady hitched a ride from him. He was on his way to drop her off at her residence when the police stopped him and informed him that he was a suspect in a case of rape.

7.3 Coming to the description that the complainant would have supplied to her parents and the police that led to the appellant's apprehension Mr Ishmail, his counsel, plea-explained further as follows:

"Yes [the accused has] a mole and wears specs but [he says he is] not the only person wearing a mole or having a mole, wearing specs [and] driving a red Golf in [...]." The mole is on *the "right hand side on his face - nose on his cheek, on the right cheek"*. The red Golf "has tinted windows."

7.4 *"Court: So according to this explanation there is [another] person with a mole and who is wearing spectacles and who was driving a red Golf" in [...]?* Mr Ishmail then confirmed:

"Indeed so."

7.5 The defence therefore pleaded that this was a case of mistaken identity and that, in any event, the appellant's alibi is that when the rapes are alleged to have been perpetrated between 19h00 on 06 April 2012 and 01h00 the following day he was in the company of the mentioned people and could not have been involved.

7.6 This plea-explanation in essence also encompasses what the appellant's grounds of appeal would subsequently entail.

THE COMPLAINANT'S EVIDENCE.

8. The complainant testified that her mother sent her around 19h00 to a certain Mazwaks home, within walking distance, to borrow some money. She had walked for about 10 minutes when a red Golf car with dark-tinted windows pulled up next to her. The driver alighted and shouted *"hey jy!"* at her. She fled, tripped over a stone and fell. Whilst she was still sprawled the man grabbed hold of her, held a knife against her neck and threatened to stab her should she scream.

9. The assailant forced her into the backseat of the car, closed the door and drove off to the Kimberley Municipal Dumping side, which is located outside the city along the [...] road. The trip took about 15 minutes. Along the way much as she attempted to open the door and escape she failed. She screamed in the process but the driver was unconcerned, apparently secure in the knowledge that she was locked in. The sense that we gathered from the evidence is that the vehicle was equipped with a child-lock which was engaged. The appellant, through his legal representative, admitted as much but denied that the child-lock was engaged during the evening in question.

10. At the dumping site the abductor moved to a secluded spot. He first raped the complainant vaginally on the backseat and thereafter dumped her to the ground ("*op die grond gegooi*") and raped her anally. He left her on the scene and drove in the [...] direction, away

from Kimberley. She dressed up, walked back to Kimberley and did not notice the vehicle overtaking her back to Kimberley. She reached home around 01h00 on 07 April 2012 and made her initial report to her mother, who opened the locked gate and door for her, that she was raped.

11. To the extent that the defence suggested or implied that the fact that the complainant did not observe the vehicle's return was indicative that the driver's final destination must have been [...] is, in our view, conjecture not borne out by the facts. Mr Nel, for the appellant, also ascribed something sinister to the fact that the complainant only reached home around 01h00 on 07 April 2012, almost at the time of the appellant's arrest in the company of his ladyfriend.

12. If the complainant was abducted around 19h10 and the abductor took 15 minutes to reach the dumping site, raped her inside and outside the vehicle then the whole episode ought to have been over by around 20h00, conservatively reckoned. It is therefore wrong to suggest that the assailant was arrested shortly after the rape ordeal. The complainant testified (elucidation sought by the Court):

"Nou het u die kar dopgehou hoe lank hy in daardie pad ry? ---Nee meneer.

Het u nie dopgehou nie? --- Ja meneer.

Is dit korrek om nou tot in Soul City weer te kom moes u hele ent kom stap tot by die kruising weer? --- Ja meneer.

Het u daardie pad gekom af stap? --- Ja meneer.

Tot by die kruising? --- Ja meneer.

Nou terwyl u gestap het, het u gesien of die kar terugkom? --- Nee meneer.

En u het toe op gestap Soul City toe u moes nou met die Barkley Pad [Barkley Road] ook op stap? --- Ja meneer.

Terwyl u op die Barkley Pad stap enigsins hierdie voertuig weer gesien? --- Nee meneer."

13. Apparent from the aforegoing is that the vehicle may have turned back unnoticed. Evident from the evidence is that the dumping site was notoriously within the knowledge of the Regional Magistrate, the defence and state counsel. There are a labyrinth of ways, by-ways and paths that the attacker had the option to resort to return to the city or its suburbs or outskirts. Kimberley is not a one-horse or one-street town.

14. If the appellant was the attacker then from around 20h00 there was certainly ample time to have been where he professed he was at 22h00 (at Park's Tavern) or at 01h00 when arrested the following morning. In any event these juxtaposed times (from 22h00) are not crucial in the matrix of this case. The farfetched conjecture by counsel on why it took the complainant about five hours from the rape scene (the dumping site) to reach her parental home can, in our view, be responded to in short: she was never asked.

15. On the pivotal aspect of what the complainant conveyed to her mother and/or her father and/or the police concerning the identity of her assailant the recorded evidence goes as follows:

> *"**Prosecutor**: Ja? --- My ma het dadelik die polisie gebel.*
>
> *Ja? --- Terwyl my ma die polisie gebel het, het my pa gesê ek moet vir hom beskryf hoe lyk die man en met watse voertuig hy gery het.*
>
> *Did you describe him? --- Ja ek het die man beskryf, ek het my pa gesê hy het nie hare op die kop nie en hy dra brille en … (unaudible)* [It should read: "interruption"].
>
> ***Hof:** Net stadiger asseblief.*
>
> ***Prosecutor**: Ja? --- En hy het `n moesie gehad aan die regterkant van sy wang onder die bril.*
>
> *Ja? --- My pa het my gevra hoe lyk die voertuig.*
>
> ***Hof**: Hoe lyk, sê u, pa vra hoe lyk die voertuig? --- Ja meneer.*
>
> *Goed. --- En ek sê dit is `n rooi Golf met donker ruite. Hy het my gevra of ek die registrasie van die kar gesien het.*

***Prosecutor**: Ja? --- En ek het hom gesê nee.*
***Okay. --- Die polisie het gekom. Hulle het my weer gevra ek moet beskryf hoe lyk die man. Ek het gesê hy het nie hare of die kop nie. Hy dra `n bril met `n moesie op sy wang aan die regterkant. Hulle het gesê ek moet die kar se beskrywing ook gee. Ek het hulle gesê dit is `n rooi Golf met donker ruite**."* (Emphasis added).

16. This description was transmitted via police-radio to the police who were on patrol duty to look out for a suspect and a car of the descriptions given. As the police who received the report at complainant's home drove along, with the complaint and her mother as passengers, a message was relayed to them that a suspect who fit that description and driving a similar vehicle had been stopped. When they reached the place the complainant identified him as her rapist. The suspect was placed under arrest and taken to the local police station. As already stated it was then around 01h00 on 07 April 2012.

17. The criticism by appellant's counsel with which Olivier J agrees is that the complainant's father to whom the description of the vehicle and the suspect was given did not testify and sought an adverse inference against the state. Olivier J's articulation of the criticism is partly quoted for proper comprehension:

"76. The complainant's evidence was that she had given the description of her assailant to her father, while her mother was busy telephoning the police.

77. The complainant's father was, however, not called as a witness. Instead her mother was called. She testified that the complainant had actually described these features of her attacker to her. Her evidence therefore contradicted that of the complainant to the extent that she testified that the complainant had actually given the description of the vehicle and of the attacker to her.

78. ---.

79. This contradiction casts some doubt over the question of what features the complainant had actually mentioned when she arrived home and what features she may have only observed when the appellant was displayed to her."

18. This criticism is unjustified. The complainant's mother's evidence has not and cannot be controverted that her daughter also described the features of the assailant and his vehicle to her. The record also shows that the complainant described her attacker's features and the vehicle more than once before the appellant's arrest. Sight should not be lost of the fact that the complainant reported to her mother on two occasions that she was raped before her mother summoned the police: the first report which was made whilst the complainant was outside the house must, conceivably, have been perfunctory. The content of the second report was not elicited by any party. The complainant's mother was present when the description was repeated to the police. There is consequently no contradiction; even Mr Nel, the appellant's counsel, relented by stating that he cannot press the issue. We advert to the complainant's mother's evidence on this issue as quoted at 26 below.

19. Be that as it may, while it may have been prudent to call the complainant's father, it is doubtful that the state had something to hide or that the complainant's father's evidence would have advanced the state case or that any benefit would have redounded to the defence. This view is informed by what transpired at the close of the state case on 24 April 2015:

*"**Prosecutor**: Your Worship, the State on the last appearance also informed the Court that we are intending to call the father of this child, however the state is no longer going to call the father of the child. We are going to make that witness available to the defence, hence Your Worship, this will be the State's case.*

STATE CASE

Court: *State's case mister?*

***Mnr Ishmail**: Edele, ek sal graag wil met die pa van die kind gesels. So as die Hof vir my `n geleentheid kan gee. Ek sal vra vir `n uitstel op hierdie stadium."*

The Court duly granted the defence the indulgence sought.

20. The defence was furnished with the complainant's father's statement, consulted with him on 04 June 2015 at court and decided not to call him as a witness. In **S v Van der Westhuizen** 2011 (2) SACR 26 (SCA) part of the headnote at 26i - 27b captures succinctly the remarks set out in paras 9-14 of the judgment:

"The concept of impartiality in the South African and international codes and guidelines of prosecutorial conduct is not used in the sense of not acting adversarially, but in the sense of acting even-handedly, ie avoiding discrimination. The duty to act impartially is therefore part of the more general duty to act without fear, favour or prejudice. In an adversarial system the prosecutor's function is essentially to discredit defence's evidence for the very purpose of obtaining a conviction. Where an accused is represented, it is not the function of a prosecutor to call evidence which is destructive of the State's case, or which advances the case of the accused. ***The duty of a prosecutor, to see that all available legal proof of the facts is presented, is discharged by making the evidence available to the accused's legal representatives; the prosecutor's obligation is not to put the information before the court. There is therefore no substance in the argument that the appellant did not receive a fair trial because the State called some witnesses, and not others."*** (Emphasis added).

21. A further attack on the prosecution case is that the police did not obtain a statement from the appellant's ladyfriend to whom he gave a lift home, nor did the state call her as a witness. Even though the appellant testified that he did not recall or know her name he knew where she stayed and so did Sereo and/or Ntsie. Tracing her should

not have been a problem. The question is, though, how relevant or material would this mysterious woman's evidence have been. She, on the appellant's own version, only came into the picture at 22h00 on 06 April 2016 when the appellant shared drinks with her at Park's Tavern until 01h00 on 07 April 2016, when he was arrested. There is hardly any worthwhile dispute concerning what transpired during those latter timeframes. The complainant was abducted and raped between 19h10 – 20h00. This aspect, on the quoted authority, therefore need not detain us any further.

THE CONTRAST OF THE COMPLAINANT'S DISCRIPTION WITH THE IPSISSIMA VERBA OF THE APPELLANT.

22. This is a summary of the description that the complainant furnished to her parents and to the police:

22.1 The attacker had "no hair on his head"/ close-cropped her; "*not platgeskeer*" (not completely shaven);

22.2 The attacker wore spectacles;

22.3 He had a wart (mole) on the right side of his cheek below the spectacles;

22.4 He drove a red Golf car with dark tinted windows;

22.5 The car had a childlock which must have been engaged;

22.6 He is light-complexioned (or "bright-coloured like me" she said);

22.7 His breath smelled of liquor, which the appellant acknowledged.

We will deal separately with the T-shirt, the pair of pants that appellant wore and the moustache that he sported or did not have.

23. The cross-examination of the appellant elicited the following responses, broadly, on the features listed in para 22 (above):

"Okay. You also confirm that you were driving a red Golf that day?

--- *Yes.*

You also confirm that it was tinted, the windows were tinted black?

--- *Yes.*

Also confirm you were wearing tracksuit pants? Black tracksuit pants? --- Yes.

Can you still remember the brand the tracksuit pants was? --- Pardon?

The brand? --- It was a Puma.

You also confirm that you had spectacles on that day? --- Yes I do.

And your hair was also shaven, as the way they are today? --- There was a bit – it was a brush cut that day, it was not totally shaven.

I can't see clearly, is your hair bald now or what? --- Now it is bald, but that day it was a brush cut. It was not totally shaven.

But if someone sees you from far, a person will think it is a bald head? --- Most probably, I am not sure.

Do you also confirm that you have a mole in your face? --- Yes.

Also confirm you were wearing a t-shirt that day? --- Yes, not a t-shirt, it was a golf shirt.

Golf shirt? – Golf shirt.

Short or long sleeve? --- Short sleeve.

What colour was it? --- It was maroon and dark blue.

Now Mr Steward, is there any other person in [...] who drives a red Golf with tinted windows? That you know? -- Not that I know, not that I know but as you can go around [...] you will come across many red Golfs with tinted windows because it is not only mine."

24. The cross-examination later continues:

*"**You also heard her testifying that she could identify you because you were face to face with her. Any comment? --- I heard her saying that, that is what she testified**.*

Any comment on that? --- It is not me, the person who she said it was.

And further heard her testimony, she testified that she went home and told her parents and the parents phoned the Police and within a matter of a few hours, they found you driving a Golf – red Golf and fitted the description that she gave to the Police and she also

identified you as the person who raped her. --- I heard her saying that.

Any comment about that? --- It was not me.

Now sir, out of all the people at [...], she identifies you as the person with bald hair ["bald head" it should be], spectacles, having a mole, wearing tracksuit pants, however she made a mistake to the Court to say that it was a Nike tracksuit pants that you were wearing. And the same person that she described to the Court - she gave the description, don't you find that highly unlikely that it wouldn't be you? --- It was not me. Even if - even if she described that person as being me who did that to her.

Now [is there a] person in [...] who has a bald [head], spectacles and a mole? --- It can probably be. Because there are so many of them in the location.

Have you ever seen such a person at the location who fitted your description or who fits your description? --- I have never seen somebody like that, but with the car there are many of them.

Yes sir, I don't have a problem. There are a lot of people in [...] with red Golfs and tinted windows, but not a person with a red Golf with tinted windows who fits your description. Have you ever seen such a person other than yourself in [...]? --- No. "

THE COMPLAINANT'S MOTHER'S EVIDENCE.

25. It is convenient at this stage to deal with the complainant's mother's evidence. Undisputed or incontrovertible aspects testified to by complainant involving her mother will not be revisited. Complainant's mother testified that when her daughter had not returned at about 20h00 from the errand that she had asked her to run she went to Mzwaks place to find out what could have held her up. She established that her daughter never arrived at that place. At around 23h00 she retired to bed. It was still on 06 April 2012.

26. It was only at around 01h00 on 07 April 2012 when her daughter

turned up. She takes up the episode from there:

"Ja? --- Toe ek my kind sien wat sy aankom wat ek haar sien toe weet ek nie of ek staan of ek val of wat maak ek nie want toe bars ek in trane uit.

Hoekom het u so gemaak? --- Mevrou [sy] was asvaal, asvaal. Haar klere se kleur kon jy nie eers sien nie so asvaal was sy tot haar hare.

Ja? --- Toe begin sy te huil en sy skreeu en sy huil en ek huil en die kind, die kleinsustertjie, huil ook. Toe praat sy toe sê sy vir my mamma ek is gerape. Toe sê ek vir haar sit daar my kind dat ek eers, dat jy eers afkoel dat ek eers hoor jy kan die woorde vir my mooi uitspreek dat ek kan mooi hoor wat het jy te sê.

Hoekom het u gesê dat sy hierdie woorde mooi moet uitspreek? --- Mevrou sy was bewerig wat sy by die huis kom want sy sê toe sy aangekom het, het sy maar so geloop en `n bietjie gesit, geloop en weer `n bietjie gesit want sy was lam.

Ja? --- En toe het ek maar opgestaan en vir haar `n bietjie suikerwater aangemaak en haar gegee dat sy kan nou vir my mos nou sê wat gaan aan.

Ja? --- So begin sy vir my sê maar sy is gerape van `n man.

Kan ek so sê waar was u eie man op daardie stadium? – My man was teenwoordig mevrou.

Wat sê sy vir u? --- Toe sê sy die man wat haar gerape het toe beskryf sy nou vir my die man het `n moesie en die man is lig van kleur en die man het nie hare of sy kop gehad nie. Dit is al wat sy in die donker kon gesien het sê sy en nou die klere wat die man angehad het.

Kan u onthou wat sy toe gesê het van die klere? --- Sy het vir my gesê dat die man `n Puma broek aangehad het met `n wit T-shirt.

Ja? --- En die kar het sy vir my die kar beskryf. Sy het gesê dit is `n rooi Golf met swart vensters. So het ek my foon gevat en so het ek nou die polisie gekontak en dit was nie lank daarna wat ek gebel het toe kom die polisie daar aan, [ek het nie] die presiese tyd nie.

***Ja? – En so het die polisie die beskrywing en alles het hulle nou verder aan met die kind nou gepraat en so het hulle nou die man vasgetrek**.”* (Emphasis added).

27. As quoted above, the complainant's mother testified unequivocally that she only phoned the police after her daughter had recounted her ordeal and had described the distinctive features of her assailant. The mother also partly supplied the answer why it took her daughter an eternity to reach home. She observed that her daughter was *“lam”* (she was *“lame”*, meaning weak). The reason why the evidence of complainant's father was dispensed with is therefore, somewhat, excusable. In addition, where is the alleged contradiction in the evidence of mother and daughter? None whatsoever.

28. The complainant's mother was more observant than the police. She says further in her evidence-in-chief.

“Ja? --- So het ek maar net so `n oog oor die kar gegooi, toe sien ek dat die kar is asvaal net soos [my dogter] asvaal is.
Watse kar is dit nou? – Die rooi kar, die rooi Golf.”

29. Under cross-examination she went on to explain:

“U sê nou u het gesien die kar was vaal en die kind was vaal nou verduidelik dit vir ons asseblief? --- Die, die tiep nê was stowwerig nê daardie selfde stof was op die kind se klere gewees het wat op die kind se hare gewees het, orals op die kind was daardie stof gewees.
Ja? --- So daardie stof was op daardie kar gewees daardie dag wat ons die man daar kry en dit was in die môre.
Orals op die kar? --- Orals of the kar tot op sy rims ook.
Het die beskuldigde verduidelik dat daar was geen tiep stowwe op sy voertuig nie? --- Nee dan weet ek nie wat het geword van dit nie dan het dit geverdwyn.
Want daar was foto's geneem terwyl die voertuig daar in die (tussenbeide) --- Na dit, na, na daardie kar skoongemaak is, nadat

daardie kar skoongemaak is , ja.

Ek gaan hierdie foto's vir u handig daarso en ek sal vir u wys op die foto's wat in die staat se … (tussenbeide) **---** *Ek het daardie foto's al gesien meneer.*

Hof: Mnr Ishmail is daar enige getuies wat, die staat gaan nie getuienis lewer dat daar toetse gedoen is op hierdie stof wat op die kar moointlik was met die stof wat op die kind is nie.

Aanklaer: Edelagbare daar is nooit toetse gedoen nie.

Mnr Ishmail: Soos die hof behaag. Dan het ek geen verdere vrae nie."

30. The Magistrate's intervention was untimely, unnecessary and unfortunate. The complainant's mother, who gave her evidence on 08 May 2013, did not testify as an expert but what she observed. The Magistrate may have put off appellant's counsel but he certainly did not prevent him from pursuing that line of cross-examination. What is noteworthy about the ash or soil-material ("tiep stowwe") that adhered to the complainant's clothes is that it moved Dr Chika to take a sample thereof with a view to having it forensically analysed. Mr Ishmail elicited the evidence on this aspect as follows on 24 April 2015 (two years after complaint's mother testified):

30.1 *"Doctor, the evidence from the Complainant is that she was thrown down on the ground, near the dumping site. Now you examined her that evening?* **---** *Ja.*

Did you see any dust particles on the clothing or not? **---** *I did collect some sample of the – soil samples and the grass. There were some – I think if I remember this case, there was some dirt on her – on her panties an on her buttocks, which [was] scraped into the white paper that we are using, collecting samples or the foreign body. If I remember there were some grass, some soil samples and I think some dirt also which I collected and I sent that for forensics."*

30.2 The significance of what the doctor would have achieved is illustrated in **S v Phallo 1999 (2) SACR 558 (SCA)** 564a-f

(paras 16-18) whereat Olivier JA held:

“[16] The State called Mr Dixon, a registered professional natural scientist, to testify as regards the soil he found on the clothes of the deceased and on the soil found at the scene where the deceased was alleged to have collapsed. He found that:

'*The condition of the deceased's clothing indicates that the deceased repeatedly made contact with soil that consists of a fine red sand and that some of the sand was wet enough to adhere as mud to some part of the clothing, especially the jersey. The knees were stained with red soil as if the deceased was repeatedly in the kneeling position on the red soil. The shirt front of the deceased was heavily stained with red soil and the stain marks indicate that the shirt front was repeatedly grasp(ed) as though the deceased was pulled about.*'

[17] Dixon was adamant that the soil on the clothing of the deceased could not possibly have come from the spot where the appellants say he had collapsed. He was also adamant that had the incident occurred as averred by the appellants, traces of soil from that scene would have been found on the deceased's clothing. In fact, no such traces were found on the clothing or in the kombi - on the contrary, soil samples collected from the floor of the kombi in which the deceased was transported by the appellants are similar to the red soil samples collected from the deceased's clothing.

[18] The implication of this evidence, which was not disputed by the appellants, is clear: either red soil on the floor of the kombi was transferred to the clothes of the deceased when he was placed on the floor and transported to where Colonel Segone found the appellants and the body, or the red soil which clung to the clothes of the deceased from some place, was transferred to the floor of the kombi when his body was placed there and transported. In either event, the appellants'

version is false."

31. The complainant states that her rapist wore a white T-shirt and black tracksuit pants. However, when arrested the appellant *"het `n streep skipper aangehad met dieselfde broek."* To her and her mother *"dieselfde broek"* were a pair of tracksuit pants of the Puma brand. In her statement to the police a day after the appellant's arrest (on 08/04/2012) the complainant declared:

"This unknown man was wearing a white shirt sleeve T-shirt [should be 'short sleeve -T-shirt'] and black Nike trousers."

32. On elucidatory questions on this aspect by the Court the complainant testified as follows:

"Wat het u seker gemaak dit was `n Nike teken, u sê mos u het vir die polisie gesê dit is `n Nike teken? --- Ja meneer.

Ja goed. Wat het u seker gemaak dit was `n Nike teken? --- Die reguit merkie meneer.

Die reguit merk? – Ja meneer.

U wys nou so `n regmerk? --- Ja meneer.

Hof: Ja die kenteken is mos so `n regmerk.

Aanklaer: Ja dit is korrek edelagbare.

Hof: En is dit daardie regmerk kyk gewoonlik as die onderwyser onse boeke merk `n kruisie is verkeerd en dan die regmerk dit is daardie merk wat u gesien het? --- Ja meneer.

Kan u onthou, u kan sê as u nie kan onthou nie, kan u onthou watter kleur kyk dit was `n swart broek is dit reg so? --- Ja meneer.

Watter kleur was hierdie merk wat u gesien het? --- Wit meneer.

Nou by die Puma waar kom u nou aan dat u nou vir die hof vandag sê dit is `n Puma? --- Dit is soos ek vir meneer voorheen gesê het dit was net my verbeelding." [maybe *"verwarring"*, a confusion].

33. The Magistrate found that the complainant must be believed that the appellant got rid of his white T-shirt because it must have got soiled by the peculiar dump-soil or dump-ash *("tiep stowwe")* on the

complainant's clothes. Added to that is that the complainant kicked her rapist. If the appellant was the rapist then it would have been extremely dumb of him to go to a tavern with soiled clothes. To suggest that a person driving a car from the Municipal Dumping Site cannot reach, for example [...], Kimberley, (the appellant's residence) from around 20h00 – 22h00 or 01h00 (the following morning) amounts to an appellate court anxiously seeking to *"discover reasons adverse to the conclusions of the trial Judge"* or presiding officer. See **R v Dhlumayo and Another** 1948 (2) SA 677 (A) at 706 para 12.

34. We are satisfied, in fact it is undisputed, that the complainant correctly described the Nike brand logo which, in South Africa at least, is so commonplace or notorious as to be judicially recognised. Based on the aforegoing evidence we are prepared to accept that the complainant's attacker wore a Nike brand pair of pants at the dumping site and that she confused herself and therefore contradicted herself when she had sight of the Puma pair of trousers upon the appellant's arrest. In her evidence she made it plain that the appellant "*het die skipper gechange*." The importance of taking a photograph of a suspect to depict his/her appearance (for injuries or lack thereof as well) cannot be overemphasized.

35. As far as the appellant's moustache is concerned this aspect was elicited by the defence in this fashion:

"Nou hierdie beskuldigde verduidelik dat hy hierdie snor vir jare al dra sy baard om sy lip, boonste lip. Die persoon wat vir u verkrag het daardie aand het hy `n baard gehad of nie? – Hy het baard gehad.

Het hy `n snorbaard gehad soos hierdie beskuldigde s'n? --- Ja meneer.

Het u dit vir die aanklaer gesê of die polisie toe hulle vir jou gevra het? --- Nee.

Hof: Maar is sy gevra meneer? U moet seker maar eers dit vasstel.

Mnr Ishmail: Was u gevra wat was kenmerkend van hierdie assailant of hierdie persoon wat hierdie dinge aan u gedoen het?
Hof: Het die polisie u gevra wat het u gesien, waaraan kan u hom uitken? --- Ja meneer.
En wat het u, en dit is al wat u gesê het? --- Ja meneer.
Enige iemand vir u op daardie stadium gevra of hy `n snor gehad het? --- Nee meneer."

Counsel for appellant argued that the confirmation of the moustache was given by the complainant with the wisdom of hindsight. Once more, an upon-arrest photograph would have been decisive of this issue.

THE DEFENCE CASE: THE ALIBI.

36. The appellant regurgitated his plea-explanation and generally what was put to the state-witnesses when he testified. He says that he and his two friends, the alibi witnesses (Ntsie and Sereo) were in each other's company at his home from 09h00 to 22h00 on 06 April 2016. They had breakfast consisting of bread, bacon and eggs. They also had lunch together. All the while they played music and drank Castle Lite beers.

37. Ntsie and Sereo arrived in the same vehicle, a Ford Bantam, driven by Ntsie, says the appellant. In all that time Sereo left around 19h00 to visit his girlfriend and returned only about an hour later (make it 20h00). At 22h00 they left for Park's Tavern. The rest of his version is known, with material portions thereof, more particularly his cross-examination, being encapsulated in paras 23 and 24 (above). What is immediately stark is that Sereo would not have known where the appellant was at 19h10, when the complainant was abducted, because he was with his girlfriend.

MR NTSIE'S EVIDENCE.

38. Mr Ntsie says that he remembers very well that 06 April 2012 was a Good Friday. He says in his evidence-in-chief he arrived at appellant's

home "*around 09h00 or 10h00*" "*driving my own vehicle*" "*a Mercedes Benz C180.*" During cross-examination this version emerged.

38.1 *"Sir, you informed the Court that you remember clearly as to what happened that day right? --- Yes, I informed the Court I remember precisely where I was during that day.*
You further remember precisely what kind of a car you were driving that day going to Mr Steward's house? --- Yes.
You informed the Court it was a Mercedes? --- Yes.
Now sir what is strange for the State is Mr Steward testified that you arrived at his place driving a Ford Bantam. --- It can also be possible because I also own a Ford Bantam."

38.2 *"Okay, now which one is it, were you driving a Ford Bantam or a Mercedes Benz? --- Because it has been a while, a long time after the incident, it is also possible that I was driving a Ford Bantam bakkie.*
In other words, you don't remember what vehicle you were driving to Mr Steward's place? --- That is correct.
With whom did you arrive at Mr Steward's place with? --- I arrived there alone.
Sir, do you know Mr Kagisho Sereo? --- Yes.
Is it your friend? --- Yes.
Is Mr Steward your friend also? -- -Yes.
So all three of you are friends? --- Yes.
Now Mr Steward testified before the Court that you came with Mr Kagisho Sereo at his place in the morning. --- As I said it has been a while ago that is why I said things that I can't remember, if I found him there or did we come together.
So you can't remember if you arrived there at Mr Steward's place with him or not? --- I do not – most of the time I go fetch him and most of the time I find him at Mr Stewards place."

38.3 The appellant gave the impression that throughout the day he

whiled away time with Ntsie and Sereo only and that the three of them left for Park's Tavern at 22h00. Friends are mentioned for the first time in these terms by him (the appellant): *"And there were some friends that we joined to have some drinks*". On the other hand Ntsie is speaking of friends who were coming and going. He even says: *"I still remember I was with one of the other friends inside my motor vehicle",* when they left at 22h00 for Oupa's Tavern (apparently another name for Park's Tavern). The trend with the latter quoted statement is that Ntsie still adheres to the Mercedes Benz story as opposed to the Ford Bantam bakkie mode of transport.

38.4 According to the appellant only Castle Lite was consumed but Ntsie starts with Whiskey being consumed, as well as Castle Lite.

38.5 The cross-examination of Ntsie continued:

"You informed the Court that Mr – is it Kagisho Sereo arrived late at Mr Steward's place, do you still remember? --- Yes, I think so, he arrived late.

Okay then it means he could not have come with you in the morning, am I right? --- It is possible because on the same street Kagisho is having [his] girlfriend there. Sometimes Kagisho will say just drop me here at my girlfriend's place, I am going to come. Maybe it is possible.

What time is late? When you say he came late? --- Around 14:00.

So he came around 14:00 around 22:00 at night you all drive to Park's Tavern? --- As I said it is correct. Kagisho will sit with us and go out to [his] girlfriend and come back again to sit with us. Just like that.

You mean in general? I am talking about that day. --- Yes. During that time Kagisho was still together with that lady.

Where now? --- I mean that he was still dating that lady.
Oh okay. Mr Ntsie, just understand me, you informed the Court- you must just correct me if I am wrong. You informed the Court that Kagisho Sereo came at about 14:00 am I right?
In the afternoon? --- I estimated around there, I am not precise."

38.6 Because the gulf between the evidence of Ntsie and the appellant was gaping more and more the prosecutor aptly summarised her cross-examination in this manner:
"Because you can't remember the exact car you were driving. You can't remember if you arrived with Mr Kagisho Sereo on the morning. You also cannot remember when did he leave.
--- That is correct Your Worship, and also what is more dramatic, it is about this one. ***How Mr Steward was accused or alleged in something actually where we were during that time.***
What did you eat at Mr Steward's house? --- I ate food, but I can't remember what we ate. Normally when we are visiting his place, he cooks for us.
You can't remember what he cooked? --- No I can't remember."

38.7 *"Can you remember what clothes [the appellant] was wearing that day? --- I can't remember."*

38.8 Because of the dichotomous versions of the appellant and Ntsie the prosecutor suggested that Ntsie spoke of a different day than the date of the incident (06/04/2012). **In our view, it does appear so.** The above extracts and analysis are clearly demonstrative that Ntsie is an out and out liar. He cannot remember anything; and contradicted himself and the appellant in just about everything he said. We are therefore, with respect, puzzled that our brother, Olivier J, could still find

some corn within the chaff that Ntsie brought to the barn. He could not have been with the appellant and Sereo from 09h00 to 22h00. The Magistrate correctly rejected his evidence.

MR SEREO'S EVIDENCE.

39. Mr Sereo essentially aligned himself with the appellant's evidence. He arrived with Ntsie in the latter's Ford Bantam, driven by Ntsie, he says. No, he did not arrive at 14h00, as testified to by Ntsie, but at about 09h00. Well, the appellant may not have mentioned that there was whiskey but according to Sereo one or more of them partook thereof. Yes, Ntsie may have stated that there were people who came and went. However, he (Sereo) did not know them because they were appellant's friends.

40. Strangely, in respect of two of the people that Ntsie mentioned who visited the appellant's house Sereo responded as follows under cross-examination:

"Do you know a guy by the name of Magic? --- Yes, I know him.
Was he there? --- No I didn't see him.
Sizwe Mbi, do you know Sizwe Mbi? --- Yes, I know him.
Did you also see him that day at Mr Steward's place --- No I didn't see him there."

It therefore seems that names were just bandied about by Ntsie to obfuscate what may or may not have transpired.

ASSESSMENT OF THE ALIBI EVIDENCE AND THE DECIDED CASES.

41. In the assessment of the defence case, particularly the evidence of Ntsie and Sereo, the following must be taken into account:

41.1 Upon his arrest the appellant phoned his alibi witnesses, related to them what happened and summoned them to the police station. They obliged. They therefore knew all along

that they were potential witnesses, for the defence or the state. It is therefore not as if, to their knowledge, nothing eventful happened during the night of 06/07 April 2012.

41.2 On 09 July 2015 when the appellant completed his evidence his counsel applied for a postponement to adduce Ntsie's evidence. Ntsie was then present at court. The prosecutor objected and pointed out that there was ample time. The Magistrate agreed. Ntsie testified and, as we have noted, was exposed as a liar.

41.3 On 09 July 2015, after Ntsie's evidence, the case was postponed to 04 August 2015 for the evidence of Sereo. On the latter date the case was postponed by attorney Mr Williams because Mr Ishmail was reported to be sick, but was well enough to complete the case the following day (05/08/2015). The contention by the state is that Sereo opted to align his evidence with the appellant's because the latter's freedom was at stake. What for us is questionable is that the appellant, Ntsie and Sereo profess to have been in each other's company for about 16 hours (09h00 on 06/04/2012 – 01h00 on 07/04/2012). If the appellant's version is reasonably possible true, so must Sereo's evidence be despite some discrepancies. Similarly, if appellant's evidence was fabricated Sereo's would also stand discredited. Where the evidence of the appellant and Sereo deserve the strongest criticism is that they vouch for the fact that they were in Ntsie's company from 09h00 to 22h00 at the appellant's home. On this crucial respect they lied. There is no discrepancy in their evidence where they allege that they were together at Park's Tavern from around 22h00 onwards. That part of the evidence is unimportant because the complainant had already been abducted and raped between 19h10 and 20h00.

42. The problem in this case is that the state was derelict in its duty. It

appears that the police neglected to obtain the statements of Ntsie and Sereo as witnesses who could either vouch for the appellant or disavow such extended time in his company. The police have an obligation to investigate an alibi raised by a suspect. The earlier that is done the better, for reasons that suggest themselves. See **S v Mlati** 1984 (4) SA 629 (A) at 632 A-D; and 640E-I.

43. The further problem is that the investigating officer should have been called to explain whether the alibi was investigated, if not why not. If the alibi was indeed investigated he/she had to explain to the Court what the result thereof was. In **S v Nkosinathi Piyela and Others**, Case No K/S44/1998, Kimberley, delivered on 02 November 1999 (Unreported), Kgomo J (as he then was) remarked as follows:

"In conclusion, I wish to make this general observation. This is the third case in a space of over a year in which at the end of the trial I have been left wondering whether alibis raised in court by accused were known and investigated by the police and if so why the State did not adduce evidence accordingly. If alibis are properly investigated and evidence thereon presented this could obviate protracted and unseemly cross-examination of accused and their witnesses and in fact discourage accused from calling such witnesses who sometimes perjure themselves with impunity and encumber the record unduly. Alternatively, the prosecution of suspects whose alibis are confirmed by police investigations could be avoided."

44. For purposes of this judgment we cannot emphasise enough that starting with the police, followed by the prosecution authority and culminating with presiding officers (in the present scenario the Magistracy), the need to familiarise themselves thoroughly with the seminal Constitutional Court judgment in **S v Thebus and Another** 2003 (2) SACR 319 (CC) from 349c-354b (paras 59-78) concerning alibi defences. At paras 76-78 the Court held:

"[76] After his arrest, the first appellant was confronted by the police with the allegation that he had been present at the scene of the

shooting. After having been warned of his rights he was asked by the police, prior to his arrest, what he had to say about these allegations. He chose to proffer an explanation, albeit a truncated one. His response that the family was in Hanover Park is hardly consistent with the alibi subsequently asserted. The only explanation he could give was that he was referring to his family and not to himself. This disingenuous explanation for the failure to disclose the alibi when confronted with the evidence against him can legitimately be taken into account in the evaluation of the evidence. Having regard to the fact that a late disclosure of an alibi carries less weight than one disclosed timeously, the cogency of Kiel's evidence and the unsatisfactory nature of the first appellant's evidence, the trial Court was entitled to reject the evidence of the alibi, and to convict the first appellant.

[77] The trial Court properly convicted the first appellant on a consideration of the totality of the evidence. The appellant's explanation of why he chose to remain silent, the lateness of the disclosure of his alibi defence, the unacceptable evidence which was tendered by two of his witnesses and the cogency of the evidence tendered by Kiel taken together, entitled the trial Court to return a verdict of guilt against the first appellant.

[78.] Such is the adversarial nature of our criminal process. Once the prosecution had produced sufficient evidence which established a prima facie case, the first appellant had no duty to testify. However, once he had chosen to testify it was quite proper to ask him questions about his alibi defence, including his explanation on his election to remain silent. When his evidence was found not to be reasonably possibly true, as did the trial Court, he ran the risk of a conviction. Thus, absent a credible version from the first appellant, the version advanced by the prosecution, if found credible, was likely to be accepted. In S v Dlamini and Others [1999 (2) SACR 51 (CC)] Kriegler J emphasised the importance of freedom of choice in a democracy.

However, liberty to make choices brings with it a corresponding responsibility and 'often such choices are hard'."

45. In the circumstances, and notwithstanding the state's dereliction, we find the alibi defence of the appellant to be false beyond a reasonable doubt. An approach of a court, if an alibi is rejected, is that it should treat such accused's evidence as if he or she had never testified. See **S v Shabalala** 1986 (4) SA 734 (A) at 736C-D where it was held:

"It was proved beyond any reasonable doubt that the appellant's alibi was false. The effect of the falseness of an alibi on an accused's case is to place him in a position as if he had never testified at all."

See also **Thebus and Another** (supra) at paras 76-78.

46. The dismissal or rejection of an alibi or any defence is, however, not the end of the matter. An accused person, it is trite, has no onus to prove his/her innocence. It is sufficient if his version of the events is reasonably possibly true. In either case the state bears the onus to prove the accused's guilt beyond a reasonable doubt. The appellant's counsel, for understandable and sound reasons, leaned heavily on **S v Charzen and Another** 2006 (2) SACR 143 (SCA) at 149g-h para 9 on pronouncements to this effect:

"[19] This is inevitable, mainly because the only evidence the State called about the robbery was the single testimony of the complainant. There was no physical evidence: not a fingerprint, not a recovered cellphone, nor wallet, nor purse, nor baby seat, nothing to connect the accused to the crime and thus provide a measure of objective assurance against the pitfalls of subjective identification. The greatest assurance of guilt must lie in such evidence, rather than in identification on its own, which, as this case shows, can be beset by error and misdescription and doubt in which case possibly and even presumably guilty persons must walk free."

47. Let us now examine the aspects that have caused us to agonize

long and hard why, notwithstanding the complainant being such a good and honest witness, there still remains genuine lingering (and not fanciful) doubts which say to us: What if the wrong person has been convicted? The Magistrate found that it was "too much [of a] coincidence that [there was] another person that fits the exact description as given by the complainant." Indeed the appellant himself just about acknowledged that *"his identical twin"*, who he is unaware of, was described by the complainant's parents and the police. Flowing from this conspectus of facts and circumstances we suggested to appellant's counsel, a stoical debater who is not easily cowed, that it seems to us (at least two of us) that unless there was a conspiracy between the police, the complainant and her mother to mislead the court by concocting an *ex post facto* description of the appellant then the appellant ought to be the rapist. Surely, if they wished to conspire to implicate the appellant falsely the complainant would not only have described the facial features of the appellant that she is alleged to have copied but she would not have omitted to furnish the registration numbers (particulars) that were staring at her where the appellant was arrested. Counsel conceded that there are no pointers to a conspiracy.

WHERE THE PROSECUTION IS FOUND WANTING OR THE MAGISTRATE'S INTERVENTION WAS REQUIRED.

48. **IN THE FIRST PLACE:** the complainant acknowledged, frankly, that she was short-sighted and that she did not wear spectacles that evening because her parents could not afford them. However, when she testified a year after her ordeal she wore spectacles. See **S v Mthetwa** 1972 (3) SA 766 (A) at 768A-C Holmes JA state:

"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the

extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as R. v Masemang, 1950 (2) SA 488 (AD); R. v Dladla and Others, 1962 (1) SA 307 (AD) at p. 310C; S. v Mehlape, 1963 (2) SA 29 (AD).”

49. **IN THE SECOND PLACE:** the complainant was attacked at 19h10 on 06 April 2012. She says it was dark where she was first accosted. There was evidently no artificial light like street lights nor did she, to her credit as an honest witness, suggest that the headlights of the appellant’s vehicle were of any assistance to her or enhanced her identification. The complainant goes on to say it was also dark inside the car and her assailant never looked back during the entire drive to the City Dumping Site.

50. **IN THE THIRD PLACE:** she only managed to have a 3-second glimpse of her rapist, after he had raped her vaginally inside the car when he dumped her to the ground. At one stage he lay on top of her and they were “*face-to face*”. The only assistive illumination was a half-moon or a waning moon. On paras 49 and 50 (above) see **S v Mthetwa** (*supra*).

51. **IN THE FOUTH PLACE**: the state failed to call one of the police witnesses to whom the description of the assailant and his car were given at the complainant’s home. The importance of this evidence lies in the fact that, unlike the complainant and her mother, unless it was a public announcement over the police vehicle radio, only the reported-to police officer would have been privy to what the arresting police officer conveyed to him or her. Besides, it was vital to call the police officer

to complete the chain of communication and investigation.

52. **IN THE FIFTH PLACE:** the arresting officer or officers should no doubt have been called. This became even more important because the complainant was taken to the appellant where she pointed him out as her rapist. The arresting officer(s) would have given an account of the basis or information on which the appellant was arrested. Such evidence would have eliminated the suspicion or suggestion that the complainant's description of him was made *ex post facto* when she gave her statement on 08 April 2012, a day after appellant's arrest. We should not be over-fastidious and take up the attitude of an *"armchair critic who is wise after the event and cloistered in an ivory tower"* by placing obstacles in the paths of the police. However, to avoid a possible wrongful arrest and malicious prosecution suit useful guidance may be sought on how to go about in **Duncan v Minister of Law and Order v Sekhoto** 1986 (2) SA 805 (A) at 818G-H, **Minister of Safety and Security** 2011 (5) SA 367 (SCA) at 372H-373E and generally **Minister of Justice and Constitutional Development v X** 2015 (1) SA 25 (SCA).

53. **IN THE SIXTH PLACE:** The vehicle itself was part of the crime scene and therefore an exhibit. It was therefore correct that one of the police officers drove it to the police station and locked it. What was impermissible and highly irregular has been described by the ever alert complainant's mother as follows:

53.1 *"Ja? --- So is ons in die stasie, soos ons binne-in die aanklagkantoor is toe arrive van die beskuldigde se familie. Ek ken hulle nie maar soos hulle nou daar gepraat het, het ek maar net uitgefigure is van die familie want die ander een het die sleutel gevra en hy is toe die sleutel gegee en hy is na die kar toe. Ek kon nie sy gesig sien nie want hy het `n kombers om gehad."*

The *"hy"* should read *"sy"* because it is a reference to a woman.

54.2 The car-keys were given by an unnamed police officer to the said lady before the investigating officer arrived but were handed to the officer by the *"old lady".* The complainant's mother was asked:

"Hoe lank sal u sê was dit vandat hierdie persoon die sleutel ontvang het tot die sleutel weer teruggegee is? --- Ek sal sê dit is min of meer as ek nou moet net skat rofweg dit is meer as `n uur en `n half so, ja se tyd wat sy daar besig gewees het by die kar. Ja `n uur en `n half."

It was an awfully long time for scavenging, unsupervised.

54.3 It need to be pointed out that Mr Ishmael, for the appellant, put to the complainant's mother that the appellant did not know the person or people who had access to the vehicle. Asked by the Court whether those are the appellant's instructions to that effect, Mr Ishmael intimated that it was not. He refused to take instructions on the point but persisted in that line of conduct. This was clearly unethical behaviour. No unauthorised person should have been allowed to contaminate the crime scene by having access to the car.

54. **IN THE SEVENTH PLACE**: The complainant stated that she was raped at knife-point. The *"old lady"* and/or the appellant's acolytes (Ntsie and Sereo whom appellant summoned to the police station) could have removed the knife or any incriminating item such as a condom.

55. **IN THE EIGHTH PLACE**: The appellant was allowed to retain his cellphone with which he summoned the people mentioned in para 54 (above). The cellphone should have been confiscated as an exhibit and examined by scrolling through its data and to have the appellant's movements mapped out. This would also have indicated where he

was at a particular time. See for example what was brought to light in **S v Oliphant**, Case No K/S 38/2010, Delivered 03/05/2011 (Kimberley), Unreported, Kgomo JP observed at paras 159 and 160 thereof as follows:

> "*159. At 09h19 the accused phones Rehana again to ascertain progress and her whereabouts. This is roughly the time that Rehanna's mother sees her leave. At 09h52, in other words 33 minutes later, Rehanna phones the accused. At 09h19 accused's reception station (base station) from which he makes the call, is recorded as Kimberley West 3 (It is in [...]). At 08h52 when Rehanna phones the accused the call is transmitted from the same base station (Kimberley West 3). Incidentally, where the accused's wife phoned the accused in [...] the call was transmitted from the same base station (Kimberley West 3). This is merely to illustrate that none of these calls were made from town [Kimberley, where he claimed to have been].*
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> *160. What is stated hereinbefore demonstrates that between 09h19 and 09h52 the accused and Rehanna were in fairly close proximity to each other.*"

56. **IN THE NINTH PLACE**: The police officer who handed over the car-keys to the "old lady" should have been called to testify who she gave the keys to (the name) and what explanation this person gave for seeking the keys and how long she was in possession of the keys. The complainant's mother's evidence satisfies us that the "*scavenger*" and those in her company were closely connected to the appellant.

57. **IN THE 10TH PLACE**: It was put to the complainant and/or her mother and also in address that no fingerprints were dusted for nor were any identifiable ones uplifted. The "old lady" may have wiped them off or even wiped the car clean. These were contentious issues during the trial. It was for the state to clear them up.

58. **IN THE 11TH PLACE**: The complainant was quite emphatic and

positive that the appellant raped her and that he "*changed his shirt*." This should immediately have alerted the police that an urgent search of his house for the items of clothing was necessary. Who knows, they may even have come up with a pair Nike pants with *"tiep stowwe*" adhered to it.

59. **IN THE 12TH PLACE**: As pointed out in para 30.2 (above) the state failed to dispatch the "tiep stowwe" material found on complainant by Dr Chika and observed by complainant's mother on appellant's vehicle for forensic analysis.

THE MAGISTRATE'S INVOLVEMENT.

60. **IN THE 13TH PLACE:** The Regional Magistrate did not help matters by over-indulging the accused and the state with postponements, by curtailing the defence's cross-examination that was relevant and in respect of which fertile ground was explored. We must hasten to add, though, that this factor standing alone would not have vitiated the proceedings. See: **Bernert v ABSA Bank** 2011 (3) SA 92 (CC) at para 35; and **S v Rall** 1982 (1) SA 828 (A).

61. **IN THE 14TH PLACE**: In light of a combination of the aforegoing factors the Magistrate should, in the interest of justice, have exercised his discretion in terms of s186 or 167 of the CPA to call the investigating officer, at the very least, to clear up those matters that screamed for his intervention including whether the officer investigated the alibi. The evidence may have persuaded the Magistrate to acquit the appellant or have strengthened the trial court's hand in convicting him. See: **R v Hepworth** 1928 AD 265 at 277.

62. In the end we are persuaded, very reluctantly, that it is too risky to uphold the appellant's conviction with so many unanswered questions. We agree with Olivier J, but based on our assessment of the merits, where he states that *"had the prosecution been conducted more*

effectively the eventual outcome may have been different." In **S Kubeka** 1982(1) SA 534 (W) at 538G-539B Slomowitz AJ, in a seminal judgment that resonates with us even more currently, enunciated:

"The rule that the State is required to prove guilt beyond a reasonable doubt has on occasion been criticised as being anomalous. On the other hand, the vast majority of lawyers (myself included) subscribe to the view that in the search for truth it is better that guilty men should go free than that an innocent man should be punished. More especially is this so in [serious] cases. It should be borne in mind, however, that a Court seeks to do justice not merely to the accused but to society as a whole. If then the police do not fully and properly investigate crimes, especially of the type with which I am here concerned, as a result of which insufficient evidence is made available to the prosecution and in consequence put before the Court, guilty men will go free, not because of the existence of the rule to which I have referred, but simply because cases have been inadequately investigated. The consequence will be that the administration of justice will fall into disrepute. Wrongdoers will be encouraged to carry on their nefarious activities because of the high probability that they are likely to be acquitted in an ensuing trial (even if perchance they should be arrested, which today seems more unlikely than not), and the victims or their families will be encouraged to take the law into their own hands."

63. The police and the state have failed the complainant, Ms J, her mother who was on the verge of collapsing, her little sister who cried bitterly at the cadaveric (ghostly) sight of her ravaged sibling, the father who must have been silently devastated and society at large that is running out of patience at such abject incompetence. The truth is that the case was not investigated at all nor was it property prosecuted due to complacency, indifference and indolence. May we never see those responsible for this shoddy work in higher office without accounting for their dereliction of duty.

ORDER:

1. The appeal succeeds. The conviction and sentence are set aside.
2. A copy of this judgment must be furnished to:
   2.1 The Director of Public Prosecutions (DPP) (Northern Cape);
   2.2 Provincial Commissioner of Police;
   2.3 The President of the Regional Court (Northern Cape); and
   2.4 The Chief Magistrate (District Court), Kimberley.

_____
F DIALE KGOMO
JUDGE PRESIDENT
Northern Cape High Court, Kimberley

_____
V M PHATSHOANE
JUDGE
Northern Cape High Court, Kimberley

Olivier J:

64. As is apparent from the majority judgment I had made a draft of my judgment in this matter available to Kgomo JP and Phatshoane J before receiving their judgment. I do not intend commenting on any of the remarks and comments made by my colleagues in their evaluation of the evidence and in their findings.

65. Subject to the following qualifications I agree with their summary of the evidence:

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65.1 Insofar as paragraphs 12 and 13 of the majority judgment are concerned, and although it is in my view not by any means decisive (as will be explained below), I should point out that the passage of evidence quoted in paragraph 12 of that judgment is preceded by the following questions and answers[1]:

> "*Het u opgelet hoe ver hy ry, het u gekyk waarnatoe hy ry, het u die ligte sien wegraak of as u nie gekyk het nie u kan maar net vir my ook sê u het gesien hy ry [...] se kant toe? == Ja meneer.*
> *Hy het nie omgedraai en teruggekom nie? == Nee meneer.*"

65.2 As regards paragraph 16 of the majority judgment:

65.2.1 There was no evidence by any police official regarding what information had in fact been conveyed to the police official/s who eventually stopped the appellant's vehicle, and more specifically whether that information included the description of the suspect (as opposed to a description of only the vehicle). In fact, the evidence of the complainant suggested that the police official/s that stopped the vehicle had only been given a description of the vehicle[2]. The police official/s who attended at the complainant's home (and who

1 Record: p75/8-13

2 Record: pp33/19-22; 55/17-19; 88/9-23

would have relayed the information to their colleagues who eventually stopped the vehicle) were also not called to testify on whether the complainant had described to them not only the vehicle, but also the attacker himself (which is of importance when regard is had to what follows concerning the complainant's initial statement to the police).

65.2.2 That the complainant had identified the appellant at the scene of his arrest was not a coincidence and certainly not spontaneous. She had been taken there by the police, after being told that her attacker had indeed been apprehended. Her mother's evidence was that the complainant had in fact at the scene of the arrest been taken to the appellant himself. There she was asked whether the appellant was the attacker.

65.2.3 Lastly I would add that not only the appellant was at the police station that night after his arrest. The complainant was there too, and statements were taken (presumably including the initial statement of the complainant, to which I will revert below).

66. The appellant, in explanation of his pleas of not guilty to these counts, explained that he had been driving a red Golf vehicle with tinted windows that night, but he denied having raped, or even encountered, the complainant that night.

67. The appellant essentially raised an alibi defence. He explained that he had been at his residence with his friends, Mr O T Ntsie and Mr K D Sereo, until approximately 22:00 that night, when they all left for a tavern. They, together with other friends, including a female friend of the appellant (Who later appeared to have been the lady who was with the appellant when he was stopped by the

police), spent the rest of the evening at the tavern. At about 01:00 the next morning the appellant decided to go home. His female friend requested a lift home and the appellant agreed. The two of them left and he was about to turn into the street where she lived, when the police stopped his vehicle.

68. As far as the issue of identity is concerned, the prosecutor presented only the evidence of the complainant and her mother. The appellant testified in his defence, and the evidence of Mr Ntsie and Mr Sereo was presented on his behalf.

69. The Regional Magistrate found that the complainant had, in the report made by her when she got home, described not only the vehicle, but had also mentioned that her attacker had no hair, that he was light in complexion, that he had a mole on his right cheek, that he had spectacles on, that he smelled of alcohol and that he had worn a white short sleeved T-shirt and black tracksuit pants.

70. When the appellant was arrested, he was found to have all these characteristics, with the exception of the fact that he was wearing a striped shirt at that stage.

71. The Regional Magistrate found that this was too much of a coincidence, that it had been shown that the appellant was the attacker and that accordingly the alibi defence had to be false.

72. It was also held that the appellant and his two witnesses had "*conspired to deliberately mislead the Court by concocting false evidence*". This conclusion was based on findings:

72.1 that they could not remember things which the Regional Magistrate would have expected to have been "*imprinted in their memories*"; and

72.2 that the fact that Mr Sereo testified about which of Mr Ntsie's vehicles was used by him that day, without

having pertinently been asked about that, was indicative of a conspiracy in this regard.

73. At first blush, and when approaching the matter on the basis that the complainant had indeed mentioned all the detail concerning the personal features of her attacker after arriving back home, and before having seen the appellant at the scene of his arrest, there would appear not to be any reason to interfere with the convictions.

74. I do, however, have a number of concerns. The first one pertains to precisely this question, namely what detail the complainant tendered in her report.

75. The fact that the appellant was found to be driving a vehicle similar to the one described by the complainant in her report, would not in itself have been significant enough to justify the inference, as the only possible reasonable inference, that the appellant had been her attacker. It is also clear from the judgment that it was the presence of the other personal features which the complainant had according to her mentioned in her report that persuaded the Regional Magistrate that it was not reasonably possible that the police had stopped the wrong person. It is necessary therefore to consider the evidence in this regard carefully.

76. The complainant's evidence was that she had given the description of her assailant to her father, while her mother was busy telephoning the police.

77. The complainant's father was, however, not called as a witness. Instead her mother was called. She testified that the complainant had actually described these features of her attacker to her. Her evidence therefore contradicted that of the complainant to the extent that she testified that the complainant had actually given the description of the vehicle and of the attacker to her.

78. This is a clear contradiction. The fact that the complainant's mother testified that her husband had been present when the report was made, does not assist the respondent. On the complainant's version her parents were not both present, in the sense of listening to her giving the description, since her mother was busy telephoning the police when she gave the description to her father. It was not the evidence of the mother that she had heard the description while calling the police, and when the description was actually given to her husband. That all three of them may at that stage have been in the same house would not remove this contradiction. The fact remains that it was the complainant's clear evidence that her furnishing of the description was directed to her father, and not to her mother.

79. This contradiction casts some doubt over the question of what features the complainant had actually mentioned when she arrived home and what features she may have only observed when the appellant was displayed to her.

80. The presence of this contradiction is exacerbated by other factors. When the complainant made a statement that same night, shortly after the arrest of the appellant, she quite clearly made no mention at all of any distinguishing personal features of the attacker. That must be why, two days later, she made a supplementary statement in which she dealt exclusively with this. It does not appear what circumstances had led to the making of the second statement and, importantly, at whose instance it happened.

81. It is so that the complainant testified that she had also described the attacker to the police officials who arrived at her home that night. No police official was however called to corroborate this evidence of the complainant. Against the background of the contradiction between the complainant and her mother, as well as the apparent absence of any description of the attacker in the complainant's initial statement, the failure to present the evidence

of the particular police official/s is of some importance.

82. Even in her supplementary affidavit the complainant said nothing about her attacker having had a moustache. On her own version she also never mentioned this to her father, or thereafter to the police. When her attention was during cross-examination drawn to the fact that the appellant had a moustache, she insisted that her attacker also had a moustache. If so, why did she not make any mention of it when allegedly describing the personal features of her attacker? It would surely have been a prominent feature. It unfortunately raises the question whether her attacker had a moustache at all.

83. The Regional Magistrate attempted to dispose of this issue by eliciting from the complainant the response that she had never pertinently been asked, during examination in chief, about the presence or absence of a moustache. The fact remains, however, that the complainant had been asked by what features she had identified her attacker, and that she had then failed to mention a moustache. In fact, she had on two occasions before being referred to the moustache pertinently been asked whether there had been any other personal feature of her attacker by which she had identified him[3].

84. Also she testified, in cross-examination, that as far as the face of her attacker was concerned, she had been able to discern only the mole and the spectacles.

85. This is perhaps not surprising, given the circumstances under which the complainant had to observe her attacker[4]. Her initial evidence was that it had been dark and that there had been no

3 Record : p43/4 – 44/3; 51/24 – 52/10

4 Compare **Sv Matshivha** 2014 (1) SACR 29 (SCA) para [23]; **S v Mehlape** 1963 (2) SA 29 (A) at 32 A-B

lighting, and that she had observed the attacker's face for only about 3 seconds when he was lying on top of her, and after she had wiped away her tears.

86. It was only when the Regional Magistrate, during the cross-examination of the complainant, pertinently raised the possibility of the moon as a source of light, that the complainant for the first time testified that there had been a waning moon.

87. The complainant contradicted herself and her statement about whether the tracksuit pants of her attacker had been of the Puma or of the Nike brand. What is perplexing is how the complainant would have been able to see the logo on the trousers in the circumstances described by her. Her evidence was that she had observed the logo when the attacker threw her on the ground, in other words after having raped her in the back of the vehicle. Did she manage to observe this in the darkness of the rape scene, by the light provided by only a waning moon, in the moment when she was dragged from the back seat and before being pinned down on the ground?

88. As far as the issue of the brand name on the trousers is concerned it is also interesting that the complainant's mother, in her version of the description which the complainant had given, testified that the complainant had said they were Puma trousers. This would of course be inconsistent with the complainant's eventual version, and her supplementary affidavit, that her attacker had worn Nike trousers. It must be kept in mind that the police had displayed the appellant also to the complainant's mother. She would there have seen that the name on the trousers was Puma, which would have made it very easy for her to testify that the complainant had mentioned the name Puma when she described her attacker. Why would the complainant, if she had indeed on the day of the incident remembered and mentioned the name Puma, two days later depose to an affidavit saying that her attacker had worn Nike trousers, and

then in her evidence eventually confirm this?

89. The contradiction regarding the logo on the trousers of the attacker must also be considered with the evidence about the shirt of the attacker, as compared to the shirt worn by the appellant at the time of his arrest.

90. The shirt which the appellant was arrested in was completely different from the one which her attacker had worn according to the complainant.

91. The Regional Magistrate suggested that the appellant may have in the meantime changed shirts because the white one may have become dirty in the struggle with the complainant. This is blatant and unfounded conjecture. The possibility that the different shirt may indicate that the appellant was not the man described by the complainant[5] was not sufficiently considered.

92. In any event, if the appellant's clothes had become dirty in the struggle, why would he not also have changed his pants?

93. When the appellant's attorney wanted the complainant to comment on the fact that the appellant had been arrested in a striped shirt and Puma tracksuit trousers, as opposed to the white shirt and Nike tracksuit trousers which her attacker had according to her worn, the Regional Magistrate intervened, stopped this line of questioning and said that the attorney could deal with this in argument.

94. It must also be remembered that the complainant had last seen her attacker driving off in the direction of [...]. He was alone at that stage and he was wearing a white short sleeved T-shirt. In all the time that she walked back to Kimberley and to her home, the

5 If it is for the moment assumed that she did indeed describe her attacker before the arrest of the appellant.

vehicle never drove back past her again.

95. Shortly thereafter the appellant was arrested. He was not alone. He was accompanied by a lady friend. That much is common cause.

96. Moreover the appellant was wearing a striped shirt, or in any event a shirt different from the one allegedly described by the complainant, and the appellant's evidence that he was wearing Puma tracksuit pants was never discredited.

97. On the complainant's version there would be no apparent explanation for this. On the appellant's version, on the other hand, there is. According to him that lady left the tavern with him, shortly before his vehicle was stopped. This was corroborated in all material respects by Mr Ntsie and Mr Sereo.

98. Although the name of the lady was not mentioned in evidence, it appeared that she was a neighbour of Mr Sereo. The police would also in all probability have established her identity the night of the appellant's arrest. Yet no attempt was made by the prosecution to present her evidence, and the Regional Magistrate apparently also did not consider this possibility.

99. If the appellant, Mr Ntsie and Mr Sereo had concocted the story of how they had been together that day and night up until 01:00 the following morning, this witness would surely have been able to say so.

100. That the appellant was giving the lady a lift home when his vehicle was stopped, was never disputed. If that is so, where did the two of them come from before he was stopped?

101. The complainant's version offers no explanation for this. On her version, and for the attacker to have been the appellant, he would at some stage along the [...] road have had to have turned around

his vehicle and he would have had to have driven back to Kimberley, where he then at some unknown stage changed clothes, or at the very least trousers, and ended up in the company of the lady, all this at that time of night. Clearly the complainant's evidence did not rule out the possibility of her attacker having at some stage along the road to [...] turned his vehicle around and driven back to Kimberley, but this is not the issue. The issue is how he had then, in what on the complainant's version could not have been a very long time, ended up not only in different clothing but also in the company of another lady, whom he was on the undisputed evidence at that stage taking home.

102. Then there is also the fact that the complainant had, during cross-examination, conceded that she may have been mistaken about the identity of her attacker. It was put to her that she could, just as she had made a mistake with the brand of the trousers, be making a mistake with the identity of her attacker. This was then followed up with a simple question: "*Is dit so dat u 'n fout kan maak van hierdie persoon*", to which the complainant answered: "*Ja meneer*"

103. When the Regional Magistrate then for some reason intervened, the complainant pretended not to have understood the question. Then follows these questions by the Regional Magistrate and answers by the complainant:

> "*Mnr. Ishmael sê u maak 'n fout, dit is moontlik dat u 'n fout maak dat dit nooit hierdie persoon is wat u daar verkrag het by die dumps nie, wat sê u daarvan? -- Ek weet nie seker nie.*
> *Wat sê u? -- Ek is nie seker nie.*
> *Van wat is u nie seker nie, of dit die persoon is of is u nie seker of u 'n fout maak nie? -- Nee.*
> *Maar is u nie seker of u 'n fout maak nie? -- Ja meneer.*
> *So sê u, u kan moontlik 'n fout maak? -- Ja meneer."*

104. The Regional Magistrate, for some strange reason still not satisfied, went on to suggest that the question in cross-examination had not been clear and eventually, and in fact in response to further and quite leading questions by the Regional Magistrate, the complainant confirmed that she had not made a mistake.

105. To my mind this was a clear concession by the complainant, and a clear indication of doubt on her part, and the Regional Magistrate was wrong to regard the complainant's answers as the result of a misunderstanding.

106. The complainant's evidence was that she had suffered from poor vision and that she had no spectacles at the time of the incident, because they could not afford it. Against the background of this evidence the following question and answer followed:

> "*En u sê nou vir die hof vandag dat u hierdie persoon uitgeken het in die donkerte met swak oë daardie dag is dit wat u vir die hof sê? – Nee meneer.*"

107. This answer was in my view already a clear indication that the complainant realised that the circumstances had not been conducive to a reliable identification and she was, at the very least, clearly hesitant to persist in her identification of the appellant given those circumstances. This preceded her clear concession.

108. Moreover, it is very significant that the complainant's concession followed immediately upon having been confronted with the fact that the arrested person's clothing had differed from those described by her and the fact that the complainant had never made any mention of her attacker having had a moustache.

109. What is also significant is how the complainant eventually explained that she was indeed sure that she was not making a mistake in saying that it was the appellant who had attacked and

raped her. The Regional Magistrate asked her why she was at that stage saying that she was sure that she was not making a mistake and the following appears from the record in this regard[6]:

> "*HOF : … nou u sê mos nou u maak nie 'n fout nie u is seker hoekom sê u, u is seker? – Daar wat ons hom gekry het meneer daar wat die polisie gesê het hulle het die rooi Golf gekry ons het aan die regterkant van die pad gestaan hulle het aan die linkerkant van die pad gestaan van die pad.*
> *Ja? – Toe het ek voor my, agter my ma gestaan toe staan hy so in die lig in en die vrou toe kom die vrou om na hom toe, toe staan hy met die vrou toe sien ek hom.*
> *Toe sien u hom? – Ja meneer.*
> *Dat dit hy is? – Ja meneer.*"

110. This is a perfect example of why it is so undesirable that a suspect is displayed like this to a witness who may later be requested to make an identification and to describe features. The complainant's answers revealed that she was in actual fact being influenced by the observations she had made when she was deliberately given the opportunity to view the appellant, with the vehicle which fitted the description of the vehicle of her attacker, and asked to confirm that he was the attacker.

111. Mr Nel posed the rhetorical (and in my opinion valid) question why the police had followed this procedure, which they would surely have realised could seriously compromise evidence of identification, if the appellant had so clearly fitted a detailed description which the complainant had by then already given to them. One possible answer which of course presents itself is that the police had at that stage only been given a description of the vehicle, and not yet of the suspect. This would fit in with the fact that, when the complainant's initial statement was taken shortly after that, no

6 Record : p 61/25 – 62/11

description of the attacker himself was apparently included in that statement.

112. The way in which the prosecution was conducted left much to be desired:

112.1 Why was the evidence of the police official to whom the complainant allegedly described her attacker not presented, especially in view of the contradiction regarding who the description of the assailant had been given to?

112.2 Why was the evidence of the complainant's father not presented, not only because of the said contradiction but also because he had after all according to the complainant been **the**[7] person to whom she had described the assailant? The fact that her father was made available to the defence as a witness is irrelevant. The defence bore no onus of proof. Could it be that his evidence would have been inconsistent with that of the complainant and/or her mother? One does not know and to speculate about this would be irresponsible.

112.3 Why was the evidence of the lady in the appellant's vehicle not presented?

112.4 In the appellant's plea explanation it was stated that the appellant's attorney had advised him that the DNA results were "*negative*". What would this have meant? Had no foreign DNA been found in the complainant's sample, or had the foreign DNA that was found not matched that of the appellant? At a later stage,

7 As opposed to just another and additional person who could testify about this.

however[8], the appellant's attorney wanted to know whether the prosecution had received the DNA report and requested that it be handed in. The prosecutor replied that the "*results*" (presumably referring to the report) had not yet been received (which would at the very least suggest that DNA samples had indeed been submitted) and the Regional Magistrate adopted the attitude that he could not tell the prosecutor how to do her work. In his address the appellant's attorney stated that "*There was no DNA tests done*"[9]. Whether or not DNA tests had in fact been done and, if so, what the results were, was therefore not clarified. The appellant and his attorney had no duty to clarify this. The fact that what was said in the plea-explanation regarding DNA may have differed from what his attorney said in later addressing the court on the merits can never be seen as a contradiction on the part of the appellant. His plea-explanation was clearly to the effect that what he stated is what he had been advised by his attorney.

112.5 Similarly the statement in the plea-explanation that "*no fingerprints of the complainant was (sic) found*" would in all probability have been based on information supplied to the appellant by his attorney, who would have been privy to the contents of the docket. Insofar as this may have suggested that a fingerprint examination of the vehicle had indeed been conducted and that identifiable prints had been found, it would on the face of it be inconsistent with the attorney's statement, in addressing the court, that "*no fingerprints was (sic) lifted*", but the fact of the matter

8 Record : p 125

9 Record : p 232/14

is that the plea-explanation did not state that fingerprints had indeed been found. The appellant's own evidence in this regard was that no fingerprints were lifted from his vehicle **in his presence**[10]; his evidence was not that no fingerprints were lifted from his vehicle. This could easily have been clarified by the prosecutor. If fingerprints had indeed been found, but they did not belong to the complainant, it may have raised the question why her attempts to get out of the vehicle would not have left a single fingerprint in the vehicle.

112.6 The evidence of the complainant's mother that when the appellant's vehicle was stopped it was covered in dust, just like the complainant was, and that the place where the rapes occurred was also dusty, was a clear attempt to incriminate the appellant. When it was put to the witness in cross-examination that the appellant denied that there had been "*tiep stowwe*"[11] on his vehicle, the witness responded that the dust on the vehicle must have disappeared; whatever this may have meant. When the appellant's attorney wanted the witness to look at photographs taken of the vehicle, she said that she had already seen them but that they had been taken after the vehicle had been cleaned. It can safely be assumed that the photographs referred to had been taken by the police while the vehicle was in their possession and custody. Why would the police have washed the vehicle, or have allowed it to be washed? The prosecutor presented no evidence to clear this up and for some unknown reason the photographs

10 Record : p 188/15 - 18

11 An apparent reference to the dust at the municipal dump site.

were apparently not handed in[12]. Once again the Regional Magistrate intervened, this time by suggesting that in the circumstances where there was no evidence that dust on the vehicle and dust on the complainant had been analysed, the issue of dust on the appellant's vehicle was irrelevant, or at least not worth pursuing, and the appellant's attorney then stopped questioning the complainant's mother in this regard. In my view it would in the circumstances be unfair to have regard to this part of the evidence of the complainant's mother.

112.7 The evidence of the investigating officer was never presented. He or she would have been able to explain why the appellant had been exhibited to the complainant in this manner, as well as the circumstances which necessitated a supplementary affidavit by the complainant, specifically to deal with the personal features of the person who had attacked her.

113. Against this background I am of the view that the evidence presented by the prosecution was not of such a nature and quality that it could in itself have justified the conclusion that the alibi defence was false.

114. The appellant's evidence in this regard was substantially corroborated by that of Mr Ntsie and Mr Sereo. What vehicle Mr Ntsie and Mr Sereo had arrived in at the residence of the appellant during the course of that day[13] and whether they had arrived together, is completely immaterial.

12 Because they do not form part of the record.

13 Incidentally the incident occurred during the evening and late night, and not during the day.

115. The fact that there may have been minor and immaterial contradictions between the evidence of the appellant and his two witnesses, would militate against the possibility of a rehearsed and concocted story. Insofar as they pertained to the activities and whereabouts of the witnesses before the time of the incident they would also not really be relevant.

116. The Regional Magistrate placed great emphasis on the fact that Mr Sereo had, after an adjournment and after Mr Ntsie had already contradicted the appellant in regard to what vehicle of Mr Ntsie had been used, and in response to a question:

> "*Meneer, hoe het jy gegaan na Mnr Steward se huis toe*"
>
> responded by saying:
>
> "*We were driving a black Bantam, along with Tom* (Ntsie)"

117. The Regional Magistrate drew the inference that the contradiction must have been discussed during the adjournment and that because of that the witness had then, without pertinently being asked the question, volunteered that they had gone there in Mr Ntsie's Bantam vehicle.

118. Again, what vehicle of Mr Ntsie was used, is completely irrelevant.

119. In any event, I do not find the answer a strange response to the question of how they went there, in other words by what means. To have responded as the Regional Magistrate suggests he should have done, namely that he went there with Mr Ntsie, would not have explained how they went to the appellant's residence and would strictly speaking not have answered the question.

120. In my view the evidence of the appellant, Mr Ntsie and Mr Sereo should not have been rejected on the basis done by the Regional

Magistrate.

121. There is also no basis for finding that the appellant had not disclosed his alibi defence before his plea-explanation. Both Mr Ntsie and Mr Sereo attended the police station the night that the appellant was arrested. They were called by the appellant and requested to go there. Whether or not statements were taken from them does unfortunately not appear.

122. As early as 13 January 2015, long before the charges were put to the appellant, Mr Ntsie was warned by the Magistrate to attend Court as a defence witness on the remand date.

123. In his affidavit in support of his bail application, long before pleading to the charges, the appellant stated that he had "*an alibi to prove where (he) was at the time of the alleged rape*"[14]. Whether or not he also disclosed this in a warning statement and, if so, in what detail, is also not evident from the record. What is, however, clear is that the prosecutor, in addressing the Regional Magistrate on conviction, never claimed to have been taken by surprise by the alibi defence, neither was this argued by the respondent's counsel at the hearing of this appeal.

124. It was also not the finding of the Regional Magistrate that the appellant had not disclosed this defence timeously.

125. In cross-examination of the complainant the appellant's attorney put it to her that there were other vehicles similar to the vehicle of the appellant in the particular area, in other words red Golf vehicles with tinted windows, and that in the street in which the appellant lived there were at least two red Golfs[15]. Counsel for the respondent suggested that the appellant contradicted these statements under

14 Record : p329

15 Record : p 63/9 - 15

cross-examination. The relevant questions and answers read as follows[16]:

> "*Now Mr Steward, is there any **other person** in [...] who drives a red Golf with tinted windows? **That you know**? –-- **Not that I know, not that I know** but as you can go around [...] you will come across many red Golfs with tinted windows because it is not only mine.*
> *Especially at your street, there is also another Golf with tinted windows? –-- Yes.*
> *Which is red? –-- Yes.*"
> (Emphasis supplied)

126. It is quite clear that these answers in no way contradicted the statements. What the appellant said is that he did not know the persons who owned or drove the many similar vehicles in [...], not that he did not know of similar vehicles in [...] or in his street.

127. In furnishing a plea-explanation on behalf of the appellant his attorney stated that the appellant had not been the only person in [...] with a mole and spectacles and who drove a red Golf with tinted windows. The appellant at the time confirmed what his attorney had said. In his evidence, under cross-examination, the appellant conceded that he had never seen such a person himself. Whether not having personally seen such a person can be equated to not actually knowing of such a person is possibly debateable and the appellant was never asked to explain what had been placed on record in this regard earlier. Even if it is, therefore, assumed that this amounted to a contradiction between the plea-explanation and the appellant's evidence, it would be going too far to say that the appellant had in cross-examination "*conceded that his claim of an identical man was false*".

16 Record : p 194/13 - 20

128. I realise that a court of appeal should not readily interfere with the factual findings of a trial court[17]. However, it will, and in fact should, be done where such findings are clearly wrong[18]; all the more so where such findings are premised on the recorded evidence, rather than on demeanour[19].

129. One cannot help but feel that, had the prosecution been conducted more effectively, the eventual outcome may have been different, but "*it is better for ten guilty accused to go free than to have one accused wrongly convicted*"[20].

130. In my view the appeal against the convictions should succeed.

_____
C J OLIVIER
JUDGE
Northern Cape High Court, Kimberley

Adv I.J Nel
Rick Ishmail Attorneys

Adv M. Makhaga
Director Public Prosecutions

17 Compare **Kebana v S** [2010] 1 All SA 310 (SCA) para [12]

18 Compare **S v M** 2006 (1) SACR 135 (SCA) para [40]

19 Compare **S v Crossberg** 2008 (2) SACR 317 (SCA) para [149]

20 **Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others** 1996 (1) SA 984 (CC) para [113]; See also **S v Kubeka** 1982 (1) SA 534 (W) at 538H and **S v Lesala** 2009 JDR 0930 (NCK) para [26]