

## Director of Public Prosecutions, Gauteng v KM 2017 (2) SACR 177 (SCA)

KEY CONCEPTS	
Rape of 13-year-old girl	Rape by uncle
Life imprisonment	Leave to appeal
All evidence to be taken into consideration	DNA evidence

The respondent was convicted by the Nelspruit Regional Court on a charge of rape of a 13-year-old girl. He was sentenced to life imprisonment. The regional magistrate ordered that he not be considered for parole and that his name be entered in the register of sex offenders. On appeal, the Gauteng High Court set aside the conviction and the sentence. The Director of Public Prosecutions (DPP), Gauteng, then brought an application for special leave to appeal against the order of the court a quo.

### Facts of the case

The respondent was charged in the regional court, Nelspruit, with the rape of his 13-year-old niece, who was his sister's daughter, the complainant. She shared her home in Nelspruit with her elder sister, G. Their mother lived in Johannesburg where she worked and it seemed her father lived elsewhere as well. She lived with her paternal grandmother. At the trial, the State led the evidence of the complainant, her sister G who was 16 years old, the doctor who examined the complainant after the incident, the nurse who drew a blood sample from the respondent, and several police officers who were involved in the safekeeping and transportation of the forensic samples. The respondent was the only defence witness.

According to the complainant, the respondent (her uncle) asked her to sleep at his girlfriend's home on the evening to keep the girlfriend's 14-year-old daughter, K, company as the couple were going out for the evening. The couple fetched the complainant from her home and left her at the girlfriend's home with K. They returned home from their night out in the early hours of the next morning. They were drunk and it appeared that they had been fighting. The respondent assaulted his girlfriend until she ran away. He then ordered the complainant to go with him to her home to see if G was home, after which he informed her that he was taking her back to his girlfriend's home. On the way he told her that they needed to stop off at his house to close a window. Once there, he closed the window and bedroom door and instructed her to get undressed and get into the bed. He had a firearm in his hand. He promised not to hurt her and proceeded to have sexual intercourse with her without her consent. He gave her R50 and told her not to tell anyone about the incident. The complainant went home where she immediately told G what had happened. G testified that at about 6H00 on that morning the complainant arrived home crying, reporting that the respondent had sexual intercourse with her and that he gave her R50. G took the money and went to her grandmother's house, where she reported the matter and then used the money to phone her parents, from where she saw the respondent running away from the house. She gave the change to her grandmother to take the complainant to the clinic. The

doctor testified that she had examined the complainant and that the complainant's private parts presented with redness and she had observed a white discharge. She took swabs and sealed them in a crime kit and handed them to the police. Evidence was led about the collection and transmission of the samples as well as the evidence of the nurse who drew the blood from the respondent. Blood samples were taken from him on two occasions. A forensic analysis was performed on the specimens obtained from the complainant and the respondent, and the DNA obtained from the vaginal swab was found to be the same as the DNA obtained from the blood control sample. The state case was that the DNA results were obtained on an analysis done on the first blood sample drawn from the respondent in 2007. The second blood sample was used to confirm that the first and second blood samples belonged to the same person (the respondent).

The respondent denied having sexual intercourse with the complainant. According to him, when he arrived at his girlfriend's house after the evening out, he saw two boys leaving the girlfriend's house and alleges that they must have had sexual intercourse with the complainant. He said that the false charge of rape and fabricated evidence was motivated by a vendetta against him by his sister (complainant's mother) and her children because they did not want him to discipline them.

The magistrate convicted the respondent and found that the chain evidence relating to the DNA was never seriously disputed during cross-examination. He acknowledged that the respondent had denied that the first blood specimen had been drawn from him and suggested that the second blood specimen could have been contaminated. The magistrate was of the view that the fact that the person who drew the first blood sample from the respondent did not testify at the trial, did not undermine the rest of the evidence. It was sufficient that the nurse who drew the second blood sample and the police officer in whose presence it was drawn, gave evidence. What the magistrate found to be paramount was that both samples were proved to be from the respondent and that the DNA from the first blood specimen matched that found in vaginal smear obtained from the complainant. The magistrate found that the respondent had had sexual intercourse with the complainant.

The magistrate found the complainant's evidence to be credible. She did not contradict herself and, although a single witness, her evidence was corroborated by G. The magistrate found the respondent to be a liar and his version, including the allegation of conspiracy, to be false.

### **Appeal to High Court**

On appeal to the High Court, the conviction was set aside based on the respondent's denial of sexual intercourse, the failure of the state to sustain the chain and link of the blood samples taken from the appellant and the failure to lead evidence to corroborate the samples and the authenticity of the tests conducted and to link such samples to the appellant.

### **Matter before the Supreme Court of Appeal (SCA)**

In response to the High Court decision, the DPP brought an application to the SCA in terms of s311(1) of the Criminal Procedure Act 1977 (CPA), seeking special leave to appeal against the decision. The appeal was founded on 2 questions of law:

- May a court of appeal set aside a conviction and sentence in circumstances where an appellant is implicated by direct witness evidence without evaluating, referring to or rejecting such evidence in the judgment?
- Is there a duty on the prosecution to tender viva voce evidence of an analyst who deposed to an affidavit in terms of s212(4) of act 51 of 1977 in circumstances where an accused does not lay a basis for his mere denial that it was his DNA found in the specimen obtained from the complainant?

The SCA considered the following questions:

- whether the intended grounds of appeal fall within the ambit of s311 of the CPA
- whether such an appeal requires special leave or is an appeal of right
- whether a proper case has been made for special leave
- whether the appeal should be upheld.

Failure to take into account relevant evidence is an error of law. Since the High Court did not consider anything other than the DNA evidence, it failed to take into account relevant and admissible evidence. This means that the first question of law is in fact one which was decided in favour of the respondent, and therefore s311 is applicable.

The SCA found that s311(1)(a) of the CPA does not provide an automatic right of appeal to this court, and special leave of this court is therefore required. The SCA was of the opinion that there were special circumstances in this case which merited an appeal to the SCA. With respect to the first point of law, the record shows that the High Court simply ignored relevant evidence, including the evidence of the complainant and her sister. It also disregarded the findings of the magistrate, which is impermissible. If allowed to stand, the incorrect approach by the High Court would uproot the long-established legal principles in our law in relation to evaluation of evidence. As the High Court is a precedent-setting court. The incorrect approach would result in extensive miscarriage of justice to members of the public. The matter is of importance, not only to the parties in this case, but to the members of the general public. These factors constitute special circumstances and the application for leave to appeal was granted.

The SCA made the following order: special leave to appeal on a question of law granted to the state, appeal upheld, conviction and sentence reinstated and appeal remitted to the High Court for consideration on the merits.

“The error of law committed by the High Court, in the exercise of its appeal jurisdiction, was fundamental and of so gross a nature as to vitiate the proceedings in that court. The result is that the respondent’s appeal has not been heard on the merits. The conviction and sentence of the respondent must be reinstated in their original form as imposed by the trial court. It follows that the matter must be remitted to the High Court for it to properly exercise its appeal jurisdiction.”