S v Ndlovu 2019 (1) SACR 686 (KZP)

KEY CONCEPTS	
Gang rape	Identification in dark
Leading questions by magistrate	Magistrate has access to documents not in court record

Introduction

The appellant (accused number 2) was charged together with 5 others with assault with intent to do grievous bodily harm, two counts of rape and indecent assault. The complainant had been dragged and hit with a bottle, raped by the accused and one of the accused had inserted his penis into her mouth and ejaculated into her mouth and forcibly kissed her. The appellant was convicted on the charge of rape. The matter was referred to the High Court for sentencing, where the conviction was confirmed and the appellant sentenced to life imprisonment. The appellant currently appeals against both the conviction and sentence.

Facts of the case

The complainant was subjected to a gang rape one evening. She was in the company of two friends on her way home when she was accosted by accused no. 1 near to a scrapyard. He made advances towards her and various suggestions which she rejected. He then dragged her into the company of a group of about 11 young males where they took turns to rape her. She managed to escape to a nearby house where she sought refuge for the night. The incident was reported the following day when she was taken to the police, examined by a medical practitioner and accompanied the police to locate those suspects she knew.

Concerns raised by the High Court

There were a number of concerns raised by the High Court about the issue of identification as well as the fact that the magistrate seemed to have access to information that was not part of the court record and many leading questions were asked.

- the complainant said that she recognised accused No.2, although the areas was quite dark; she said that she knew the appellant because his father used to work with her father and there was a time when they attended lessons together during a regular Saturday class; she had known him for a long time, from when they were still young because they attended the same school; she knew his surname and where he lived; however, she did not identify the appellant by name to the police (she said she was not asked) but took the police to the house where he lived, although he was not there at the time; she confirmed that it was dark in the area on the night but that there was sufficient light for her to identify the appellant from the 11 assailants;
- the complainant's evidence was terse compared to the rest of the record, and there were many leading questions both from the prosecutor and the magistrate;
- the magistrate also seemed to have access to information that was not part of the court record; for instance, in evidence-in-chief the complainant was asked by the

prosecutor whether she had been for any form of therapy and the magistrate interjected by saying that there was an exhibit in his file relating to her treatment for depression at the Prince Mshiyeni Hospital, but there is no indication on the record how the magistrate had access to these papers – it was not formally admitted as an exhibit and does not form part of the record on appeal; there was also a reference late in the case and during the appellant's evidence that samples collected for DNA analysis had in fact been submitted and that a result of the analysis was in the possession of the prosecutor and the court; the appellant also confirmed that blood had been drawn from him, but he had not been informed about the results yet upon which the magistrate intervened by saying, "we know the results, correct Ms Lotan?" and then added, "[t]he form said no male semen could be determined or male DNA should I say,"; the High Court found this very disturbing because it appears that the magistrate was in possession of a report relating to the DNA analysis – this report was also not introduced into evidence and does not form part of the appeal record; the High Court found that the only generous interpretation that they could make was that the DNA sample could not establish a link to the appellant;

- the appellant testified and completely denied that he was anywhere near the place where the incident occurred; there is nothing to suggest that his evidence was not reasonably true, and this evidence, taken together with the DNA evidence, the doubt about his guilt increases and he must be given the benefit of the doubt;
- in addition, one of the complainant's companions also testified, but could not corroborate aspects of the complainant's evidence, and the other did not testify;
- there are a number of unfortunate interjections by the magistrate – most of them unbecoming and disturbing; for example, when the complainant was being cross-examined, the defence attorney asked her to explain the action of one of her assailants when the magistrate interrupted and said, "[T]hat's something your client did he can explain it if he did it;" later on, when the complainant was trying to explain the actions of one of her assailants, he interrupts and assists her with a leading statement by suggesting the assailants were "basically laughing and saying hurry up, so the next one can have a turn;" again later, when the complainant was being cross-examined on the written statement she made to the police, the magistrate intervened and assisted the state case by suggesting that the difference in language use is something that explains away discrepancies in the statement; this behaviour by a magistrate was described as "most unbecoming."

As a result of the above, the High Court found that the conviction of the appellant was unsafe and ought to be set aside. The appeal against conviction and sentence was upheld.