THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 694/13

Not Reportable

In the matter between

MUGWEDI MAKONDELELE JONATHAN **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mugwedi v The State* (694/13) [2014] ZASCA 23 (27 March 2014)

Coram: Navsa, Leach and Saldulker JJA

Heard: 14 MARCH 2014

Delivered: 27 MARCH 2014

Summary: Criminal law – Rape – Insufficiency of identification evidence – Comment about lack of DNA testing.

ORDER

On appeal from: Limpopo High Court (Makgoba J sitting as court of first instance):

The following order is made:

1 The appeal is upheld and the convictions and sentences imposed by the High Court are set aside.

JUDGMENT

SALDULKER JJA (NAVSA and LEACH JA concurring):

[1] The appellant was charged in the Limpopo High Court on two counts of rape. On 13 August 2003 he was convicted on those counts and sentenced to life imprisonment on each, ordered to run concurrently. On 29 January 2013 the appellant was granted leave to appeal against both the convictions and sentences.

[2] There were regrettable occurrences before and during the trial. First, in respect of the investigation of this matter, I make the following comments. The complainant was taken by the police, and transported to the trauma centre for a medical examination on the same day as the incident. It appears that no steps were taken to obtain DNA sampling for analysis. In *S v Carolus*[1] this court emphatically stated that it was imperative in sexual assault cases especially cases involving children that DNA tests be conducted. For this to occur the relevant kits have to be available. I have difficulty in understanding why repeated judicial pronouncements are not acted upon by the relevant authorities. In *S v Nedzamba* 2013 (2) SACR 333 (SCA) at para 35 Navsa JA stated the following:

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[1] *S v Carolus* 2008 (2) SACR 207 (SCA) para 32.

'One remaining aspect requires attention, namely the manner in which the police investigation and medical examination was conducted. It appears at least on the face of it, from the complainant's evidence, that there was material for DNA testing that was likely to prove conclusive. There was no indication that a testing kit was used or available. No explanation was proffered for the state's failure to conduct such an investigation. In *S v Carolus* 2008 (2) SACR 207 (SCA) para 32 the following was stated: "There are disturbing features of this case that we are constrained to address. In addition to the flagrant disregard of the rules relating to the identification of suspects, no crime kits were available at the hospital to enable Dr Theron to take a sample for DNA analysis. It is imperative in sexual assault cases, especially those involving children, that DNA tests be conducted. Such tests cannot be performed if crime kits are not provided. The failure to provide such kits will no doubt impact negatively on our criminal justice system. Fortunately in this matter such negative outcome has been avoided by the brave and satisfactory evidence of A as corroborated by other witnesses". Every effort should be made by the relevant authorities to ensure proper testing with appropriate sensitivity.

[3] I now turn to deal with the evidence adduced at the trial. I commence by dealing with the medical evidence that the state sought to lead in support of its case. During the trial, the doctor, Dr Vilakazi who medically examined the two young girls after the incident was not called to testify nor was any effort made by the prosecuting authorities to secure his attendance. No attempt was made to present his findings on affidavit in terms of s 212(4)(*a*) of the Criminal Procedure Act 51 of 1977.[2] Instead, the State called another

[2]S 212 (4)(*a*) reads as follows: 'Whenever any fact established by any examination or process requiring any skill –

(i) in biology, chemistry, physics, astronomy, geography or geology;
(ii) . . .
(iii) in computer science or in any discipline of engineering;
(iv) in anatomy or in human behavioural sciences;
(v) in biochemistry, in metallurgy, in microscopy, in any branch of pathology or in toxicology; or
(vi) in ballistics, in the identification of fingerprints or body-prints or in the examination of

disputed documents, Is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State or of a provincial administration or any university in the Republic or any other body designated by the Minister for the purposes of this subsection by notice in the *Gazette*, and that he or she has established such fact by means of such an examination or process, shall, upon its mere production at such proceedings be *prima facie* proof of such fact: Provided that the person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, In which event the provisions of this paragraph shall *mutatis*

doctor, Dr Makulane who testified that he knew Dr Vilakazi but did not know where she was that day, and that he had been delegated by the medical superintendent of Tshilidzini Hospital to come to court. Dr Makulane proceeded to read out the contents of both J88s in the court below and opined that there was vaginal penetration of both young girls. This evidence was clearly inadmissible, based as it was, on the hearsay evidence of Dr Vilakazi's findings. To the appellant's detriment, there was surprisingly no challenge to the manner in which the medical evidence was adduced. Before us, the state was constrained to concede that the medical evidence in these circumstances should not have been received.

[4] The state's case essentially relied on the identification by the complainant on count one TN, who was seven years' old at the time of the incident. According to her, she and the complainant on count two, MN, who was two years old at the time of the incident, were called into the house where the appellant resides where they were both raped in turn. Shortly after they had left the house, they were met by the parent's of MN, a Mr and Ms N who were on the way to a spaza shop. They proceeded together towards the spaza shop and, at some stage TN informed them that she and MN had been raped by a 'boy', and pointed out the house where the appellant resides.

[5] Ms N testified. According to her, they were at the spaza shop when the complainant was made and, accompanied by her husband and the two young girls, they returned to where the appellant resides. Ms N testified that she found the appellant outside the house, on the veranda. She confronted the appellant about the accusations of rape, which he denied, stating that he had just arrived there. The following part of Ms N's evidence with reference to TN is important: 'We asked her to point Makondelele (appellant) and she first just looked at him and keep quiet. . . She just stood and she was about to cry and then she pointed at him and said, "this is the one". . .' Significantly, Ms N had first confronted the appellant with the accusation in the presence of the complainant before the latter identified him.

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mutandis apply with reference to such certificate.

[6] The significance of this sequence is that Ms N confronted the appellant as the perpetrator, whereafter TN was asked to identify the wrongdoer. It is clear from what is set out above that there was no spontaneous identification.

[7] Part of Ms N's evidence was that a shoe belonging to TN and underwear belonging to MN were left behind at the perpetrator's home and when a search was effected shortly after the incident these items could not be found. This is a significant factor favouring the appellant.

[8] Mr N's testimony contradicted the evidence that the appellant was found outside the house. According to him the appellant only emerged from his quarters after they had knocked on the door. His evidence as to how the complainants identified the appellant is as follows: '. . .I asked him if he knows the children. . .He indicated that he does not know them and I asked the kids and then they said that they know him. . . I asked them if he was the one whom they were relating to me. . . and they indicated that he was the one.' As already stated it is clear that TN was prompted in her identification.

[9] TN testified that she and MN were both called into the house where they were raped, and she pointed to a place where the appellant resides. It bears recording that the place where the appellant resides was referred to as a homestead, suggesting that his was not the only living quarters within the immediate vicinity. It should be borne in mind that TN's initial identification of the perpetrator to Mr and Ms N was that it was a boy who had committed the offence in question. It is common cause that the appellant was 27 years old and could not by any stretch of the imagination be described as a boy. Yet another aspect in favour of the appellant.

[10] It was suggested that the appellant's disappearance for the three weeks following the confrontation between himself and Mr and Ms N, was a feature to be taken into account against him. He provided an explanation for his disappearance, which on its own, having regard to the paucity of reliable evidence, cannot be rejected.

[11] To sum up, the identification evidence for the reasons set out above cannot be relied upon to sustain a finding of guilt. Consequently the appeal must succeed. The appeal is upheld and the following order is made:

'The convictions and sentences imposed by the high court on the two charges of rape are set aside.'

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HK SALDULKER

JUDGE OF APPEAL

APPEARANCES

For appellant	M Madima
Instructed by:	Thohoyandou Justice Centre Thohoyandou
	Bloemfontein Justice Centre
For Respondent	A Madzhuta
Instructed by:	Director of public Prosecutions, Thohoyandou
	Director of Public Prosecutions, Bloemfontein