

S v Steward 2017 (1) SACR 156 (NCK)

KEY CONCEPTS	
Rape of 16-year-old	Rape by stranger
Inadequate prosecution	Police investigation inadequate
Forensic evidence of soil	Alibi defence

Introduction

The appeal was heard by Oliver J and Phatshoane J, who were unable to agree on the outcome and other crucial aspects. The Judge President then in terms of s14(3) of the Superior Courts Act 10 of 2013 constituted a full bench to rehear the appeal. Although all three judges agreed that the appeal was to be upheld, two of the judges were concerned that third judge was unjustifiably hypercritical of the evidence of the complainant and her mother, when they believed that the problem lay elsewhere. They were also of the opinion that there were a number of investigative, prosecutorial and adjudicative lapses that require remedial action if the administration of justice did not fall into disrepute.

The appellant, a 47-year-old man, was convicted in the regional court on two counts of rape and acquitted on a charge of kidnapping. He was found to have had penetrative sex vaginally and anally with the complainant, a 16-year-old girl, without her consent, and he was sentenced to 15 years' imprisonment on each count which was to run concurrently. The appellant appealed this conviction.

Wanton delay

The High Court drew attention to, what they described as, the wanton delay in the prosecution of the case. They found the delay in finalising the trial deeply troubling. The incident occurred in April 2012. There were numerous postponements before the evidence of the complainant and her mother was adduced in May 2013. There were further numerous postponements and then the doctor testified only in April 2015. A new prosecutor took over the case and inexplicably closed the state case. The defence also were responsible for numerous postponements and employed 3 different legal representatives consecutively. Judgement was delivered in August 2015.

The High Court found that some of the postponements were "totally unjustified and amounted to delaying tactics and an abuse of the process of court." The court was of the opinion that the presiding officer should have directed the proceedings before him with a firmer, but fair, hand.

Facts of the case

According to the complainant, her mother sent her to a certain Mazwak's home at around 19H00 to borrow some money. On the way a red Golf car with dark tinted windows pulled up next to her. The driver got out and shouted at her but she fled, tripped over a stone and

fell. The driver grabbed her , held a knife against her throat and threatened to stab her if she screamed. She was forced into the back seat and driven to the Kimberley municipal dumping sight, which is about 15 minutes away. She screamed and tried to escape but the doors were locked (child lock device). At the dumping site the driver first raped the complainant vaginally on the backseat and then dumped her on the ground and raped her anally. He left her on the scene and drove away. She got dressed and walked back to Kimberley, arriving at home at about 01H00 in the morning. She made her initial report to her mother. Her mother called the police and she described the assailant and his car to her father.

She described the assailant to the police as having close-cropped hair, as wearing glasses and he had a mole on the right side of his cheek under his glasses. He was driving a red Golf with dark tinted windows. He was wearing black tracksuit pants and a white t-shirt. The description was transmitted via police radio to police on patrol to look for the vehicle. Police stopped a suspect in a similar-looking car and notified the police who were with the complainant and her mother. The complainant was taken there and she identified the appellant as the man who had raped her. The appellant was arrested.

The complainant's mother testified that her daughter was covered in dust, her clothes and her body and even her hair.

In his plea explanation, the appellant said that he was in the company of two friends, N and S, at his home from 09H00 in the morning until 22H00 in the evening when they went to the tavern and remained drinking there until 01H00. He then left in the company of a lady, whose name he cannot recall, with whom he had been drinking. The lady hitched a ride from him and he was on the way to drop her off when the police stopped him. The defence pleaded that this was a case of mistaken identity and that the appellant had an alibi as he was in the company of his two friends during the time of the alleged rape.

Concerns about investigation and prosecution

The High Court allowed the appeal, setting aside the conviction and sentence, and blamed this on the fact that the case was not properly investigated nor properly prosecuted:

“The police and the state have failed the complainant, 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 properly prosecuted, due to complacency , indifference and indolence.”

The following issues were raised:

- the police never checked to see if the child lock was engaged in the car;

- the complainant's father to whom the description of the assailant had been given, did not testify ("the reason why the evidence of complainant's father was dispensed with is, somewhat excusable");
- the police did not obtain a statement from the appellant's lady friend to whom he gave a lift home, nor did the state call her as a witness;
- the complainant's mother was more observant than the police – she said that she noticed that the car was covered in the same dust as her daughter. The court asked whether any tests were done on the dust/dirt on the car to compare it to that found on the complainant, but no tests were conducted by the police. The doctor, who examined the complainant, took samples of the dirt and grass found on her underwear and buttocks and sent it to forensics. The court referred to ***S v Phallo and Others*** 1999 (2) SACR 558 (SCA) where the state called a registered professional natural scientist to testify about the soil he found on the deceased's clothing and the soil found at the scene. The scientist was able to explain how the knees were stained which indicated that the deceased had been kneeling on the ground and the marks on the front of the shirt indicated the deceased had been repeatedly grasped as though being pulled. The scientist was also able to prove that the soil on the clothing of the deceased could not possibly have come from the spot where the appellants said he had collapsed;
- the complainant said that the rapist wore a white t-shirt and black tracksuit pants, but the appellant was wearing a striped golf shirt when arrested – the possibility of him changing his clothing was not properly investigated, yet if he had raped the complainant at the dump, he would have had to change his clothing before going out to the pub;
- there were issues about whether the appellant had a beard or a moustache on the day and this could have been clarified if photos had been taken: "[t]he importance of taking a photograph of a suspect to depict his/her appearance ... cannot be overemphasised."
- the police did not take statements from the 2 men whom the appellant had identified as his alibis when he was arrested to determine whether they agreed or disagreed with the time spent with the appellant: "The police have an obligation to investigate an alibi raised by a suspect."
- the investigating officer should have been called to explain whether the alibi was investigated and, if not, why not; the High Court referred to the judgment in ***S v Nkosinathi Piyela and Others*** NCK k/S44/1998 delivered on 2 November 1999 (unreported) with reference to the issue of the investigation of alibis:

"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 tis 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 investigation could be avoided.”

- the state failed to call the police witness to whom the description of the assailant and his car was given at the complainant’s home to complete the chain of communication and investigation;
- the arresting officer(s) should have been called – the complainant was taken to the appellant where she pointed him out as her rapist – to give an account of the basis or information on which the appellant was arrested; this evidence would have eliminated the suspicion or suggestion that the complainant’s description of him was made ex post facto when she made her statement a day after the appellant was arrested;
- the vehicle was part of the crime scene and an exhibit; it was driven to the police station and locked, but one of the accused’s family members arrived, asked for the car keys and went out to the car; the car keys were given by an unnamed police officer before the investigating officer arrived and were only returned after an hour and a half, which was “an awfully long time for scavenging, unsupervised.” This was unethical behaviour in that no unauthorised person should have been allowed to contaminate the crime scene. The complainant stated that she was raped at knifepoint – the knife could have been removed or any other incriminating evidence;
- the police officer who handed over the car keys to the family member should have been called to testify about who she gave the keys to and what explanation the person gave for seeking the keys and how long she was in possession;
- the appellant was allowed to retain his cell phone with which he summoned the people referred to in the evidence – the cell phone could have been confiscated as an exhibit and examined by scrolling through its data, and to have the appellant’s movements mapped out; this would have indicated where he was at a certain time;
- no fingerprints were dusted for, nor were any identifiable ones uplifted – these could have been wiped off by the family member who took the keys of the car;
- at the scene the complainant was adamant that the appellant had raped her and that he had changed his clothes; this should have alerted the police that an urgent search of his house needed to be undertaken for the clothing; and
- the magistrate should, in the interests of justice, exercised his discretion to call the investigating officer to clear up these matters that screamed for his intervention.

Based on the above, the majority found that they could, very reluctantly, not uphold the appellant’s conviction with so many unanswered questions, and referred to ***S v Kubeka*** 1982 (1) SA 534 (W):

“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 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 of their families will be encouraged to take the law into their own hands.”

In the judgement delivered by Oliver J, he stated: “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.’”