S v Khauta 2020 (2) SACR 547 (FB)

KEY CONCEPTS	
Rape	DNA Evidence
Chain of evidence	

FACTS: The appellant was convicted in the Bloemfontein Regional Court on 2 counts of robbery with aggravating circumstances, one count of attempted murder and one count of rape. He was sentenced to life imprisonment.

The complainant and her friend were at a secluded spot. She and her friend had driven to the spot where they became intimate on the back seat of the car. Afterwards, when they wanted to move back to the front seats, two men appeared out of the darkness. One of them had a firearm. There was a struggle and the friend was shot in the stomach, but he managed to run away. The two men drove the friend's car a short distance with the complainant still in the car. They stopped the car and ordered the complainant to undress, after which they both raped her. They then left her in the car and ran away. Neither the complainant nor her friend were able to identify any of the perpetrators because of the darkness at the place where they were attacked.

The appellant was arrested approximately 12 months later on the basis of DNA evidence that was alleged to link the DNA of the appellant to the DNA found on the vaginal swabs taken from the complainant.

The state also presented evidence that the appellant was in possession of one of the two cell phones stolen at some later stage but no dates were provided. It is unclear whether he was in possession a few hours after the attack or only after some months.

ISSUE: The appellant appealed against the convictions of robbery with aggravating circumstances, attempted murder and rape. The main concern of the appeal was the DNA chain of evidence and the chain of custody of the exhibits.

DISCUSSION: As far as the evidence of the cell phone is concerned, the appellant's version was that he had obtained the cell phone from someone else. On its own, the evidence relating to the cell phone falls short of proving anything against the appellant.

The only evidence presented by the state relating to the DNA results was an affidavit in terms of s 212 of the Criminal Procedure Act 51 of 1977 by one W/O Eloise Reynolds, a forensic analyst of the forensic-science laboratory in Pretoria. This affidavit was handed in by consent. The affidavit states that the DNA received by the lab, identified as (15DBAH 2426) (PA 4002732631), was read into the DNA mixture of the complainant's swab (14D1AA4189) (PA4002228382). There was a match.

However, no further evidence was admitted and there were no indications as to the identity of the persons from whom the forensic samples were obtained; under which numbers those respective samples were sealed; and how the sealed bags with the samples ended up in the

hands of W/O Reynolds. Despite these glaring shortcomings, the trial magistrate found in his judgment that the DNA evidence had placed the appellant 'right at the scene of the crime'. In this respect the findings of the magistrate were clearly wrong. As already indicated, it is not even known whether the one sample came from the complainant, and the other sample from the appellant.

In *S v Matshaba* 2016 (2) SACR 651 (NWM), Djaje AJ, explained as follows:

> 'The importance of proving the chain of evidence is to indicate the absence of alteration or substitution of the exhibits. If no admissions are made by the defence the state bears the onus to prove the chain of evidence. The state must establish the name of each person who handled the evidence, the date on which it was handled and the duration. Failure by the state to establish the chain of evidence affects the integrity of such evidence and thus renders it inadmissible.
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> The court a quo in convicting the appellant relied on the DNA evidence as the only evidence that links the appellant to the commission of the offence. The investigating officer testified that blood was extracted from the appellant by a doctor at the hospital and the blood sample was then stored in SAP13 at the police station. There is no evidence that the said blood sample was sealed and of what number was allocated thereto. Therefore, the sequence from collecting the appellant's blood sample to the DNA-testing is flawed.'

FINDINGS: Based on the fact that there was no evidence linking the sample mentioned in the forensic report to the appellant, the conviction of the appellant on all four counts cannot stand. The appeal, therefore, was upheld and the conviction was set aside. The sentence of life imprisonment was set aside.

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