

**IN THE EASTERN CAPE HIGH COURT
PORT ELIZABETH**

CASE NO. CC 13/09

In the matter between:

THE STATE

versus

**THEMBELANI MZAYIFANI
LUNGA MAGONGO
MAKHWNAANDILE NINDZI**

**1st ACCUSED
2nd ACCUSED
3rd ACCUSED**

JUDGMENT

KEMP AJ:

[1] The accused are charged with raping the complainant, a 19 year old female, and of robbing her of a silver necklace valued at R50.00. The accused all pleaded not guilty to the charges, with the first and third accused pleading alibi defences, and the second accused alleging that he had consensual sex with the complainant on the night in question. The third accused alleged that he had found the necklace which was found in his possession when he was arrested, on the pavement a few days before the alleged offences took place.

[2] At the commencement of the trial the State indicated to the accused's representatives that it only had DNA evidence linking the

2nd accused to samples taken from the body of the complainant. During the course of the trial further DNA evidence emerged, linking the 1st accused and possibly the 3rd as well. This late production of DNA evidence led to an application to have it excluded, which application was dismissed.

[3] A knife was allegedly used during the commission of the offences and the State led the evidence of Sergeant Stanley, the arresting officer, who testified that he had found a knife which fitted the description of the knife used in the attack, in the possession of the 1st accused. The 1st accused denied that the knife had been found in his possession and alleged that it had been on the dashboard of the police vehicle when they were arrested. The 3rd accused denied that the necklace had been found during a search of his person and alleged that he had voluntarily given it to the arresting officer at the police station and denied that an Okapi knife had been found in his possession during the first search, and alleged that it had been on the dashboard of the police vehicle when they were arrested.

[4] The accused put the State to the proof of all the facts in the matter and initially admitted none of the chain evidence. This led to many postponements, as some of the witnesses were from out of town. After the accused had been in custody for over two years and after the case had been set down for trial for a week, the State could only produce one witness, whose evidence was finalised in a day, and requested a further postponement for the purpose of calling further witnesses to prove the chain evidence. The State conceded that it was responsible for the postponement, that the length of time that the accused had been in custody awaiting trial, the fact that the further postponement would in all likelihood be a lengthy one, taken together with the fact that the complainant had

left Port Elizabeth shortly after the alleged rape, constituted exceptional circumstances. I agreed, and in the absence of any objections to the postponement by the accused, postponed the matter and granted bail of R300 to the accused, subject to the usual conditions.

[5] I will now deal with the evidence of the various witnesses, the first of whom was the complainant. At the time of the commission of the alleged offences, she was 19 years old. She had a standard 5 level of education and had recently moved from Addo to Port Elizabeth in order to work in a tavern. She had got the job through an acquaintance of a family member, and stayed in the premises next to the tavern.

[6] On the night of the attack she was closing the tavern and had just finished locking up when three young men appeared. The one in front, who she identified in court as accused no. 1, was carrying a silver knife and she said, had a lighter complexion than the others. She indicated in court that the knife, including the handle and the blade, was approximately 12 centimetres long.

[7] The 1st accused offered to accompany her home, which offer she declined, saying that she lived right there, upon which he opened the knife and held it against her waist. She said that she did not know them but had seen them before when they came to the tavern or walked past, saying that they used to come to the tavern occasionally. She said that there would normally be about five or six of them. She then corrected her earlier evidence saying that they had not come into the tavern but had walked past whilst she was sitting at an outside table.

[8] They then walked up the road whilst the 1st accused held the knife against her. They stopped outside a house and the one with the knife said that she must take off her pants, which she did. He then removed his pants and raped her whilst she was lying on her back on the ground. After he finished, accused no.2 raped her, and then accused no.3. After he had finished, accused no.1 searched her but could not find anything of value except for her necklace, which he took. She described it as a silver necklace which did not have a clasp. She said that she used a piece of wire to fasten it. The chain was then produced in court and identified by her as being hers.

[9] Although she said that she had repaired the necklace at some stage with a piece of wire to hold it together, it seems that it was not a piece of wire, but an actual clasp which she obtained from the dressing table at the place where she was staying. The impression that I gained from her evidence was that the necklace was pulled off her neck and would have broken, although when recovered, it was in one piece. Her explanation for this is that they must have repaired it. This is unlikely, given the short period of time. More likely is that it is either not the same necklace or that it was not broken when removed from her neck. Although she said that she normally removed it by unclasping it, and demonstrated how she did so in court, it was also possible for her to remove it without unclasping it, which she also demonstrated in court, and which she said she also did on occasion.

[10] The complainant then ran to house where she knew a lady who knew the owner of the shebeen – one Ms Xoli. She knocked at her window but when she didn't answer, knocked on the door, after which Ms Xoli opened for her. She told her that she had been raped by three young men and Ms Xoli phoned the police, who arrived shortly thereafter.

[11] She was taken to the police station where a statement was minuted, after which she was taken to the Dora Nginza Hosptal where she was examined. Thereafter Sergeant Stanley arrived. He took her back to Ms Xoli's house and minuted a statement from her, after which they went back to the tavern in order for her to get clean clothing to change into, when they saw the three assailants. She recongized them because they were still wearing the same clothes that they had been wearing the previous night. They were coming from a derelict house without a roof, diagonally across from the tavern.

[12] She pointed them out to Sergeant Stanley, who then drove closer and stopped in front of them. He took out his firearm and told them to lie on their stomachs after which he searched them. She said that he found the necklace in the possession of accused no. 3, the silver knife in the possession of accused no. 2 and a brown Okapi knife in the possession of no.1. Both Stanley and the 2nd accused alleged that the Okapi knife was found in the possession of No. 3 and Stanley testified that the silver knife was found in the possession of no.1.

[13] Stanley then took them to the police station where he filled in documents, after which he took her back to Ms Xoli's house, where he asked the complainant for her panties. She told him that she had not pulled them up after the rape and he then took her jeans. She then left Port Elizabeth later that same day and returned home to Addo.

[14] Under cross examination by Mr O'Brian she said that she had previously seen no.1 about a week before the incident on a Saturday when he was in the company of other men, not his co-

accused, and that he had a beard at that stage, which she described as a "toombaard", which I gathered was a thin beard. She said that she remembered him specifically as he was light in complexion, even though it was pointed out to her, and was obvious to see in court, that he was of a darker complexion than no.2.

[15] Mr O'Brian then took her through her police statement, which was signed at 01:40 on the 29th March, a mere hour or two after the incident. On being asked whether the statement had been read back to her she said that it had not been. Mr O Brian then asked her to look at the statement and she confirmed that the first paragraph was correct but not the second. She pointed out that she had not gone home prior to the attack, as alleged in the statement, and did not scream. She also denied that they had wanted money. She also pointed out that although her statement maintained that the necklace had been taken before the rape, that was not correct. She denied that her assailants had undressed her or that she had refused to undress. She denied that the accused had raped me from the back – she said that she had been lying on her back when they raped her. She denied that the second one had lain behind her, and confirmed that he had lain on top of her. She denied that the others were looking at her, and said that they were in fact looking out for other people. She denied that she had mentioned anything about them wearing a condom or that she was scared of infections or HIV. She denied that they had left her in the street and said that she had in fact got up, dressed and ran away. It is not disputed that she did not go to the police station to report the crime, as alleged in the statement. She went to Ms Xoli, who phoned the police who then took her to the police station.

[16] It was clear that whoever had minuted her statement on the night of the incident had a very poor command of the English

language. Although one can understand the colloquial usage of the terms "sleep with" to describe sexual intercourse, the statement taker described the complainant as "waking up" after the rapes, which is clearly neither consistent with the complainant's version, nor with what one would expect after such an experience. One of the attackers "do up and down until he reach the climax. He woke up after he finish." The statement is ambiguous about whether the complainant screamed or not "I tried to scream but no one heard me, and also I was scared of knife."

[17] Why the statement taker described the rapes as having taken place "from behind" in so far as it might imply anal sex is not clear and the complainant denied that she had ever been penetrated anally, or that she had ever told anyone this, and the doctor who performed the medical examination afterwards testified that if he had been told that the complainant had been penetrated anally, that he would have made a note of that fact on the J88 form. The fact that he did not, indicated to him that she had not complained of anal penetration. He explained that anal swabs were taken as a matter of course for two reasons: firstly because some victims never complained of being penetrated anally when they had been, but also because semen often gravitated into the area surrounding the anus.

[18] Under cross examination by Mr Joubert, the complainant was not prepared to concede that her description of the accused with the knife must have been wrong when it was pointed out to her that accused no.1 was of a darker complexion than accused no.2. Her explanation was that he must have been lighter at that stage. She denied that she had met accused no.2 near the tavern, that she was slightly under the influence of liquor, and that they had agreed to have consensual sex. It was alleged by accused no. 2 that this had

happened at about 9 pm that evening. She denied that, saying that at about 9 pm she was still serving customers at the tavern.

[19] She confirmed that she had a boyfriend who was in Cape Town at the time of the incident but also had a relationship with another man in the area, and that she had had consensual sex with him on the Wednesday before the incident.

[20] She then corrected her earlier evidence that Sergeant Stanley had recovered the necklace during his search of the suspects on the pavement after arresting them and confirmed that he had actually got it at the police cells and showed it to her whilst in the waiting room.

[21] The next witness to testify on behalf of the State was Ntombekhaya Xoli, the lady to whom the first report was made.

[22] She testified that she knew the complainant as "Michelle" and confirmed that she stayed at 140 Hintsa Street, where she was working for a friend of hers. Her friend's brother and the complainant stayed in the house. She had known the complainant for about four months. She saw her in the early hours of the morning of the 29th March, after midnight. The complainant knocked at the back door but after she did not respond the complainant went around to her bedroom window. Once the complainant identified herself the witness opened the door and found the complainant crying. She was shaking and appeared to be shocked. After settling her, the complainant told the witness that she had been raped. On being asked to explain how and where it happened she said that she had finished closing the tavern when three young men arrived and attacked her and left with her. There was dirt and pieces of grass on her. After attempting unsuccessfully to summon her employer and

her brother, the witness called the police and they arrived shortly thereafter. She told them what it was alleged had happened and they left with the complainant.

[23] The complainant returned at around 11 or 12 the next morning, in the company of Sergeant Stanley, who minuted a statement from Ms Xoli. He then left with the complainant in order that she could point out the place where the rape had taken place. After a while he returned so that the complainant could wash herself. She was carrying clothes from her home to change into.

[24] Under cross examination by Mr O'Brien, for accused no. 1, and in response to a question as to whether the accused had been armed Ms Xoli confirmed that:

"After everything she did tell me that they were carrying knives"

[25] When asked to explain what she meant by "after everything" she explained that after she had made her statement and after the complainant had come back from the hospital and "subsided", that she told the witness that "he was carrying a knife"

[26] When asked to confirm that there was only one person who was carrying a knife she said that the complainant did not explain. When pressed, she said that the complainant had said that "they were carrying a knife". When pressed further, she said that she did not remember whether the complainant said that "he" was carrying a knife or whether "they" were carrying a knife. Although her evidence certainly changed and may have been an attempt on her part to adapt her evidence I am of the view that she explained herself satisfactorily when she explained that:

“I do not remember but she did say that she was attacked and now what I do not remember is whether did she say did all of them, each one carry a knife or was it only one of them but an issue relating to a knife was mentioned.”

[27] When asked what the complainant said about the identity of her attackers, Ms Xoli first said the complainant had not indicated whether she had ever seen them previously. When the question was repeated she said that the complainant had said that she had seen them before, although she at first couldn't remember where she had said that she had seen them. On being reminded that she had said in her police statement that the complainant had said that she had seen them at the tavern before, she said that she recalled that and confirmed that her statement in the police statement that:

“she had just been raped by three males whom she knew by sight as they used to visit this tavern where she works”

was in fact consistent with her recollection.

[28] She confirmed that although it did not appear in her police statement, that the complainant had told her that her assailants had also forcibly removed her chain from her.

[29] On being asked by Mr Joubert, for the 2nd accused whether she recalled whether the complainant had smelt of liquor she said that she had not smelt liquor on her and that it was not possible that she could have had a few drinks earlier.

[30] The next witness to be called was Sergeant Stanley. He was working at the Motherwell Family Violence, Child Protection and Sexual Offences Unit at the time. He met the complainant and was handed the docket and sexual assault kit. They left the Rape Crisis

Centre and as he drove he started to interview her. He specifically asked her whether she would be able to identify the suspects, which she confirmed.

[31] She told him that she had seen them in the area where she stayed and worked and had even seen them in the tavern where she worked.

[32] They first went to Ikamvilihle Police station where the sexual assault kit was handed in, after which they went to Ms Xoli's house. He also interviewed Ms Xoli after which they went to the tavern where the complainant lived and worked. After parking outside the tavern they went inside and the complainant retrieved some clothes. On returning to the vehicle, the complainant indicated that the dilapidated building across the street was a place which her attackers frequented in order to smoke dagga.

[33] As he pulled away from the kerb she suddenly said that she saw them. When he looked, he saw three males coming from the back of the dilapidated building, walking in the direction of the pavement. He then decided to arrest them. He took out his firearm and drove straight towards the suspects. He and the complainant exited the vehicle. He pointed his firearm at them and ordered them to lie down. He searched them for weapons and found a silver knife in the possession of accused no.1 and an Okapi knife in the possession of accused no.3.

[34] The situation had become quite volatile, as a crowd was gathering. He could not gauge the intentions of the crowd but was fearful for the safety of both the suspects and the complainant and handcuffed accused no's 1 and 2. He only had one handcuff so he

handcuffed the left hand of one to the right hand of the other and put accused no. 2 in the middle of them on the back seat of his car.

[35] He asked the complainant as they were driving if she was sure that they were the people who had raped her and she confirmed that she was. She told him that accused no.1 was the first to rape her, that he had also threatened her with a knife and took her chain. Accused no. 2 was the second person to rape her and no. 3 the third.

[36] When they got to Motherwell police station he left the complainant in the crime office and took the three suspects into the cells. He warned them and searched them again. He explained that the first search was conducted very quickly and had as its primary objective the discovery of any weapons. He explained that the second search was conducted prior to handing the suspects over to the cell officials and that it had to be a thorough search. He found a silver chain in the front pocket of accused no. 3. He said that accused no. 3 gave no explanation as to how he came to be in possession of the chain. He then took the chain to the complainant who identified it as hers.

[37] He then took her back to Ms Xoli's house where he took custody of her jeans. The complainant had previously explained to him that after the rape she had not had time to pull her panties back on, that when she pulled her jeans on after the rape, that the panty had remained around one leg, at the bottom of her jeans, and that he had therefore not bothered to take possession of it.

[38] On the way to Ms Xoli's house they had first gone to the scene of the rape. He knocked on the door of the house but there was no

response. The complainant pointed out the precise spot where she had been raped.

[39] He confirmed that he had found no cigarettes in any of the accused's possession, another aspect disputed by no. 1, who said that he was left in possession of one packet of cigarettes and even smoked them at the charge office and at St Albans prison.

[40] Under cross examination by Mr O'Brien Stanley confirmed that he was aware of glaring inconsistencies between the complainant's statement to the police and to her version as put to him. He said that he did nothing about it as the poor quality of charge office statements was well documented, and he did not want to take another statement which introduced further inconsistencies.

[41] He said that the complainant had said that accused no. 1 had threatened her with a silver knife by holding it against her side when they were walking from the tavern to the house where she was raped. It was put to him by Mr O'Brian that accused no. 1 would allege that the knife was not found in his possession but that it was on the dashboard in the vehicle after his arrest, which he emphatically denied.

[42] Mr Skepe, for the 3rd accused, put it to the witness that the 3rd accused would deny that the necklace was found in his possession by Sergeant Stanley when he was searched at the police station, and would testify that he voluntarily handed it over and that he told Sergeant Stanley that he had picked it up on the street two weeks before his arrest. Sergeant Stanley denied that the necklace had been handed to him voluntarily or that accused no. 3 had offered any version as to how he came to be in possession of it.

[43] The next witness to testify for the State was Dr Owolabi Olwishallah. He confirmed that he had examined the complainant on the 29th March 2009. He confirmed that according to the J88 form which he had completed, that the complainant had complained of being raped by three men. He confirmed that her clothes were soiled, that she appeared to be emotionally balanced and did not appear to have been under the influence of alcohol or narcotic substances. He confirmed that she had advised him that she had already had one child, and that she was still menstruating at the time, having begun her cycle on the 26th March, and that her cycle normally lasted for four days. She had confirmed that she had had consensual sex on the 25th March 2009. Although he concluded that he could see no clinical signs of genital injury, that in his experience that did not exclude forceful vaginal penetration. He confirmed that the anal swabs are taken as a matter of course and that the complainant had not complained of being molested anally.

[44] The next witness to testify was **Siphokazi Maweni**. She was a warrant officer in the employ of the South African Police Services, employed at the Forensic Science Laboratory at Delft in the Western Cape as an assistant forensic analyst and reporting officer. She has a BSc degree majoring in Biochemistry and Micro-biology and an Honours degree in Biochemistry. Although she claimed to have had 9 years experience in the biological sciences, she included her university years in that experience and actually only had 4 years working experience at the time of deposing to the affidavit and had only given evidence three times before. She explained the procedures involved in testing samples for traces of DNA.

[45] Prior to her receiving a docket it would first go to a submission analyst who would open the docket and decide which samples to submit into the DNA process. Those samples would then

be removed from the docket and introduced into the DNA process. Whilst the samples are in the DNA process, the remaining samples would be left in the docket and those dockets would be kept in a sealed container. The submission analyst would then monitor the progress of the samples and once completed, put them back into the docket and seal the docket.

[46] The docket would then be sent to the administrative component of the Unit, who would then send it to the witness, or somebody like her. She would break the seal and open the docket, which would then be in her custody and safekeeping until her report was completed after which it would be sealed by her and sent to the archive for storage.

[47] She testified that what happened in this case was that when she was compiling the DNA report in February 2010, she noticed that some of the samples had not been submitted by the submission analyst. The submission analyst apparently has a discretion to submit only some of the samples if there is a single suspect, but in a case like the present, where there are more than one suspects, the protocol dictates that all of the samples be tested. A subsequent witness informed the court that the submission analyst was subsequently disciplined for failing to submit all of the samples. Maweni, on noticing that not all of the samples had been submitted, continued compiling the initial DNA report and then submitted the remaining samples into the process and subsequently analysed them and submitted a supplementary report in August 2010.

[48] In her initial report she concluded that DNA from the 2nd accused could be identified in three samples – the vestibule, the

vaginal vault and the cervical os. She concluded that the most conservative occurrence for the DNA result from the vaginal vault swab "for all the possible contributors to the mixture DNA result is one person in every 664 406 people".

[49] In the supplementary report she found that DNA from the first accused could be identified in the rectal swab taken from the victim and that the most conservative occurrence would be one person in every 1645.

[50] She also found traces of accused no. 2's DNA in the external anal swab, the vulva swab and the rectal swab and concluded that the most conservative occurrence for the DNA result from the vulva swab would be one in 485 999 people. She indicated that she could neither include nor exclude the DNA from accused no. 3 in the rectal swab. Her evidence in court however contradicted her report. She testified in court that the tests revealed that the 1st and 3rd accused could in fact be excluded as suspects, and that there were probably one or more contributors of semen besides any of the accused.

[51] She made some other remarks that appeared to be inconsistent with her report and common sense, for instance that an exclusion rate of 99% meant that the 2nd accused was probably not linked to the semen. Quite clearly the report meant quite the opposite and I do not believe that anyone can criticise the conclusion that she got to a point in testifying where something went wrong. She was either tired, confused, nervous or a combination of all three. Looking through the transcript afterwards I can also understand that she must have been frustrated at our lack of understanding of what she was trying to convey, especially regarding the mixed samples. As the matter was in any event to be postponed for a lengthy period of time after her evidence was

concluded, I compiled a list of requests, comments and suggestions, which I put to the court, which list was subsequently introduced into evidence as exhibit Z, as follows:

“Whether having more than one contributor of semen to the samples tested could have affected the results.

- 1.1 If so how would it affect the reliability of the results?
 - 1.2 Is it possible to detect how many contributors there were?
2. Explain why the identification of different alleles on different suspects would affect the statistical prediction of possible matches on those suspects, with different outcomes depending on which alleles were identified.
 - 2.1 In exhibit K1 the number of alleles range between 8 and 25, in Exhibit K2 between 11 and 34, and in Exhibit K3 between 10 and 31. This appears to be quite a limited number of alleles. How many alleles are there in fact?
 - 2.2 Explain what statistical conclusion is consistent with proof beyond a reasonable doubt and in particular why there is such a large difference in the statistical presentation of the probabilities of finding a match in a random sample of the population between the 1st and the 2nd accused.
3. Provide evidence regarding the reception of the samples at the Western Cape Laboratory in Delft, the custody thereof, and the handing over of the samples to the various staff involved in their custody and control.
4. Provide evidence regarding the actual testing of the samples and the production of results.
5. Provide evidence regarding the reliability of the equipment and software used for analysing the specimens and for drawing scientific conclusions therefrom.
6. The provisions of section 212 must be borne in mind, and in particular the provision that “a deponent to an affidavit must depose to facts which are within his personal knowledge.”
7. Provide a statistical probability such as was provided in Maweni’s affidavit regarding the results for the vaginal vault, for the vestibule and the cervical os, in respect of the 2nd accused, or explain why it is not possible.
8. Provide clarity on certain aspects of Maweni’s evidence, not necessarily limited to, but in particular, regarding the inclusion or exclusion of suspects as possible matches if all ten loci matches are not obtained.

9. Comment on the requirements of other jurisdictions relating to the number of loci required – for example 13 appear to be required in some jurisdictions, whilst a match of less than 10 could appear to have evidentiary significance as well.
10. Indicate whether the complainants alleles were detected in any of the suspect's samples and whether and if so how the presence thereof could have influenced the outcome of the results.

[52] Colonel Sharlene Otto, the chief forensic analyst and reporting officer in the service of the South African Police Services testified next. She pointed out, quite correctly, that the word "suspects" should have been deleted from paragraph 10. What I had meant to ask was whether any of the complainant's DNA was likely to have been found in any of the samples taken from her body, and if so, whether this could have influenced the outcome of any of the tests.

[53] The position with DNA testing, as I understand it in simple terms, is that the sample undergoes an initial test to see whether it contains DNA. Thereafter, if the test is positive, it is tested to see if it contains male or female DNA. If it contains female DNA and it is in the sample which is supposed to contain the DNA of a male suspect, then the testing stops there. If it is however found to contain male DNA then the testing proceeds.

[54] What then happens is that the DNA is introduced into a process which copies certain identifiable components of DNA, components which are common to all humans, but which have different characteristics. At the end of the process places, referred to as loci, are identified. Each individual inherits one characteristic, or allele, from each parent. It is also possible to inherit the same allele from each parent, in which event only one allele will be identified on that locus. The first locus has two alleles which determine sex and have only X's and Y's, whilst the other nine loci

each have between around ten to thirty possible alleles each, which are each numbered from one to approximately thirty.¹ So for example one could have two tens on one locus, a twenty and an eighteen on another, and so on. The end result is like a combination lock which has twenty tumblers. To find a match at random would be like spinning a one armed bandit with twenty tumblers, and hitting the jackpot, bearing in mind that the tumblers vary in possible combinations, from only X's and Y's on the first, to between approximately eighteen on the others.

[55] What happens when semen from another contributor is found in the sample is that on each tumbler there are now possibly double the correct answers. Even so, the chances of finding an exact match are still remote. Although doubling the contributing semen would appear to increase the odds of finding a match by fifty per cent, it appears that although the statistical probability of a hit increases, it is not simply by fifty percent.

[56] When reduced to numbers, the process appears to be quite simple. The second accused had the following alleles present in loci one to ten respectively: X:Y; 14:16; 15:16; 23:27; 11:15; 31.2:34; 15:19; 11:13; 11:12; and 11:11. On the Rectal swab those exact alleles were found in the same order, as well as a number of others.² The additional alleles indicated an additional sperm donor or donors, and according to Colonel Otto, all of the additional alleles are to be found in the sperm of either the second or the third accused.

[57] The position with the third accused however, was that although he can not be excluded as a suspect, as traces of sperm which could have been his were found, there was not enough of that

¹ On my count, on average about 18 each

² 16 on 2; a 20, 24 and 25 on 4; a 13 and 14 on 5; a 28 and 31 on 6; a 14 and 16 on 7; a 10 on 8; a 13 on 9 and a 10 on 11

sperm present to pass the stringent criteria set by the laboratory. Colonel Otto demonstrated however that in each locus, both of his alleles were to be found. Both alleles were numbered at loci 1,3,8 and 9,³ but only one at loci 2, 5, 6, 7 and 10.⁴ Colonel Otto showed the court how, on each of those diagrams there were peaks corresponding with the unnumbered alleles, meaning that the likelihood of an exact match was in fact extremely high. Their protocol however, demanded that the unnumbered peaks could not be accepted as unqualified proof of an exact match. Colonel Otto however had no doubt that it was in all probability an exact match and a clear indication that the other unknown donor was not anyone other than the 3rd accused. She confirmed that there was absolutely no evidence of any other donors other than the three accused and Maweni's evidence to the contrary appears to be demonstrably incorrect on this score and Colonel Otto's demonstrably accurate. She explained that the system only permitted the numbering of peaks which were high enough to indicate that sufficient volumes of DNA were found to be present to test conclusively. As argued by Mr Coetzee for the State I am satisfied that the evidence regarding the 3rd accused's DNA has probative value and strengthens the circumstantial evidence against him, the cumulative value of which must then be evaluated at the end of the day.

[58] Although Colonel Otto's evidence was very helpful I am constrained to criticise certain aspects thereof. At one point in her evidence she assured the court that only male DNA could be found in the samples, but when it was pointed out to her that one of the alleles in fact matched that of the complainant,⁵ she attempted to qualify her previous unqualified declaration by explaining that when

³ D3S1358, FGA, D5S818 and D13S317

⁴ Vwa, 8S1179, D21S11, D18S51 and D7S820

⁵ D7S820 on the Rectal swab showed a short peak in the position which she confirmed could have been a 9, and which would then correspond with some DNA from the complainant.

making the statement she had disregarded alleles that were not numbered by the system. This is despite having presented a written report to court the previous day, in the form of Exhibit BB, where in table 1 it can be seen that the only alleles identified in the last locus, E7S820, of the external anal swab were 11 and 11, whilst accused no. 1's alleles on the same locus are 10 and 11. In order to be a perfect match allele number 10 should also have been present on the same locus on the external anal swab. She even provided a statistical probability based on the so called match, being one in every 11 000 people. Strangely, she provided no statistical probability with regards to the Rectal swab, which had a 100% match. She pointed out that the 10th allele was in fact present on the external anal swab, and pointed out that there was an unnumbered peak at D7S820 on the external anal swab diagram in Exhibit BB, page 1, on the grey line, which she described as the allele positions, just before the 11th allele. She testified that although the system was programmed not to number peaks that were not high enough, she was qualified to identify it and was satisfied that there was absolutely no doubt that it was the tenth allele. It certainly wasn't as low as the other smaller peaks she referred to as artifactual stutters and her evidence appears in this regard to be logical and convincing.

[59] Although I have criticised certain aspects of her evidence, I do not believe that her evidence regarding the scientific processes and conclusions can be criticised. I can understand that a scientist explaining such complicated processes and concepts to lay people will try to simplify the explanation as much as possible, but unfortunately, it can then lay their evidence open to criticism.

[60] After the conclusion of Colonel Otto's evidence Mr O'Brian, for the 1st accused brought an application to have all DNA evidence linking the 1st accused to the samples, expunged. I dismissed the application and indicated that my reasons would follow. These then are my reasons.

[61] Mr O'Brian argued that the investigating officer had testified that there was no DNA evidence linking the 1st accused, and that he had also been advised of this fact prior to having to plead, as the supplementary report only surfaced after he had put his client's alibi defence to the complainant in cross examination. He argued that the 1st accused had been prejudiced in the conduct of his defence in that his legal representative had been unable to properly advise his client. I fail to understand in what way the 1st accused might have been prejudiced. It is true that he pleaded an alibi defence and that had he known that there was DNA evidence linking him that he might have been wiser not to have pleaded an alibi initially. The 1st accused however declined to disclose his evidence at the outset, and his version was only disclosed during cross examination of the State witnesses, in particular the complainant. That is not legally recognizable prejudice. He is not permitted to tailor his defence to suit the evidence. If he had been prejudiced in obtaining the services of a DNA expert timeously then arrangements could have been made to postpone the matter in order to make such arrangements, but no such request was ever made, notwithstanding that the supplementary DNA results have been known since August 2010.

[62] Mr O'Brian referred me to S v Dzukuda and Other; S v Tshilo 2000 (2) SACR 443 (CC), and in particular paragraphs [9] – [11] thereof. They bear repeating *verbatim*.

[9] As was said by this Court in *Zuma*'s case, an accused's right to a fair trial under section 35(3) of the Constitution is a comprehensive right and "embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force." Elements of this comprehensive right are specified in paragraphs (a) to (o) of subsection (3). The words "which include the right" preceding this listing indicate that such specification is not exhaustive of what the right to a fair trial comprises. It also does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete sub-rights, some of which have been specified in the sub-section and others not. The right to a fair trial is a comprehensive and integrated right, the content of which will be established, on a case by case basis, as our constitutional jurisprudence on section 35(3) develops. It is preferable, in my view, in order to give proper recognition to the comprehensive and integrated nature of the right to a fair trial, to refer to specified and unspecified *elements* of the right to a fair trial, the specified elements being those detailed in sub-section (3).

[10] It should not be assumed that a fair trial, as required by section 35(3), can only be achieved by one specific system of criminal procedure. There may be more than one way of securing the various elements necessary for a fair trial and provided the legislature devises a system which effectively secures such right, it cannot be faulted merely because it settles for a system which departs from past procedures. The norm prescribed by section 35(3), is a "fair trial." The question to be determined in each case is whether the criminal procedure scheme, or the relevant part thereof, devised by the legislature, whatever its *form*, conforms in substance to that *norm*.

[11] It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof. In what follows, no more is intended to be said about this particular right than is necessary to decide the case at hand. At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused. There are, however, other elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of averting a wrong conviction, but which arise primarily from considerations of dignity and equality." (my emphasis - footnotes excluded)

[63] Mr O' Brian also referred me to *Crossberg v S*,⁶ a case where thirteen statements minuted by the police went missing, and Navsa JA, had the following to say:⁷

“[79] In *Taillefer*⁸ it was made clear that the determination of whether there exists a reasonable possibility that the fresh evidence would have an impact on the result of the trial process should be dealt with as a separate issue from the assessment of the effect of the failure to disclose on the overall fairness of the trial. At para 84 in relation to the fairness of the trial the court said the following: ‘The reasonable possibility of affecting the overall fairness of the trial “must be based on *reasonably* possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of non-disclosure...” That would be the case, for example, if the undisclosed statement of a witness could reasonably have been used to impeach the credibility of prosecution witnesses. The conclusion would necessarily be the same if the prosecution fails to disclose to the defence that there is a witness who could have led to the timely discovery of other witnesses who were useful to the defence.’

[80] Each case must of course be considered on its own merits. A retrial is not ordered merely on an assertion that the State's failure to disclose impacted on the original trial. In the present case, whilst the statements themselves are not available for scrutiny, it is clear from the evidence adduced by the State (and referred to earlier) that they are highly relevant to the outcome and to the issue of a fair trial in relation to the murder charge. They go to the true strength of the state's case against the appellant and they impact on credibility. The State presented dubious reasons for the retaking of the statements and offered no reasonable explanation as to why so many statements were missing. The disclosure that numerous statements were taken and were missing came only after State witnesses had been ‘caught out’. As stated earlier, entries were made in the investigation diary of statements even before they had been taken. The other factors set out in para 69 above are significant. In the totality of the circumstances

⁶ (440/2007) [2008] ZASCA 13 (20 March 2008)

⁷ At [79] – [80]

⁸ *R v Taillefer* (2004) 114 CRR (2d) 60 (SCC)

of the present case, the conclusion that the first set of statements did not suit the State's case and that they are missing by design rather than misfortune is compelling" (my emphasis)

[64] Mr O' Brian also referred to a doctoral thesis by Fawzia Cassim,⁹ and in particular chapter five thereof, where the learned author discussed *inter alia*, the *Shabalala*¹⁰ decision, and regarding expert evidence, concluded that¹¹:

The defence's ability to competently challenge expert evidence depends on the extent of information available to it. The timing of disclosure relating to expert evidence could be crucial to the proper preparation of the defence case. This is because access to comprehensive expert reports and pre-trial meetings between experts can contribute to delineating the issues in the dispute. According to *Shabalala*, the timing of disclosure will depend on the circumstances of the case. Disclosure can occur at a later stage provided the accused has sufficient time to prepare the defence" ' The Constitutional Court stated in *Shabalala*, that the primary reason for disclosure is that an accused may prepare a defence by being fully informed of the case that he has to meet, and that disclosure should take place at a time 'when the accused is acquainted with the charge or indictment or immediately thereafter". However, the duty to disclose is said to be a continuing one." (footnotes excluded)

[65] Mr Coetzee referred me to *Du Toit v Direkteur van Openbare Vervolging, TVL*¹², which I think is apposite. It is indeed so that the investigation "does not have to come to a screeching halt at the commencement of the trial." I am satisfied, after considering the explanation given by Colonel Otto, that the non disclosure

⁹ *The right to meaningful and informed participation in the criminal process* – accessed on 26 January 2012 at <http://umkn-dsp01.unisa.ac.za/handle/10500/1840>

¹⁰ *Shabalala v Attorney-General of the Transvaal* 1996 (1) SA 725 (CC) (1995 (2) SACR 761; 1995 (12) BCLR 1593)

¹¹ pp 33-34

¹² 2004 (2) SACR 584 at 596 a-b "...dit was nie in dispuut nie, dat dit nie gesê kan word dat die ondersoekwerk by die aanvang van die saak met skreeuende bande tot stilstand kom en dat sekere opvolgwerk nie gedoen kan word nie. "

was not purposeful and more importantly, that the accused suffered no legally recognizable prejudice as a result thereof.

[66] The State then closed its case and the accused each testified. The 1st accused testified that he lived in the same street as the tavern, approximately a three minute walk away, and that he had been into the tavern previously in order to buy cigarettes but had been served by the owner, not the complainant. He normally went to Kabane garage further down the road to buy packets of cigarettes which he would then sell individually to patrons of the garage who were refuelling their cars. On the day of the rape he had gone there at about 09:00 and returned at about 20:00 after which he went home to his room behind the main house, ate his supper, had a cigarette, and woke up the next morning at around 08:00 after which he washed, had breakfast and then left to go to the garage to sell cigarettes.

[67] Whilst in the street, he met the 2nd and 3rd accused who asked for cigarettes, which he gave to them. As they were smoking, a police vehicle arrived and they were arrested.

[68] He said that although the investigating officer searched him, he found nothing on him, but found an Okapi knife on accused no.3. He said that they were searched again at the police station but before accused no. 3 was searched, that he took out a silver necklace and handed it to the police. He said that he had seen a silver knife on the dashboard of the police vehicle along with the Okapi knife, when he got into the vehicle. He said that he knew that accused no.3 had picked up the necklace on the pavement, whilst on his way back from school about a week prior to their arrest. He, like his co-accused, denied having emerged from the direction of the dilapidated house at the time of their arrest, contrary to the evidence of both Stanley and the complainant.

When asked by Mr Skepe, for the 3rd accused, whether he was sure about no. 3 being in possession of a knife, he was adamant that he was. He denied that he knew the complainant or had ever seen her before.

[69] The 2nd accused testified that on the night of the incident he had had a few drinks and whilst on his way home at around 20:45, met the complainant, who had obviously had a lot to drink and was quite inebriated. They chatted for a few minutes and at around 20:50 or 20:55 they agreed to have sex, after which they went to the back of a nearby house, where there was fortuitously a mattress lying on the ground. After being arrested he said that he asked the complainant why she had accused him of having raping her when she knew that they had had consensual sex and she replied that she had been raped by three men. This was not put to either the complainant or to Stanley. He said that he had not seen accused no. 3 that day.

[70] Under cross examination he denied that they had been arrested in the vicinity of the dilapidated house and although he confirmed that he normally smoked with accuseds 1 and 3 he then denied that he had ever socialized with either of them.

[71] The 3rd accused testified that he had gone to sleep at around 20:00 the previous evening, as he had written an exam that day and his father had promised him a present. He slept in the same room as his little sister and never went out until the next morning when he met accused no.2, who asked him for a cigarette, which he did not have. They then met accused no. 1 who had a cigarettes and while they were smoking they were arrested. He denied that Stanley found an Okapi knife on him. When asked by Mr Skepe, his legal representative, whether he was aware of any motive the complainant could possibly have for

falsely accusing him he said that it was possibly because a few days prior him and accused no. 2 had been confronted by the complainant's elder brother who accused them of stealing a gate from his property and had threatened to beat them or deal with them. That version was never put to the complainant.

[72] The 3rd accused's mother also testified. She confirmed that as far as she knew, that he came home that evening at around 18:00 and that when she went to her room at around 21:00 that he was already asleep in his room, that she locked the gate and that if anyone had tried to leave that night, that she would have heard. She confirmed that her disabled daughter was wearing nappies at the time and that she would normally have checked on her two or three times in the evening. She recalled that when she checked on her that night that she saw the accused in his bed sleeping. She said that she told the investigating officer that her son had been at home the previous evening but that he was not interested in her story at the time, only wanting to know what his age was and that he only told her where he would be detained.

[73] There were inconsistencies in both the complainant's version as well as those of the accused. I am not particularly troubled by the inconsistencies between the complainant's version and that of the police statement. The police statement is palpably inaccurate and only needs to be read in isolation for one to realize that virtually no reliance can be placed on it for any purpose. It is clear that the prosecutor failed in his duty to point out inconsistencies in her evidence to the accused's legal representatives and this was quite rightly conceded by Mr Coetzee, who only became involved in the trial when Colonel

Otto gave her evidence. The State's obligations in this regard are set out by Fawzia Cassim¹³ as below:

When a state witness gives evidence which differs from a statement in the prosecution's possession, the prosecutor must consider the question whether or not the discrepancy is of a serious nature. The prosecutor is not required to do anything if the discrepancy is of a minor nature. However, if the discrepancy is clearly a serious one, the prosecutor must as soon as possible make the statement available to the defence. If the accused is unrepresented, the prosecutor must disclose the discrepancy to the court. The court held that the rationale of the rule requiring disclosure of a previous inconsistent statement is to provide a safeguard against the danger of an accused being convicted on the evidence of a witness who is not a credible and reliable witness. The prosecutor may not ignore an averment in a statement which is *prima facie* in conflict with the witness's evidence. If the prosecutor is in doubt, he must disclose it to the defence. If he fails to disclose the discrepancy which is indeed serious, that might well result in a failure of justice.

The prosecutor's duty was to make the original statement of the witness available to the defence in order that the credibility of the witness can be properly tested by cross-examination with the aid of that statement. Where there are two conflicting statements, it is the prosecutor's duty to disclose and make available both statements to the defence. The absence of a request by the defence for the deviating statement to be made available (and, where such is the case, of mutually conflicting statements) does not relieve a prosecutor of this aforementioned duty unless the defence has been made aware of the existence of such statements and has indicated that it does not require them.

[74] The complainant testified that she did point out discrepancies in her statement to the prosecutor prior to testifying and as pointed out by Mr Coetzee, the prosecutor should either have made his consultation notes available to the accused's representative, or alerted them. Having regard to the poor nature of the statement, and the fact that the complainant was tackled on the discrepancies by all of the accused's legal representatives, at length, and in my view, acquitted herself well under cross examination, I am not of the view that the failure to draw the discrepancies to the attention of the accused's legal representatives in this case in any way prejudiced the accused. One must also beware of arm chair criticism of the prosecutor's conduct. One is not aware of how much time he had when

¹³ *Supra*, Chapter 5 at p24

consulting with the complainant, when it was prior to her giving evidence that he consulted with her and to what extent she alerted him to the discrepancies.

[75] The complainant's attempts to justify discrepancies in the complexion of the 1st accused can be criticised, as can some of her evidence regarding the necklace and the clasp. It seems however, at the end of the day that she was convinced that it was her necklace and at the very least, it bore a striking resemblance to hers. There is no doubt that a necklace was stolen from her that night and the prospects of the third accused having picked up a similar necklace a week or two prior, just seem to be another co-incidence, which taken together with all the other, seem not to be reasonably possible. The 3rd accused's version that he voluntarily gave Sergeant Stanley the necklace at the police station is gainsaid by Sergeant Stanley who is emphatic in his evidence that he found it on the 3rd accused during the second search. Sergeant Stanley was also adamant that he found knives on accused no.'s 1 and 3, which evidence was denied by both of them, although no.2 confirmed that a knife was found in possession of no.3. Why no. 3 would have carried a necklace around which he found a week before, is also unknown. I recalled him after completion of argument and posed that question to him and his response was that he had transferred it from his school trousers to those he was wearing on the day of the arrest, as he wanted to wear it with his smart clothes. He could not explain why he did not leave it at home but left it in his pocket.

[76] If there was consensual sex it is highly unlikely that the complainant's panties would have remained in her jeans around one leg or that she would have gone to Ms Xoli and alleged that

she had been raped. She testified that she would still have been working at the tavern at around 21:00 which is the time when the 2nd accused alleged that the consensual sex took place and she positively identified all three accused. The positive DNA match of accused no. 1 vindicates her evidence in this regard, at least as far as no.1 is concerned. Although it is theoretically possible that she could have had consensual sex with accused no. 2 and then been raped by three others, including 1 and possibly 3, when her evidence is viewed in conjunction with all of the other evidence, it makes that possibility so remote as not to be reasonably possible. The complainant was adamant about all three and given her positive and objectively correct identification of accused no 1, the possibility of an incorrect identification of no. 3 appears to be so much more unlikely. The lighting was good and she had ample time to identify her assailants.

[77] The denials by accused no's. 1 and 3 that Stanley found knives in their possession appear to be palpably false. There appears to be no reason why Stanley would have wanted to concoct such evidence or that he could have had the time to do so. The identification and arrest happened spontaneously and couldn't have taken more than a minute or two. There simply wouldn't have been time to manufacture such evidence. Whilst the evidence regarding the knives has no direct bearing on whether accused no.'s 1 and 3 raped the complainant or not, the fact that they lied about the knives, is another factor that must be considered in conjunction with all of the other evidence. The 3rd accused knew both other accused, socialized with them previously, was found in their company that morning, and was identified shortly after the fact with them. No.3 was found in possession of a necklace similar to the one stolen a few hours

previously, lived close by, and had a DNA profile consistent with that of the additional DNA identified on the complainant.

[78] I do not believe that accused no. 3's mother's evidence tilts the scales in his favour sufficiently to cast any reasonable doubt on the evidence against him. It appears clear from the balance of the evidence that he took part in the rape and the inescapable conclusion is that even if his mother saw him there that night, it was either before or after he had surreptitiously left the house and taken part in the crimes.

[79] Mr O'Brian argued that the theft of the necklace was no more than that and did not amount to robbery. I am unable to agree. The use of force or the threat of the use of force was present and operated throughout the attack. The wielding of a knife before the attack resulted in the complainant not resisting and was operative throughout. Aggravating circumstances in relation to a robbery are defined in the Criminal Procedure Act¹⁴ as

“the wielding of a fire-arm or any other dangerous weapon...by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence”

[80] Whether accused no. 1 or one of the others took it or not is also irrelevant. It is clear that notwithstanding the fact that no. 3 might have appropriated the necklace after the rape, that they all associated themselves with the theft, used the threat of force, and are therefore also guilty of the crime of robbery, with aggravating circumstances. The theft might well have been an afterthought and was not in itself accompanied with the use of any force and my views in that regard will be reflected in the sentence I impose in respect of that offence.

¹⁴ 51 of 1977 at section 1

[81] Under all the circumstances I am satisfied that the State has proven all of the elements of the crimes that the accused have been charged with and they are all accordingly convicted of the crimes of

1. Robbery with aggravating circumstances as defined in section 1(1)(b) of Act 51 of 1977
2. Rape in contravention of section 3 read with section 1, 56(1) 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007.

L D KEMP

ACTING JUDGE OF THE HIGH COURT

Matter heard on : 3, 4, 5 May, 23 August, 12 October, 13, December 2010, 4, 5 April, 3, 4, 5 October, 2010, 24, 25, 26, 27 January 2012

Judgment delivered on : 30 January 2012

Counsel for the State : **Messrs Nyendwana and Coetzee**

Counsel for the Accused : **Messrs O'Brian, Joubert & Skepe**