

**IN THE KWAZULU-NATAL HIGH COURT
DURBAN
REPUBLIC OF SOUTH AFRICA**

CASE NO.CC.55/11 D

In the matter between

THE STATE

and

THANDUKWAZI MKHIZE

**REASONS FOR JUDGMENT AS REQUIRED IN TERMS OF SECTION
227(7) IN AN APPLICATION IN TERMS OF SECTION 227(2)(a) OF
THE CRIMINAL PROCEDURE ACT 51 OF 1977, AS AMENDED**

HENRIQUES J.

[1] This is an application in terms of section 227(2)(a) of the Criminal Procedure Act 51 of 1977, as amended brought by Mr Pillay on behalf the accused. In support of such application, the accused seeks to rely on the factors listed in section 227 subsection(5) specifically on sub-sections 5 (a), (c), (e), (f) and (g).

[2] The basis for such application is that Mr Pillay seeks to cross-examine and question the complainant on an incident of a sexual nature which is alleged to have occurred a week or two after the arrest of the accused and the alleged rape of the complainant on 19 February 2011.

[3] He made the following submissions, in regard to the factors listed in sub-section 5 which the accused relied on, namely:-

[3.1.] Among the charges, is one of an alleged rape of the complainant-issues of the complainant's sexual activity and/or promiscuity are thus relevant to the charge. This is more so, he submitted in light of the fact that the accused says that he did not have sexual intercourse with the complainant and that her parents instructed her to falsely implicate him. Accordingly, questions relating to the incident of alleged sexual activity which occurred after the alleged rape was relevant to a fact in issue.

[3.2.] He also submitted that it would be in the interests of justice specifically the accused's right to a fair trial that the questions be allowed as they were fundamental to the accused's defence and consequently were relevant. In addition, he submitted that such questions would explain the presence of semen or any injury to the complainant and was thus relevant to a fact in issue.

[3.3.] In addition, he submitted, the questioning in cross-examination would relate to a particular incident of a sexual nature which happened closely in time to the alleged rape and appeared to be perpetrated by somebody who lived in the area and who was known to the complainant. This was in line with the accused's defence that he did not rape the complainant and that she falsely implicated him on the instructions of her parents.

[3.4.] He submitted that insofar as the rights of the accused and the complainant were concerned, a balance must be struck between the competing interests. The potential prejudice to the complainant's personal dignity and right to privacy was outweighed by the accused's interests – namely his right to a fair trial and to confront his accuser.

[4] Advocate Smith, who appeared for the State, opposed the application and submitted that the questions were not relevant and thus the application ought to be dismissed. She submitted that in terms of the evidence adduced, the alleged rape was reported on the same day it occurred, and it was thus improbable that the complainant would have had a sexual encounter with anyone else so soon after the alleged incident. She submitted that even though she could not argue that the incident was not sufficiently closely linked in time to the alleged rape, it was not in the interests of justice to allow the questioning and that the prejudice to the complainant outweighed the rights of the accused. This, she indicated, ought not to be influenced by the fact that the matter was being heard in camera.

[5] She further submitted that the evidence in relation to the presence of semen was not before the court yet and submitted that in light of the fact that the complainant was examined on 19 February 2011, the presence of semen ought not to be a factor to be considered for an alleged sexual encounter a week or two after the alleged rape.

Legal Position

[6] Section 227(2) reads as follows:

“No evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross-examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings pending before the court unless –

- (a) *the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question; or*
- (b) *such evidence has been introduced by the prosecution.”*

[7] Sub-section 4 enjoins this court to grant such an application only if it is satisfied that such evidence or questioning is relevant to the proceedings before it. In determining relevancy, the section mandates the court to consider whether the evidence or questioning :-

- (a) *is in the interests of justice, with due regard to the accused’s rights to a fair trial;*
- (b) *is in the interests of society in encouraging the reporting of sexual offences;*
- (c) *relates to a specific instance of sexual activity relevant to a fact in issue;*
- (d) *is likely to rebut evidence previously adduced by the prosecution;*
- (e) *is fundamental to the accused’s defence;*
- (f) *is not substantially outweighed by its potential prejudice to the complainant’s personal dignity and right to privacy; or*
- (g) *is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue.*

[8] Sub-section 6 provides that the court shall not grant such an application if in its opinion, the evidence or questioning is sought to be adduced to support an inference that by reason of the sexual nature of the complainant’s experience or conduct the complainant is “*more likely to have consented to the offence being tried or is less worthy of belief.*”

[9] Section 227 has undergone some changes since its initial enactment, the

most recent of which has been in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The reasoning behind the section is clear. There has been a recognition by our legislator that victims of sexual assault often suffer “secondary sexual assault” at the hand of the courts and agencies responsible for prosecuting such offences and is linked to gender bias and rules of evidence regulating the prosecution of such offences.

[10] The legislation has recognised that the procedural and evidential rules often exacerbate the trauma a rape victim experiences from reporting a rape and enduring a trial. This has made victims of rape reluctant to report a rape and testify in court. Gradually there has been a shift in public and judicial opinion about procedural and evidential rules employed and the need to advance the constitutional imperative of gender equality.

[11] In my view, the section was designed primarily to protect complainants from unnecessary and irrelevant questioning and to protect the privacy and dignity of complainants while simultaneously ensuring that there is still a full and thorough ventilation of the issues. If the questioning is relevant to an issue in the trial depending on the defence proffered, then it ought to be allowed. I am fortified in this view by the remarks of Heher AJA in the decision of ***S v M 2002(2) SACR 411 (SCA)*** albeit that these remarks were made prior to the 2008 amendment. In addition, in this matter, what this court also has to bear in mind is the constitutional imperative in section 28(2), namely that “*the rights of a child are of paramount importance.*”

[12] The test to be applied is thus one of relevance. How does one determine what is relevant? In ***R v Matthews and Others*** 1960 (1) SA 752 (A) at 758 A – B, Schreiner JA remarked as follows, “*Relevancy is based on a blend of logic and experience lying outside the law.*”

[13] Subsection 5 is of some assistance in determining what is relevant. In my view though, in considering what is relevant, I must have regard to the facts of the matter before me. Consequently, I must have regard to the evidence adduced thus far namely the medical evidence, the complainant's evidence and the accused's defence.

[14] The complainant testified that she was raped by the accused who was known to her, by him inserting his penis into her vagina. No evidence of previous sexual conduct was led. In addition, the evidence of the district surgeon who examined her a few hours after the incident, was that even though her hymen was intact there was inter alia bruising which was indicative of sexual assault. There also did not appear to be any evidence of previous sexual conduct.

[15] The accused denies raping the complainant and says her parents told her to falsely implicate him. The questions sought to be adduced appear to relate to an incident of a sexual nature which occurred a week or two after the alleged rape. The impression I gain from the submissions made by Mr Pillay and the basis of the defence is that the questioning may either constitute an attack on the complainant's credibility and /or that one is to infer that she ought not to be believed regarding the alleged rape as she is alleged to have been involved in an encounter of a sexual nature a week or two after the alleged rape.

[16] If the questioning sought to be adduced is merely to attack her credibility and no more, then the application cannot succeed. This is specifically what section 227 was enacted for.

[17] If the questioning to be adduced is to support an inference that she cannot

be believed, then the application must likewise fail as it is struck by the exclusion in subsection 6 (b).

[18] Prior to launching this application, Mr Pillay put to the complainant the following in regard to the incident which is alleged to have occurred a week or two after the alleged rape, it being common cause that the accused was arrested on the day of the alleged rape, being the 19 February 2011. This was after establishing that the complainant knew one Maceli and Vusi and where they lived.

Question: *Thanda tells me, a week after he was arrested, Maceli found you in the house with Vusi and you were putting on your clothes, do you know anything about that?"*

Answer: *No*

[19] In my opinion, having regard to the accused's defence and the question that was put to the complainant, the questions sought to be adduced are for the purpose of supporting an inference that the complainant's evidence regarding the alleged rape is not to be believed or to use the language of the section "*is less worthy of belief*" as she is alleged to have been found a week or two after the alleged rape in a house with Maceli's husband Vusi putting on her clothes.

[20] In my opinion, the application must thus fail on the basis that it falls foul of section 227(6)(b). If I am wrong in that opinion, I now also consider whether the questions sought to be adduced are relevant in light of the factors mentioned in s 227(5) and the evidence presented thus far.

[21] The application must also fail as the questions sought to be adduced, in

my view, are not relevant. The accused's right to a fair trial would not be infringed should the application fail. The question has been put to the complainant and she has answered same, and the accused would be entitled during the presentation of his case to testify concerning same and call witnesses in support thereof. This would likewise apply to ss 5(e).

[22] In considering the interests of justice and society as envisaged in ss 5 (a) and (b) apart from considering the accused's interest I must also consider the complainant's. Having regard to the purpose of the section and the shift in opinion towards victims of sexual assault, I am of the view that it would not be in the interests of justice or society.

[23] A balancing of interests likewise applies to the consideration of relevance envisaged in ss 5 (f). In light of the constitutional imperative, the defence raised and the evidence presented thus far, I am of the view that the potential prejudice to the complainant's dignity and right to privacy outweighs that of the accused.

[24] The questioning does not in my view relate to a specific instance of sexual activity which is relevant to a fact in issue if one has regard to the accused's defence. Traditionally, the section has been invoked (prior to its amendment) where the defence is one of consent. Our courts appear more willing under those circumstances to invoke the section where the questioning or evidence goes to the crux of the defence and is not merely limited to the credibility of the complainant. See in this regard *S v Zuma 2006 (2) SACR 191 WLD* and *S v Katoo 2005 (1) SACR 522 SCA*.

[25] As regards ss 5 (d) and (g) are concerned- it is not relevant bearing in mind that the incident occurred on the 19 February 2011, it was reported the same day and the complainant was examined on the same day albeit a few hours

after the incident. It would also not be relevant in light of the accused's defence of a denial. The questions sought to be adduced relate to an alleged incident which occurred a week or two after this.

[26] For the reasons mentioned above, I am not convinced that the questioning sought to be adduced is relevant and consequently the application must fail. The application in terms of s 227(2)(a) is thus refused.

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J.I. HENRIQUES

DATE OF HEARING
OF ARGUMENT

7 DECEMBER 2011

DATE OF JUDGMENT

8 DECEMBER 2011

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