REPORTABLE

IN THE HIGH COURT OF THE REPUBLIC OF

SOUTH AFRICA NORTH GAUTENG, PRETORIA

Case Number: A1051/11

DATE:08/10/2012

In the matter between

JIMMY MAFEMANE SITHOLE Appellant

and

THE STATE Respondent

JUDGMENT

BAM AJ

1. The Appellant was convicted in the regional court on a charge of rape in contravention of the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No 32 of 2007, of a girl of 14 years. He was sentence to 18 year's imprisonment of which a period 4 years was conditionally suspended. Leave to appeal against the conviction and sentence was granted by the trial court.

2. The State alleged in the charge sheet that the crime was committed during the year 2009. The appellant, who was legally represented by an attorney, pleaded not guilty. The defence was a denial of the alleged sexual intercourse.

3. The State proceeded with the trial and applied for leave to adduce expert evidence in the form of an affidavit in terms of the provisions of section 212 of the Criminal Procedure Act, 51 of 1977 [the"Act"). This affidavit purported to contain evidence in accordance with the terms of subsections 212(4Ka) and 8(a) of the Act, in respect of the result of forensic DNA analysis pertaining to paternity tests.

4. When appellant's legal representative, an attorney, raised an objection against the admissibility of the statement, the learned regional court magistrate requested him to explain why he objected. The attorney responded and stated that he wanted to have the DNA results independently examined. The magistrate then insisted to be informed what the legal basis of the objection was. The magistrate even went further and asked the attorney whether he was aware what section 212 statements were all about. The result of the learned magistrate's

conduct was that the attorney summarily withdrew the objection.

5. The State was entitled to adduce evidence of this nature by way of a section 212 statement, to prove prima facie what it contained, even in the face of an objection. In raising the objection the defence recorded that it contemplated to investigate the situation regarding the forensic evidence with the intention to rebut the prima facie proof thereof. Accordingly, in my view, the learned magistrate should merely have noted the objection at that stage. I will return later in this judgment to the issue of prima facie evidence

6. The trial nevertheless proceeded and the prosecutor read the contents of the section 212 statement into the record. The learned magistrate then remarked as follows: 'Thank you Mr Mbambala (the appellant's attorney) the court will come to your assistance. If you have allegations in respect of the process that was used and with regards to the analysis the results obtained, you must lay that basis and then the court will have consideration to that, considering whether I will accept or not accept the Section 212 of Act 51 of 1977 statement"

The attorney replied and stated that, according to his instructions, the process had been tampered with, especially regarding the samples. He stated further that the docket indicated that the rape allegedly occurred in August 2009 but that the child was born on 21 December 2009. He further added that there was a rumor that the stepfather of the complainant impregnated her. The attorney repeated that an independent DNA test should be conducted.

7. The learned magistrate thereafter commented as follows:

"Now what has been submitted and whether that was tampered with, that evidence must still come. This does not say that all of that is in order. So maybe just rethink your basis of your objection because this does not say that all the other aspects are important. You can still cross-examine witnesses and lay the basis of your case that was said is not what was drawn or the conditions or circumstances under which it was drawn or taken, those things. That is a completely different matter to what this person has done and analyzed."

The attorney then capitulated and conceded that the section 212 statement could be allowed as evidence.

8. In my opinion it is clear that the forensic evidence adduced by the State's by way of the section 212 statement, primarily the so-called chain evidence linking the blood samples obtained for the purpose of the forensic DNA analysis, including the marking and safekeeping thereof during the time before it reached the forensic laboratory, was challenged and disputed. In view of the learned magistrate's remarks referred to above, the learned magistrate was, without doubt, acutely aware that this was what the appellant's defence pertaining to the forensic evidence actually entailed.

9. The admission of forensic evidence in the form of a section 212 is subject to the provisions and prerequisites of sub-sections 212(4)(a) and 212(8)(a) of the Act.

10. The relevant part of the subsection 212(4)(a) reads as follows:

"Whenever any fact established by any examination or process requiring any skill -(i) In biology, chemistry, physics, geography or geology; 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…, and that he or she has established such fact by means of such examination or process, shall, upon its mere production at such proceedings be prima facie proof of such fact:"

The applicable provisions of subsection 212(8)(a) provide as follows:

"In criminal proceedings in which the receipt, custody, packing, marking delivery or despatch of any fingerprint or palm-print, article of clothing, specimen, specimen (as defined in section 1 of the Anatomical Donations and Post-Mortem Examinations Act, 1970 (Act 24 of 1970), or any object of whatever nature is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges —

(i) That he is in the service of the State or is in the service of or is attached to the South African Institute for Medical Research, any university in the Republic or anybody designated by the Minister under subsection (4);

(ii) That he in the performance of his duties -

(aa) received from any person, institute, State department or body specified in the affidavit, a fingerprint or palm-print, article of clothing, specimen, tissue or object described in the affidavit, which was packed or marked or, as the case may be, which he packed and marked in the manner described in the affidavit;

(bb) delivered or despatched to any person, institute, State department or body specified in

the affidavit, a fingerprint or palm-print, article of clothing, specimen, tissue or object described in the affidavit, which was packed or marked or, as the case may be, which he packed or marked in the manner described in the affidavit-fee) during a period specified in the affidavit, had a fingerprint or palm-print, article of clothing, specimen, tissue or object described in the affidavit in his custody, which was packed or marked in the manner described in the affidavit, Shall upon the mere production thereof at such proceedings, be prima facie proof of the matter so alleged:"

11. It is of specific importance for the purposes of this judgment, to keep in mind that:

(a)The terms of sub-section 212(4)(a)(ii) deal specifically with the "analysis", of the DNA exhibits.

(b)The terms of sub-section 212 (8)(a)(ii)(aa) deal with the receipt of the exhibits by the deponent to the statement.

(c)Sub-section 212(8)(a)(ii)(bb) deal with the delivery or dispatch of the exhibits by the deponent.

(d)Custody of the exhibits by the deponent to the statement is dealt with in sub-section 212(8)(a)(ii)(cc).

12. In this matter the relevant contents of the particular section 212 statement, drafted "in accordance with Section 212 subsection (4)(a) and (8)(a)", and deposed to by captain M S Mashegoana, read as follows.

"I. . .am Captain in the South African Police Service, attached to the Biology Unit of the Forensic Science Laboratory as a Senior Forensic Analyst and a Reporting Officer, and

I am in the service of the State"

"3.1 During the course of my official duties on 2010-08-10,1 received the case file and thereafter interpreted the DNA results of the crime scene and reference sample pertaining to SASELAMANI CAS 31/09/09 (LAB No 178134/09 [2009110485]) by process requiring competency in Biology.

3.2 The following finding(s) can be made from the DNA analyses on the exhibits;

3.2.1 Paternity cannot be excluded as the alleles present within the DNA profile of the alleged father "SITHOLEJ. S. (09D4AA4761XX) occur within the DNA profile of the child "SHIBAMBO G. "(09D4AA4778XX).

3.2.2 The Data for the Black population group has been used as the alleged father "SITHOLE J S" (09D4AA47761XX) presumably belongs to this population group.

3.2.3 Given the DNA results, the probability of paternity is 99.99%. (Refer to table 1.)

3.2.4 Given the DNA results, the alleged father "SITHOLE IS." (09D4AA46761XX) has a

2 800 000 times bigger chance of being the biological father of the child "SHIBAMBO G" (09D4AA4778XX), than any other randomly chosen individual within the specific population group. (Refer to table 1)."

"4.The case file and its contents were in my safekeeping for the duration of the investigation, from date of receipt until completion." (Own emphasis.)

13. In considering the contents of this particular section 212 affidavit, it appears that it

indeed complied with the requirements of sub-sections 212(8)(a)(ii)(aa) and(cc), as far as, respectively, the receiving and custody of the samples by the deponent of the statement, at the laboratory, is concerned. It also complies with the requirements in terms of section 212(4)(a) pertaining to the actual forensic analysis. Accordingly only the receipt and custody of the blood samples at the laboratory, and the analysis thereof were prima facie proved.

14.Regarding the receipt of the exhibits at the laboratory, the statement lacks any reference from whom the samples were received. Section 212(8)(a)(ii)(aa) clearly requires that the "person, institute, State department or body" from whom the exhibits were received, has to be specified. The mere reference to a "case file" and "SASELAMANI CAS 3109/09", although it has the appearance of a police docket reference, is in my view insufficient proof of the identity of the entity or person who packed, marked or despatched the exhibits to the laboratory. The statement, in my view, does therefore not comply with the requirements of the said sub-section and does accordingly not constitute prima facie proof in that regard.

15.This, however, does not seem to be the only problem. The section 212 statement makes no reference to any delivering or dispatching of the exhibits provided for and required by section 212(8)(a)(ii)(bb). It goes without saying that the exhibits were either delivered at or despatched to the laboratory by somebody or entity.

16.Apart from the above problems in the State's case, it should also be noted that section 212 makes no reference to the gathering of evidence for purposes of forensic analysis, or to the

safekeeping and marking thereof, immediately after the obtaining thereof and before it was delivered at, or despatched to the laboratory. In my opinion these facts can therefore not be proved by way of a section 212 statement. Accordingly the State will be obliged to adduce evidence in that regard unless it is formally admitted by the accused in terms of section 220 of the Act.

17.No evidence was adduced by the State in respect of the delivering or despatching and custody of the exhibits before same were received at the laboratory, neither was any evidence adduced pertaining to the gathering and the marking and custody thereof, immediately thereafter.

18.In addition to the above issues, it has to be kept in mind that the defence specifically challenged and disputed the prima facie proof of the evidence contained in the section 212 statement, regarding the chain evidence subsequent to the eventual forensic analysis of the blood samples in question. The challenging of the forensic evidence clearly included the challenge of the actual receipt of the exhibits in an uncontaminated condition. This again surely affected the issue of whether the correct blood samples were analyzed. Accordingly, even if I am wrong in finding that the exhibits were not proved to have been received from a specified "person, institute, State department or body" in terms of section 212(8)(a)(ii)(aa), the question remains whether prima facie proof thereof became conclusive in the circumstances where the chain evidence was specifically challenged.

19.1 do not deem it expedient to deal with what exactly prima facie proof entails. In my

view it is sufficient, for the purposes of this judgment, to consider the question in what circumstances prima facie evidence will be elevated to conclusive proof.
In S v Veldhuizen 1982(3) SA 413 AD the Court considered the meaning of prima facie proof in section 212 of the Act. The following was held at 416G-H:
"The words "prima facie evidence" cannot be brushed aside or minimized. As used in this section they mean that the judicial officer will accept the evidence as prima facie proof of the issue and, in the absence of other credible evidence, that prima facie proof will become conclusive proof “

20. Although the State is required to prove its case beyond reasonable doubt, an accused facing prima facie evidence allowed in terms of section 212, is obliged to rebut such evidence. However, the standard problem arising in matters of this kind, is what an accused is called upon to do to obtain and adduce "other credible evidence" in rebuttal of prima facie proof.

21. In Veldhuizen the following was stated at 416E-F:

"In so far as the facts contained in the certificate may be peculiarly within the knowledge of the State, so that it may be difficult for an accused to impugn such facts, it must be remembered that in terms of section 212(12) of the Act the court may cause the person who made the certificate to be subpoenaed to give oral evidence/'

22. This dictum In Veldhuizen, however, in my respectful view, does not remedy the problem faced by an accused regarding the collecting, marking, and custody of exhibits before delivery or despatching thereof to the laboratory. The person who deposed to the section 212 statement regarding the receipt of the exhibits and the analysis thereof,

is usually not the person who obtained or collected the exhibits. This situation is borne out by the contents of the section 212 statement in hand. Section 212 (12), in any event, specifically refers to the person who deposed to the section 212 statement. The sub-section reads as follows:

"(12) The court before which an affidavit or certificate is under any of the preceding provisions of this section produced as prima facie proof of the relevant contents thereof may in its discretion cause the person who made the affidavit or issued the certificate to be subpoenaed to give oral evidence in the proceedings in question, or may cause written interrogatories to be submitted to such person for reply, and such interrogatories and any reply thereto purporting to be a reply from such person, shall likewise be admissible."

23. The provisions of section 212(12) are indeed applicable to the evidence contained in the section 212 statement in respect of the receipt of the exhibits at the laboratory and the analysis thereof. However, in view of the other problems pertaining to the forensic evidence, I find it unnecessary to consider what impact implementing of the provisions this sub-section could have had on this case. The point is that it was in any event apparently not considered and not implemented.

24. In S v Van der Sandt 1997(2) SACR 116, at 135f, the following is stated:

"As the intention with the enactment of section 212 of the Criminal Procedure Act was to avoid undue wastage of mainly official manpower by court attendances for the purpose of frequently undisputed evidence on matters nearly always incontrovertible, there is no reason to read into

s 212(4) a component that relieves the State of the duty to prove by documentary means that which it would otherwise do by viva voce evidence."

This dictum, with which I respectfully agree, in my opinion confirms that the State is also required to prove the relevant chain evidence in respect of any forensic analysis.

25. In accordance with the dictum in Veldhuizen, the presumption of prima facie proof provided for in section 212, in my view, casts a so called reverse onus on an accused. It was nevertheless found to be constitutional in Van der Sandt. Cf S v Manamela (Director-General of Justice Intervening) 2000(3) SA1CC. The constitutionality of section 212 is however not an issue before this Court. The problems in this matter mainly turn upon questions of procedure and adequacy of evidence relative to the issue of a fair trial.

26. In our law it is every person's constitutional right to challenge evidence against him or her in a court of law. Section 35(3)(i) of the Constitution, Act 108 of 1996, reads as follows:

"Every accused person has a right to a fair trial, which includes the right -(i) to adduce and challenge evidence."

This issue was discussed in S v Zuma and Others 1995(2) SA 642 (CC), at par 16, where the following is stated:

"The right to a fair conferred by that provision (substantive fairness) is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to equated with what might have passed muster in our

criminal courts before the Constitution came into force."

27. In practice an accused faced with prima facie proof in terms of section 212, will usually find himself in the invidious position that he will not be able to adduce evidence to rebut the presumption due to the fact that all relevant facts pertaining to the chain evidence, relating to the gathering of exhibits as well as the marking and safekeeping thereof, are exclusively in possession or control of the State.

28. In my opinion it is obvious that an accused will be severely prejudiced if he is virtually precluded from contesting and rebutting prima facie proof in terms of section 212, if the State does not adduce such evidence. What is accordingly of importance is to determine in what circumstances, if any, the State will be obliged to adduce evidence substantiating prima facie proof contained in a section 212 statement.

29. It was ruled by the then Appellate Division in Veldhuizen and R v Chizah 1960(1) SA 435 AD (at 442 C-G), that the mere challenging of such evidence will not be sufficient to affect the evidential value of prima facie proof. Accordingly it stands to reason that an accused challenging prima facie proof will be obliged to lay a basis for contesting such evidence before the State can be required or compelled to adduce the evidence in question, or, at least to make all necessary information available to afford the accused the means and opportunity to rebut the prima facie proof. It should, however, in my view, not be required from an accused to state in detail what the basis for the challenging of such evidence is. It should suffice if the defence states, for example, like in this case, that it is suspected that the blood samples had

been tampered with.

30. Subject to the evidential value of any possible concessions or admissions that may be made during cross-examination by the accused, if any, or other proof emanating from the evidence so adduced by the State in favour of the accused, an accused still has to adduce evidence to rebut the prima facie proof. If anything emanating from evidence adduced by the State favours the accused to the extent that it amounts to credible evidence rebutting the prima facie proof contained in the section 212 statement, then cadit quaestio. If no such favourable credible evidence emanated, the accused will still have to rebut the prima facie evidence by adducing other credible evidence in that regard.

31. In HIEMSTRA'S CRIMINAL PROCEDURE, at 24-31, where the learned authors discuss the provisions of subsection 212(8), the following is stated:

"Chain—So-called "chain" evidence explains what happened to the exhibit from the time it was despatched to the time the report was received. It is important that the chain be properly proved if it is not admitted by the accused."

Subject to what has been alluded to above pertaining to the challenging of such evidence, I am in respectful agreement with this statement in view of the fact that section 212 provides for nothing more than prima facie proof. The onus remains on the State to prove its case beyond reasonable doubt.

32. In this case the State did not adduce any evidence, extraneous to the section 212 statement, regarding the challenged chain evidence. Accordingly the appellant was effectively precluded from rebutting the prima facie evidence contained in the section 212 statement. I will return later to the question whether the appellant experienced a fair trial as Constitutionally provided for.

33. Pertaining to the chain evidence regarding the gathering of the samples and the marking and safekeeping thereof before it was despatched to the laboratory whilst not dealt with in the section 212 statement, it follows that the chain evidence regarding those issues was not proved. Accordingly, in view of the lacking of the said linking chain evidence, the section 212 statement in any event became irrelevant and inadmissible evidence. It should therefore have been disregarded by the trial court.

34.1 now turn to the evidence on the merits. The complainant, T S, a female person aged 16 at the time the trial commenced on 9 February 2011, testified that she knew the appellant, he was her neighbour. On a specific day she was invited to sleep over at the home of a family member, named P, (the second witness, P M). P was the appellant's lover. At about midnight, the appellant arrived and was admitted to the house by P. The appellant had sexual intercourse with P and thereafter with the complainant. The complainant said the appellant undressed her and then raped her. She failed in pushing him away. P observed what happened but did nothing. The appellant remained in the house until the next morning and then left.

It was the complainant's first sexual experience. She did not report the incident to anybody. She told the court that the appellant threatened to kill her should she tell anyone. After some time, not specified by the complainant, she discovered that she was pregnant. The child was born on 21 December 2009. According to the complainant blood samples were apparently taken from herself, the child and the appellant.

35. During cross-examination of the complainant, it appeared that the appellant, after having been admitted to the house, fell asleep. The complainant stated that the incident occurred after the month of June 2006. When confronted with the statement she made to the police, the complainant conceded that she initially said to the police that the incident occurred in July that year. The complainant was also asked whether she recalled an occurrence when she went to hospital with a broken hand and that she was then "implanted" with semen. The complainant responded that she fell on a Sunday. The remaining part of the question about the "implanted" semen, became of no consequence in that it was not pursued or cleared up by the defence, the prosecutor or the learned magistrate. The complainant was however adamant that the appellant had intercourse with her and stated that she was a virgin at the time. She further stated that she was pregnant for a period of 9 months. It was put to the complainant that from the month July 2006, when the incident allegedly occurred, according to her version to the police, until December 2006, when the child was born, a period of nine months does not fit in. The complainant failed to give any explanation in that regard.

36. The second witness, P, after having been sworn in, was on the receiving end of a stern warning by the learned magistrate not to deviate from the statement she made to

the police, otherwise, said the magistrate, she would be charged by the prosecutor and be declared a hostile witness. What prompted the learned magistrate to issue this warning does not appear from the record at all. It appears to have been uncalled for. What, strangely as it might seem, coincided with the learned magistrate's admonishment, is that soon thereafter, during the witness' evidence in chief, the prosecutor informed the court that the witness indeed deviated from her statement. The learned magistrate's foresight in this regard was, to say the least, remarkable.

37. Petu testified about an incident when she and the complainant were asleep and the appellant, her ex-husband, came into the house. The complainant kept on sleeping. The next morning the appellant left. It was at this point that the prosecutor informed the court that the witness deviated from her statement to the police. The prosecutor, however, without more, carried on questioning P. The latter then confirmed that the appellant had intercourse with her that night. She also confirmed that the appellant had sexual intercourse with the complainant.

38. In cross-examination, the appellant's attorney endeavored to question P about the contents of a statement she made to the police. P stated that the statement was not read back to her. An application for a trial within a trial was subsequently granted by the court to afford the defence to attempt to have P's statement admitted as evidential material for purposes of further cross-examination. In the trial-within-a-trial, Inspector Chabalala, called by the defense, testified that he took P's statement down in writing and that it was read back to her. The prosecutor did not contest this evidence. The learned magistrate however questioned the witness about his evidence-in-chief where

he said that nothing happened after the statement was read back to the witness. The learned magistrate was clearly not impressed with the evidence of inspector Chabalala. The witness was nevertheless adamant that the contents of the statement were confirmed by P. The State did not refute the evidence of inspector Chabalala and closed its case. The statement of P was eventually ruled admissible by the learned magistrate.

39. The trial then proceeded and the cross-examination of P continued. P denied that the incident occurred in August as stated in her statement and said that it in fact happened in June. She further testified that she was asleep when the appellant had intercourse with the complainant and that she was forced to say that she saw what happened and that that version was a lie. She also stated that she knew nothing about the complainant's pregnancy. The learned magistrate then proceeded to put a few questions to the witness in order to find out why she contradicted herself. The questions eventually counted more than thirty.

40. The appellant elected to testify. He denied that he had intercourse with the complainant. Regarding the DNA evidence the appellant admitted that a blood sample had been taken from him but contended that the evidence, apparently the blood samples, was in some way manipulated and tampered with. The learned magistrate then questioned the appellant. Firstly the magistrate enquired from the appellant whether he would concede that it is possible that the complainant could make a mistake about the period of her pregnancy. After the fifth question was put to him in this regard by the learned magistrate, the appellant conceded the point. These questions, to my mind, amounted to cross-examination and were not justified. It

creates the impression that the learned magistrate descended into the arena.

41. After the appellant's case was closed on 9 February 2011, the question about the DNA evidence again arose. The appellant's attorney then applied for a postponement to enable the defence to secure independent evidence in that respect. The application was opposed by the State.

42. The learned magistrate then enquired from the defence what had been done about the issue since October 2010, the day the trial commenced. The attorney responded that no arrangements had been made, due to several reasons, including financial problems. The learned magistrate further enquired what basis had been laid for the application. The attorney submitted that the facts stated by the complainant, namely that the rape was committed in July and that the child was born on 21 December, prove that the child must have been conceived long before July. The learned magistrate then required that the attorney should orgue on the law. The defence attorney, however, did not take the matter any further and the application was refused by the trial court.

43. In his judgment the learned regional court magistrate expressed his concerns about the appellant's legal representative's competence and behaviour as a legal practitioner. It seems that the learned magistrate was of the opinion that the attorney did not conduct the appellant's case properly because of lack of experience. Whether this remark of the learned magistrate was fair and justified, is a debatable issue and actually of no consequence as far as this judgment is concerned.

44. In evaluating the evidence, the trial court found that the complainant and P corroborated each other in all material respects. In this regard it is clear that the learned magistrate totally disregarded P's contradicting evidence during cross-examination when she stated that she did not see that the appellant had sexual intercourse with the complainant.

The learned magistrate failed to record the reasons for disregarding P's evidence given during cross examination, save to say that P was influenced by the appellant to change her version. This finding is not borne out by the facts, and in my view constitutes a material misdirection.

45. Regarding the complainant's intellectual capacity, the learned magistrate referred to the "underdeveloped state of her brain". This remark by the trial magistrate is apparently based on the fact that the complainant, at the age of 16, was still in grade 6 whilst her friends of the same age group were already in grade 11. The issue about the complainant's apparent problems at school was not properly investigated. To arrive at any conclusion without evidence in that regard will amount to speculation.

46. The learned magistrate apparently did not form an opinion of the complainant's mental capacity based on her evidence and demeanour in court. Unfortunately the impression is created that the learned magistrate was looking for justification to find that the complainant could have made a mistake pertaining to the date of the alleged rape. This reasoning by the learned magistrate's seems to be consistent with the questions put to the appellant by the court to which I have referred to above.

47. In evaluating the evidence on the merits, the following issues are of importance.

The complainant was a single witness. In view of the contradictions in the evidence of P M, the latter's evidence cannot be regarded as corroboration for the complainant's version that she was raped. P admitted that she lied in court and her evidence should accordingly be disregarded pertaining to the question whether the appellant indeed had sexual intercourse with the complainant.

48. A further matter of concern is, taking into consideration the evidence of the complainant and the date of birth of the child as well as the State's allegation that the crime was committed during the year 2009, when the rape actually occurred. In my view this date had to be proved by the State to enable the accused to prepare his defence. It takes but simple arithmetic to determine that the complainant, on all probabilities, could not have conceived the child after March 2010. Why the dates in June, July and August were mentioned by the complainant (and P for that matter), as the day the rape was committed, is very difficult to comprehend. In my opinion the learned magistrate's finding that the complainant could have made a mistake in that regard is questionable, especially in view of the fact that the State apparently also wanted to rely on the evidence of P who, in her witness statement, mentioned 4th August as the date of the incident. This issue is, in my view, further complicated by the allegation in the charge sheet that the rape was committed during 2009.

49.Another bothering aspect is the complainant's failure to complain about or to inform

anybody that the appellant had raped her. How it came about that paternity tests had eventually been done is not clear at all. This is not a matter falling under the provisions of section 59 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) Act No 32 of 2007 where the complainant's report of the rape was delayed for some or other reason. No evidence was adduced proving that the complainant reported the alleged rape at all. (Section 59 of Act 32 of 2007 provides that no inference can be drawn against a complainant for the delay in reporting a sexual crime.)

50.In conclusion, pertaining to the merits, I wish to remark as follows. When the evidence is considered in totality, it appears that the evidence of the complainant as a single witness does not pass muster. Her evidence was not clear and satisfactory at all, and, in my view, the complainant was not truthful and reliable. It follows that the complainant's evidence needed corroboration in some or other form. In view of the fact that the section 212 statement became inadmissible evidence and the "corroborating" witness, P, admitted that she lied to the court, there was no corroboration whatsoever for the complainant's version that she was raped by the appellant..

51. Therefore, in my opinion, the State failed to prove its case beyond reasonable doubt. In applying the guidelines stated in inter alia S v Trainor 2003(1) SACR 35 SCA, the appellant's denial of having had sexual intercourse with the complainant should have been held to be reasonably possibly true.

52. Returning to the question whether the appellant experienced a fair trial, I have already

referred to the dictum in Zuma and Others par [16] in par 26 above. In my view it suffices to remark that the right to a fair trial clearly also embraces substantial fairness. See Sanderson v Attorney General, Eastern Cape 1998(2) SA 38 (CC) par 22.

51. In the matter at hand the following aspects seem to be relevant.

(i) The trial court's refusal of the appellant's application for postponement to have the issue of the forensic evidence investigated, apparently because of the fact that no legal basis had been laid; and

(ii) Failure of the State to adduce the chain evidence alluded to above, resulting in the trial court finding that the prima facie evidence contained in the section 212 statement becoming conclusive.

53. Pertaining to the first aspect: The trial magistrate's criticism that the issue of possible changed blood samples was not taken up during cross-examination of the complainant is unfounded. The issue was raised on at least three occasions during the trial. The complainant, in any event, would clearly not have been able to respond to any questions in that regard.

In my view the learned magistrate should have appreciated, after having considered the totality of the evidence, that it was reasonably possible that a problem pertaining to the

forensic evidence existed. The learned magistrate's reasoning that the admissibility of the forensic evidence was not properly challenged by the defence attorney, lost sight of the fact that the issue was repeatedly raised by the defense.

54. Regarding the issue that the State failed to adduce the relevant chain evidence, whilst specifically challenged and after a basis had been laid substantiating the challenge, it is clear that it resulted in the appellant being prejudiced in being effectively prohibited to challenge and rebut the prima facie evidence.

It goes without saying that the challenging of evidence in any event includes the right to cross-examination.

55. Accordingly, in my opinion, the aspects alluded to above constituted irregularities that were substantially unfair to the appellant^) the extent that it vitiated the proceedings. Consequently it cannot be said that the appellant experienced a fair trial. This was conceded by Mr Mashuga, appearing for the State.

56.1 therefore propose that the appeal against the conviction and sentence should succeed and the following order be made.

ORDER

The appeal against the conviction and sentence succeeds and the conviction and sentence are set aside.

A J BAM

ACTING JUDGE OF THE HIGH COURT

21 September 2012

I agree. The above order was made on 30 August 2012.

HJ FABRICIUS

JUDGE OF THE HIGH COURT

For Appellant: Adv R T Ntshwane;

Instructed by Mokgobi Attorneys, Roodepoor

For Respondent: Adv M M Mashuga;

Director of Public Prosecutions, Pretoria.