

IN THE HIGH COURT OF SOUTH AFRICA

WITWATERSRAND LOCAL DIVISION

CASE NO. :

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA

Accused

and

THE STATE

**ACCUSED'S HEADS OF ARGUMENT
SECTION 174 APPLICATION : INADMISSIBLE STATEMENTS
APPLICATION FOR DISCHARGE**

1.

GOVERNING PRINCIPLES : SECTION 174

The traditional formulation of the test related to there being no evidence on which a reasonable man acting carefully might convict. The credibility of the State witnesses was not a factor and the possibility that the accused

may incriminate himself was a discretionary factor which could serve to prevent discharge. Almost all of this has changed.

2.

It is, however, submitted that on the traditional test - whatever that means - the accused is still entitled to a discharge. The formulation shows its age and antiquated values both in the reference to the jury (surely it is the court and not some reasonable court or other mental construct whose judgment is in issue?) and the gender. It cannot surely be suggested that the court might convict if the evidence in the absence of evidential contradiction, does not establish guilt beyond reasonable doubt? What sort of court would do that?

See : ***S v Mpheta* 1983 (4) SA 262 (C)**
 ***R v Dladla* (2) 1961 (3) SA 921 (D) 923**

3.

It is submitted that the current approach to discharge amounts to this:

- (a) The State's evidence must be taken as the factual matrix against which guilt must be measured.

- (b) This is subject to a number of provisos, the most important being that:
 - (i) if the State's evidence or any part thereof is clearly wholly unreliable, it cannot be accepted - in short if the court at the end of the day in the absence of any countervailing evidence would not accept it, it cannot be accepted now.

 - (ii) this is especially relevant and important if the State leads evidence which conflicts with other evidence adduced by it.

- (c) The discharge cannot be refused in the exercise of a discretion because the defence testimony on behalf of the particular accused may strengthen the State case (as opposed to testimony on behalf of another accused).

Compare : ***S v Lubaxa 2001 (2) SACR 703 (SCA);***
 S v Amerika 1990 (2) SACR 480 (C) 484;
 S v Jama 1998 (2) SACR 237 (N)

4.

In short, the high watermark of the permissible State case is that as at the close of the State case - if that case standing in exactly that format would not have sufficed at the end of the whole case, a discharge must follow. Inherent weaknesses in the State case as opposed to gainsaying weaknesses (where evidence to the contrary would be involved) are obviously to be considered in arriving at this conclusion.

5.

There are in any legal system institutional inequalities which cannot be redressed on the basis of principle or the reformulation of long-standing rules. Thus quality of counsel, resources to fund the defence etc. cannot be effectively equalised. This does not mean that where basic inequalities which offend the constitutional values and constitutional rights of persons

can be addressed by a simple reinterpretation of the existing law, it should not be done and indeed it must be done.

See : Section 39 of the Constitution

See on the court's obligation to do this: **Carmichael**

And see the results :

6.

The traditional test was one achieved mainly by interpretation. It reads:

"Whether the evidence of the Crown if believed, might be sufficient to satisfy a reasonable man acting carefully that the accused is guilty"

See : **Diadla (supra) 923;**

S v Khanyapa 1979 (1) SA 824 (A) 838 F

7.

Section 174 reads (virtually echoing its predecessors):

"If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty"

8.

It is clear that these words of the trite test are very different to the words of the statute. What is thus kept alive, is a pre-constitutional judge made test which cannot survive the dictates of the constitution nor the very changed system in which it now operates.

9.

For an example of a judicial re-assessment along the lines advocated herein, see **Govender**

10.

The classic formulation firstly demonstrates how a criterion fashioned in certain circumstances and at a certain time, becomes a logical paradox:

The formulation originated from the time when jury trials were the order of the day and perverse convictions resulted. The jury was to decide the guilt - hence the reference to a reasonable man. The judges were in this way controlling what was to be put before the jury and thus formulated the test with reference to someone else who had to make the decision. What the Judge himself would do, thus did not feature in the criterion for it was on an institutional basis, not his decision ever. That has however changed - the touchstone for the decision disappeared : it is now the Judge (and perhaps his assessors) who must make the decision. It is supremely irrational to pose the question still to the reasonable man (sic person) when the reason why it was posed in that manner, has wholly disappeared - *cessante ratione legis, cessat et ipsa lex*. The new constitutional dispensation abhors irrationality in the legal process.

See on the history: *The South African Law of Evidence, Zeffert et al 157*

See on irrationality : ***S v Zuma 1995 (2) SA 642 (CC) paragraph 18 and arbitrariness***

11.

It is noteworthy that in a recent decision the SCA itself no longer refers to the reasonable man but to "evidence upon which the accused might reasonably be convicted".

See : ***S v Lubaxa (supra) paragraph 11***

12.

The test thus becomes far simpler and less of a guess if it is related to the court itself - it must know - not divine what someone else will do - whether it will convict the accused on the State's evidence. It may be faced with that very question if the case gets closed and frequently the court gives a

firm indication of this (compare ***S v Legote 2001 (2) SACR 179 (SCA)*** paragraph 4 and paragraph 9.

13.

What is then the true question and how must the court then answer the question posed in effect to itself? When does the court decide there is evidence upon it might convict the accused? If it gives the State every advantage of taking its case at face value, and that does not equate to proof beyond reasonable doubt, how can it say it might convict? That must be an intellectually impossible if not dishonest answer. What might happen is all very well when one is asking what a third party trier of fact would do - it is wholly irrational when you ask the question of yourself and a *fortiori* where this device is used to introduce an artificial uncertainty into the equation. The might relates to the trier of fact someone other than the poser of the question - when the questioner and the trier becomes one, it becomes utterly irrelevant.

14.

The decision to close or not is an extremely difficult one - experienced and very able counsel still have sleepless nights about it. Guilt or acquittal may depend on it - very few accused can make that decision properly or have the means to do so. It is a forensic gamble which must not be. Add to that the fact that many judges, quite permissibly, give a very clear indication whether the case should be closed or not. Others do not. This introduces a further element of chance in whether A goes to jail for 15 years and B goes free. It is an element of chance which can be eliminated by a simple compulsory test at the end of the State case. Discrimination is abhorred and equality sought by the constitution - compare **Brink v Kitshoff 1996 (4) SA 197 (CC)**.

15.

If this is not the case, the position and the court's role is the following:

"If following my discharge refusal, you had closed your case I would have acquitted you : however, you or your lawyer chose not to do so, sufficient

thereafter emerged to convict you. Hence your conviction is in order. You have had a fair trial."

16.

The conviction or otherwise of the accused would thus depend to a material degree on the ability to make the right decision at the end of the state case. Given that most accused are unrepresented and that the expertise of representatives vary widely, conviction or acquittal depends on a very arbitrary mechanism. What is clear is that if a different lesser test is adopted than a beyond reasonable doubt criterion, convictions which result at the end of trial, must be the result in single accused prosecutions, of self-incrimination. A discharge principle invoking four square a beyond reasonable doubt criterion applied on an unanswered State case basis, provides the following benefits:

- (a) It utilises a tried and tested yardstick which is in any event to be used at the end - whilst it has an uncertainty component due to its normative character, it is a trite one which in any event does have application in the final analysis. The test for

discharge utilising another more stringent criterion is difficult to apply given the uncertain elements thereof.

- (b) It strips the process of a large measure of arbitrariness. The decision of the court at this stage as opposed to that of the Accused (or his representative) is brought to bear on the issue. Thus the wealth of an accused translated into the use of experienced top counsel, no longer is a major discriminating factor in acquittals and convictions.
- (c) Proper effect is given to the presumption of innocence. If the State with all the resources at its disposal cannot adduce proof on a non-gainsaid basis which meets the criminal standard, an accused should not be placed on his defence.
- (d) It promotes equal treatment of all accused persons our law demands this - see **Legote** (*supra*) and the non discrimination and equality rights in the constitution.

- (e) It promotes rationality - acquittal or guilt should where feasible depend on a value judgment of the court not the accused or his representative.

17.

It is submitted that the judgment in **Lubaxa** clearly recognises these principles and that it can only be reconciled with such an approach.

See : Paragraph 16 and paragraph 18 and 19.

18.

THE ISSUE OF MENS REA

Proof of mens rea

The state must prove that the accused had the intent to rape the complainant and must do so beyond reasonable doubt. It must thus negate beyond reasonable doubt any belief of the accused that the complainant had consented to intercourse.

19.

The section 115 statement

The issue of lack of mens rea and a bona fide belief in the consensual nature of the intercourse was squarely raised in the section 115 statement. See paragraph 3 read with paragraphs 4 and 5 of Exh 'A'. The State thus knew exactly what it had to deal with in the process of proving its case. This is an important consideration.

See : **Du Toit 22-23G**

20.

There is no onus on the accused to convince the court of any of the propositions advanced by it. The Prosecution must prove these false beyond reasonable doubt.

See: **R v Difford 1937 AD 370 at 373:**

It is not disputed on behalf of the defence that in the absence of some explanation the Court would be entitled to convict the

accused. It is not a question of throwing any onus on the accused, but in these circumstances it would be a conclusion which the Court could draw if no explanation were given. It is equally clear that no onus rests on **the accused** to convince the Court of the truth of any explanation he gives. **if he gives an explanation**, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, **but that beyond any reasonable doubt it is false**. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal, and I turn at once to consider what his explanation is. @

21.

Indeed , on the complainant's own evidence it was always foreseen that the accused would contend that intercourse was with consent with the corollary of absence of mens rea.

22.

Mens rea and particularly intention and its component consciousness of unlawfulness is proven by inference from the proven facts - there is very seldom direct evidence of a guilty state of mind. This is particularly so where the conduct in question is not a malum in se, intercourse is a very usual and very acceptable form of conduct. No inference of criminality can thus be drawn from the nature of the act itself.

23.

The drawing of such an inference of intention to rape must accord with the general principles which govern the drawing of inferences in criminal law.

24.

What is clear is that:

- (a) Each fact which make up the circumstantial evidence from which inferences are sought to be drawn must be proven beyond reasonable doubt in the final analysis.

See : **R v Kleyn 1937 CPD 292;**
Chamberlain v The Queen (No. 2) (1984) 153 CLR
521:

"...(a court) cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond reasonable doubt."

"...It seems to us an inescapable consequence that in a criminal case the circumstances from which the inference should be drawn must be established beyond reasonable doubt."

R v Blom (infra) at 202 ("proved facts" - there is only one measure of proof in criminal law).

Compare also : **Mtsweni (infra)** which refers to
"proven facts" as the bases for
legitimate inferences.

- (b) The inferences can only be drawn if the logical dictates of **Rex v Blom 1939 AD 188 at 202** are fully complied with.

See : **S v Mtsweni 1985 (1) SA 590 (A) at 593 E-I**. Inferences can be drawn with due observance of the **logical** dictates in **Blom**. These are minimum requirements for the drawing of inferences - their satisfaction does **not** mean that such inferences are to be drawn.

25.

INFERENCE v CONJECTURE AND/OR SPECULATION

In criminal cases, the two cardinal rules of logic when reasoning by inference, were formulated as follows by WATERMEYER C J in the leading case of **Rex v Blom 1939 AD (supra) at 202**:

In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the **proved** facts. If it is not, the inference cannot be drawn.*

- (2) The **proved** facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. @*

26.

The above dictum has been followed in numerous cases and the test still applies to this day. These are the minimum requirements to be met for the drawing of inferences in criminal cases.

See also: The Law of South Africa (LAWSA), Vol. 9, 1st re-issue, par. 643 (p.449) (*supra*) and the authorities there mentioned.

27.

The "two cardinal rules of logic" were recently again approved by the Supreme Court of Appeal in South Africa in **Cooper and Another NNO v Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA) at 1027F-G.**

28.

A distinction should be made between inferences validly drawn on the one hand; and on the other hand, conjecture, speculation and making assumptions, which would not allow permissible legal inference.

See: **S v Cooper and Others 1976 (2) SA 875 at 888H-889C;**

S v Naik 1969 (2) SA 231 at 234D-E, with reference to **Caswell v Powell Duffryn Associated Collieries Ltd** (1939) 3 All ER 722 at 733;

S v Essack and Another (AD) 1974 (1) 1 at 16D, approving the *dictum* in the **Caswell** case.

44.

The inferences to be drawn and referred to in the **Blom** case must therefore be based on the proved facts before this Court and rationally be connected to them and not arrived at by guesswork or speculation or pre-conceived positions.

See: **S v Cooper and Others** 1976 (2) (*supra*), at 889A-C;
S v Mtsweni (supra).

These individual material facts must be proved beyond reasonable doubt (*supra*).

29.

The evidence

It is submitted that the main factual matrix for any inference of mens rea is the pre, during and post intercourse relevant conduct of the accused and the complainant and particularly their interaction with one another.

30.

THE COMPLAINANT'S CONDUCT AND EVIDENCE

The complainant clearly acknowledges that the Accused could have thought she had consented. Whilst this is ultimately a decision for the court, the complainant's evidence is vital in this respect (see p187):

- (a) Whether the Accused could have believed that the complainant had consented, depends on an overall

impression of a whole variety of interactions including body language, tone of voice etc. Evidence can describe some of these but can never replace them or adequately reflect them. In rape cases it is the woman's consent and perceptions thereof which are important. In a case such as the present, the woman is in one sense in a far better position than the court to judge whether her conduct could have led to a belief of consent. The complainant did not make the concession as a result of overbearing cross-examination or tiredness; she made the concession because the circumstances fully warranted it. Of particular importance is the following:

- (i) the complainant now clearly is very antagonistic towards the Accused and regards herself as a fighter for woman's rights. The concession thus comes from an adversary of the accused.

- (ii) the complainant earlier in the evening did not disagree with the accused when he said she must find someone to satisfy her sexual

needs - someone to comfort her. In that same conversation he mentioned that he would comfort her.

- (iii) in earlier conversation she had also repeated sentiments that the current crop of boys are not man enough hence (inter alia) she does not have a boyfriend. The accused was clearly not one of these boys.
- (iv) She sent him a lot of SMS messages in the immediate prior period; these contained messages of love, hugs etc.
- (v) It was arranged that he would visit her room to tuck her in. She agreed to it. She was on her bed dressed just in a wrap around Kanga at the time he could have visited her.
- (vi) He told her he could tuck her into his bed, she jokingly said what kind of tucking in is

this. The sexual content could not have gone unnoticed certainly not from his side.

(vii) He came into her room unannounced. She did not protest. He asked if she is sleeping and clearly implied that he would be back. She did not question his presence, said nothing to the effect that he must not come into her room unannounced or that he should not be back. The light was on, she was on top of the bed (hence still to be tucked in) and dressed in a kanga clearly with no bra. The outside door was not closed.

(viii) He came back; the lights were still on. This obviously at face value suggests in context an expected visit.

31.

He asked if she was sleeping - she said yes. He offered a massage - she declined and said she will see him in the morning. There is no suggestion that the refusals were forceful. They only indicated sleepiness as the reason for the refusal not an aversion to the idea. He removed the bedclothes, she did not protest; he massaged her for close to a minute. She did not protest. She recognised a massage as a seduction technique. She could proffer no sound reason for the lack of a firm protest. (See P160, P162).

32.

He then turned her onto her back by pulling on her one shoulder with one hand. She weighed 85 kg's and is well built. There is no way that he could turn her on her back without a great struggle if she did not want to be turned on her back and he must have known that. She confirmed that : she rolled onto her back. (See p163).

33.

She simply when he massaged her shoulders said "no Malume". There is no suggestion that this was said abruptly. Where she was abrupt, she said so. He removed her kanga - she had no underwear on. Clearly that was how she was dressed earlier as well or that was a very reasonable thought. On his thinking she clearly expected him to visit her. She made no objection to this overt sexual act. This would be the time for a very real and firm objection.

34.

The question as to whether he may ejaculate inside her is a highly significant one:

- (a) It clearly presupposes that she has a choice in what is going on; she is not simply being subjugated; and a will less automation clearly he has not recognised that she had frozen if she had.
- (b) It displays a measure of trust by the accused in the complainant - she will tell him truthfully if it is inadvisable.

- (c) It invites a reply that he must continue the love-making.
- (d) It means that he is going to leave her with indubitable evidence of sexual intercourse linked to him only. She in short, is going to be able to tell the world in totally clear terms, that he had unprotected sex with an HIV woman. That in itself would be a very powerful weapon in her hands.
- (e) He was obviously not a sex crazed maniac unable to control his sex drive and sexual actions.

35.

Both knew there was a policeman on duty 10 meters away who clearly was tasked to investigate any disturbance. At no stage did the accused threaten the complainant, prevent her from calling out or tell her to be quiet.

36.

He felt her vagina and opened it for intercourse. She made no objection at all. He penetrated her and had intercourse with her for 10 minutes - again there was no objection of any nature. She made no attempt to hit him, bit him, scratch him or wriggle out from under him or asked him to stop. She made no complaint whatsoever. Even when he asked if he could ejaculate in her she did not object.

37.

The complainant's concession that the accused could have thought that she had consented was thus a perfectly reasonable one. A muted protest at physical contact had never stopped amorous activities in their tracks.

38.

The complainant did not at the time his intentions were very clear utter a single word of protest at his actions - removing the kanga and spreading her legs and then spreading her vagina. Given that she said no the

massage and in the entire context, what was he in contradistinction to make of this? The answer is obvious.

39.

To the aforesaid must be added:

- (a) The parties knew each other for some years but as a result of physical proximity had seen more of each other during the second part of 2005. The accused had assisted the complainant in furthering her studies and also financially (e.g. airfare shortly before the incident).

- (b) The complainant sent the accused some 54 SMS messages in the 2 months prior to the intercourse. Some ended with terms such as "love" and "hugs" and similar words. The accused stated that the tone of these had become more affectionate shortly prior to the incident (see 'L' paragraph 10). This has not in any way been refuted by the prosecution and this is evidence in favour of the accused (compare *R v Valachia* 1945 AD 826 837).

- (c) The parties had some two months prior to the incident a conversation about the complainant not having a boyfriend, that she should have one. She remarked that the current crop of young men are not man enough. Clearly the accused did not fall under this group. This discussion clearly related to sexual matters and seen in conjunction with the number of SMS messages and their tone, could be interpreted as some interest in a sexual relationship.
- (d) On the night in question, the complainant was staying over - she clearly decided to do so of her own volition. She could leave at any time even after the tucking in remarks etc and the arrangement to visit her in her room. She had on a previous visit left after 10:00 pm from the very house. Her staying over clearly gave another indication that the arrangement and remarks did not displease her.

- (e) The conversation the parties had in private at about 9:00 pm for some 20-30 minutes had an explicit sexual content to it. It has been referred to above.
- (f) The complainant herself immediately afterwards recognised this conversation as clearly suggesting sexual advances. This was so for obvious reasons. Thus the complainant identified the conversation as the conduct which comprised the accused sexual interest in her. She explained her SMS (to Kimmi and Mlabi) to the effect that the accused was displaying a sexual interest in her, as based on that conversation (even in her "dazed" state she could recognise the explicit sexual nature thereof).
- (g) The complainant was shown a double bed to sleep on which the accused showed her despite her knowledge which room she had to sleep in. She was told to prepare for bed.

- (h) The parties agreed that after the accused had finished his work (some 45 minutes) they would see one another; with her retiring to bed that could only have meant that he would come to her room. The complainant is very vague about the purpose of this visit. She referred earlier that the accused would tuck her in - that he said so repeatedly. It is extremely difficult not to infer amorous intent from this. She was a well built 31 year old woman - tucking her in like a child would be an unlikely aim of the exercise.
- (i) The complainant then went to say goodnight to Duduzile (whom she barely knew) and they went to the accused's study to say goodnight. She stayed behind dressed only in a kanga at his request. He suggested that he would later tuck her into his bed - she laughed and enquired what tucking he had in mind. Clearly this conversation was sexually charged. She said goodnight but the previous arrangement was not expressly cancelled. His remark that he had to see these people, suggested otherwise.

- (j) The accused later visits her room. The light is on, she lies across the bed, dressed only in a kanga on top of the bedclothes. Clearly this suggests she was waiting for him.
- (k) He enquires whether she is already sleeping and states that he will now see and attend to his urgent visitors. The clear implication is that he will be back afterwards. She does not ask what he is doing in her room, what this has to do with her, he will now see these people, she does not complain about him simply going into her room. She is totally unable to explain the purpose of the visit. She does not say goodnight tell him not to come back and does not even check if the door is closed - it was apparently slightly ajar. The light is left on.
- (l) That is what he finds on his return - again she does not ask what he is doing in her room and that he must leave it.

40.

THE CONDUCT OF THE PARTIES DURING INTERCOURSE

The State case is the following:

- (a) The complainant did not protest or cry out when she was first penetrated.

- (b) Never once during the 10 minutes intercourse lasted did she protest, ask him to stop, tried to physically resist, call for help or do anything at all to indicate his attentions were unwelcome.

- (c) The accused said words of endearment and expressing affection to her as a lover would. If he said it as opposed to whispering as she intimated, he clearly thought it is in order if others heard. This would be highly unusual conduct of a rapist.

- (d) There was no attempt to prevent her from calling out etc.
- (e) The accused asks her if he can ejaculate in her. The one clear aim of this is to establish whether there is a risk of conception - it displays a measure of trust; it is not the actions of a rapist intent only on satisfying his needs. She says nothing - clearly if it was unsafe and she did not want it, he would expect her to say so - she does not.
- (f) The fact that the accused started to massage the complainant for up to a minute militates against an inference of mens rea. This, following repeated questions to her to establish that she is awake, simply means that he did not seek to take advantage of any sleeping stupor of the complainant. Clearly, if he simply had rape in mind, he would have attacked his victim and overpowered her in a sleeping state. He, by acting as he did, and massaging her for close to a minute, gave her every chance to firmly rebuff him or call for help knowing the

immediate presence of others. Are those the actions of a rapist?

- (g) He then leaves her alone aware that she can immediately communicate whatever happens to the world.

41.

She never once suggested that he was ignorant of the disease and its mechanics. There is no suggestions that he was unaware of the basic statistics regarding the probabilities of catching the disease from normal sex and the increased risk in rape.

42.

THE CONDUCT OF THE COMPLAINANT AFTER THE "RAPE"

- (a) When the accused walks back into the room he is not met with screams of fear (the complainant had gotten her voice back) at the return of the rapist, he is not berated for what

he had done and the one question which called for an answer, is replied to. This is highly unusual conduct if the Complainant genuinely considered the accused had raped her.

- (b) The accused leaves, the complainant not then or any time thereafter seeks to ensure that the door is locked or blocked - she goes to sleep or lies around quite oblivious to any return by him. Once again highly unusual conduct if she had been raped.
- (c) The complainant spends the night in the house under the same roof as her rapist who has free access to her. That he likes her and has a very real sexual interest in her is obvious. Her explanation hereof is poor - she did not want to stay at her home alone. In short the company of her rapist was preferable! It is also reconcilable with her not equating what happened to rape.
- (d) The complainant could at any time have left the house - she could have called a cab. If not, she could have told the

court it was not possible because she thus had considered that but did not have enough money. She previously left the house past 10:00 o'clock. She is wholly unworried about further attentions from him during the night.

(e) The complainant had a cell phone and a landline available to her - she could have summoned help from her friends (to fetch her) or otherwise and she could have reported it to them or her family. In short, if she thought she had been raped, she would have done so with alacrity. It is highly improbable that a woman who had been raped, would not report this or leave the rapist's terrain when she could do so easily. The accused knows all the aforesaid - he is a phone call away from arrest if she is correct.

(f) The complainant reported sexual advances from the Accused and hinted that she many herself have invited these in some manner in the SMS's sent to her close friends (Kimmi and Mlabi). She repeated these assertions when she spoke to them early the next morning. It is only later that she says she lied in those messages - she was indeed raped. In

short, to believe her the court must find that she deliberately lied about the very event giving rise to these charges, it must apply a selective process : if the complainant's lies point to innocence of the accused they must be inverted to point to guilt and where she accuses him, she must be believed. There is no sound basis for such an approach.

- (g) The SMS request that her mother (or both mothers) must not be told clearly implies that consensual sex was in mind and that a rape charge was certainly not in mind (if so, the mother would know) and if only sexual advances were made, she should know.

- (h) The complainant did not after the rape bath or shower - this was an extraordinary thing to omit to do if you are a rape victim especially where she did not have in mind to lay a charge. This is confirmed by Dr. Friedman (and see above as well as her showering the next morning [and washing and douching as per Likibi]).

- (i) The next morning, the complainant gets up at 5:10 am. She showers (and douches / washes) which reduce recovery of semen and wanders around the house inter alia packing strawberries from the previous night and making calls from the accused landline, for probably 1½ hours (she says she may only have left at 6:30 am). She can bump into the accused at any minute. All this is of complete unconcern to her. Once again, this is not consistent with a woman who has just been raped.
- (j) The complainant in discussions whether she should lay a charge, considers the consent issue very problematic. So too the prosecution - that is why Dr. Friedman is roped in. The latter's evidence cannot effect mens rea however.

43.

CONCLUDING SUBMISSIONS

It is respectfully submitted that there is absolutely no basis on which it can be inferred beyond reasonable doubt that the accused had the requisite

mens rea. How can it even remotely be suggested that the inference to be drawn is in accordance with all the proven facts or that these exclude the reasonable possibility that the accused believed there was consent. It is interesting in this regard to have regard to the stock albeit simplistic test for consciousness of wrongfulness. "Would he have done it if there was a policeman present?" - well there clearly was and both parties knew it.

44.

It is simply not probable at all that the accused would set out to rape a woman:

- (a) Who is well built, weighs 85 kg's to his 90 kg's and is 31 years old as opposed to his 63 years and by all appearances can readily resist.
- (b) Who is assertive and an activist.
- (c) Who can seriously damage his entire career and reputation - a slap, a hit or a scratch would place him in a very parlous position; so too any injury suffered by her in the process.

- (d) Who by calling out can invoke immediate assistance resulting in either immediate arrest or immediately acute embarrassment (his daughter is also in the house).
- (e) Who can by the simple act of nicking him increase the prospects of HIV infection a hundred fold as would a rape (all these would be present to the mind of the rapist).

45.

For him then to carry it off without:

- (a) A single threat of violence or causing any injury in order to achieve intercourse.
- (b) A single item of torn or damaged clothing removed in the process. The kanga which is not the strongest material is not even torn in any manner.
- (c) A single "no" as to the act of intercourse.

- (d) A single "stop it" to 10 minutes of intercourse.
- (e) A single injury to himself.
- (f) A single cry for help.
- (g) A single semblance of resistance.
- (h) A single admonition of his behaviour;

is simply a miracle that defies all odds and a finding of rape especially where accompanied by:

- (a) the complainant sending him 54 SMS's the previous 2 months ending in terms such as "love" "hugs" "kisses".
- (b) The complainant wandering around the house in a kanga only.
- (c) The complainant rolling over onto her back.

- (d) The complainant thereafter relating the incident in non-rape terms in the first reports thereof.
- (e) The complainant sleeping over when she can readily leave because she preferred spending the night under the same roof with the rapist to being home alone.
- (f) The accused playing the role of a lover, kissing the complainant, saying words of endearment to her (when a savage bite to the jugular would have been expected).
- (g) The accused asking whether he can ejaculate inside her.

46.

There is no legal basis to put an accused on his defence in such circumstances - the above are the facts which form the high watermark of the State's case. They will not go away nor can they be strengthened by the accused's testimony. Not only is that an impermissible consideration,

but that this is not a case where preference for her version would nullify the essential defence of absence of mens rea.

Compare : ***S v Mtsweni***

47.

The question is not whether there are facts which can conceivably support an inference of rape - it is what the court is to do with the facts which negate that inference and which will not go away, that is the crucial issue.

48.

There is no right on the part of the prosecution to hear the Accused's version; if it has not done enough to convict him in the absence of self-incrimination, the high profile of the case does not assist nor the fact that merely giving testimony would be utilised to the detriment of the Accused.

49.

AND most particularly:

- (a) When the whole immediate pre-rape, rape and post rape events took place 10 meters from a uniformed on duty policeman.
- (b) The complainant who bears the accused no good will, conceding that he could have thought she consented.
- (c) The complainant, being a person who has shown a willingness to lie about the incident and who was less than frank in court.
- (d) The complainant's whole history and demeanour pointing to resistance as opposed to submission as the effective counter to rape.
- (e) There being a number of motives for making a false accusation (not that that is particularly relevant if it turns on the accused's mens rea).

- (f) Where the complainant refused to undergo a psychological assessment by a person engaged by the defence.

50.

All the above can be condensed in a nutshell. In the absence of the freeze explanation, the State case would be wholly untenable in the circumstances in respect of the issues of consent (unlawfulness) and apparent consent (mens rea). It was conceded that there is no way the Accused could have known about freezing. Whilst it may thus, if established, overcome the unlawfulness issue, it leaves the apparent consent issues untouched. How can there then be a conviction ever?

51.

It is submitted that the complainant's post "rape" conduct is entirely consistent with the defence of absence of mens rea. Her conduct including the eventual accusation, is at the very best for the State, that of a person not being sure of whether this was rape or not. And the reason for the uncertainty can only be connected with the consent/appearance of

consent/mens rea issue. It is thus no wonder that this formed the basis of discussions when considering to lay the charges.

52.

The evidence the State relies upon, take their case on mens rea no further:

- (a) The evidence of the mother that he apologised for the incident does elevate that to rape. That happened on 13 November 2005 the day the newspaper articles appeared splashing the complainant's name. There is no suggestion that he admitted raping her daughter or apologised for that. Indeed, she expressly did not say that.

- (b) The fact that he would pay money (and a very circumscribed sum at that) for the rape allegation to go away, is no indication of guilt. It is inconceivable that any one in the accused's position would in any way want to risk going through a trial process if it can be avoided.

- (c) No one put improper pressure on the complainant to withdraw charges; she was not threatened or induced to do so by offers of huge amounts of money. Dockrat's evidence is clear, convincing and probable. It has been twisted by the complainant and her cronies to further their case.
- (d) The fact that the complainant was HIV positive is neither here nor there. Whether intercourse was consensual or not, it was clearly a factor which the accused, apparently well versed in HIV matters, decided to take the small risk of. Indeed, if it was a rape, the risk would be higher.

53.

The accused is, in submission, entitled to a discharge.

54.

THE VERACITY OF THE STATE'S CASEThe quality of the complainant's evidence

The complainant's evidence in chief appeared smooth and well rehearsed with tearful emotion at the recollection of the rape scene. This is born out by the psychologist's notes which refer to many repetitions.

55.

The complainant's performance under cross-examination must be considered on the basis that she had not been badgered or tricked during the cross-examination. It is submitted that viewed in totality, the complainant's evidence is wholly unsatisfactory. The main criticisms are set out hereunder and are in submission of such significance that it can be considered at this stage.

See : **Mpheta** (*supra*) - it is accepted that significant defects must be present save if the approach advocated is the correct one

56.

The complainant is an accomplished liar who lies with ease also in respect of the subject matter of this case, where it suits her purposes:

(a) She lied to the police at the gate.

See : Statement; Record p

(b) She lied to Kimmi and Mhlabe in the SMS (if she is now to be believed) and again the next morning on the telephone as to the nature of the incident and what caused her to send the SMS.

See : P33; P36-37

(c) She lied to the accused about meeting him after the event.

See : P207-209

(d) She lied to the press as to whether she had been raped.

See : P41, 92-93, 129, 217-220

(e) She went along with the lie to Zweli Mkhize as to whether she is considering whether to drop charges.

See : P221

57.

The complainant lied to the court on a number of issues:

(a) She clearly lied about having obtained her matric - she is articulate and understands English perfectly. The adroit attempt to explain it away, renders her even more unreliable.

See : P117, P204, P244-245

- (b) She denied having any in depth discussion with Kimmi prior to the charge being laid. However, it became very clear that she did and that must be so if the possibility of consent was investigated.

See : P124, 125-126

- (c) She denied going to a college between 1992 and 1997 but later accepted that she had attended the theological college.

See : P204; 246-247; 259

- (d) Her evidence regarding Mashaya was disingenuous. He would have been the first man she had consensual penetrative sex with if she did. She was unable to remember if she did. Then it was a denial, then it was probably yes, and then it was unconfirmed again.

See : P244, 271-273

- (e) She simply lied about efforts to establish the source of her HIV. She stated that she was not counselled (hence she made no effort). Later it turned out that she trained the counsellors!

See : P96, 117-118

- (f) She resorted to stratagems e.g. not being able to read the autobiographical notes then following with ease.

See : P227 contrasted with 236, 239

- (g) She admitted indirectly that she had sex with Bheki and then denied it (who as boyfriend she had baths with 'E1').

See : P244; 265

See also : P289 – 291 for very glib answers with no substance when probed.

58.

There are a number of improbabilities in her version which make these parts simply unbelievable.

- (a) She suffers attacks when in shock or stressed, she did not suffer one when "attacked" by the accused.

See : P45

- (b) She kept her eyes shut before, during and after the rape - there is thus little detail she can be asked as to visual things. What the accused was wearing etc. (Only one glance to induce freezing)
- (c) She "froze" during the attack but does not even know if that left her stiff or absolutely pliant. Yet she remembers what the accused said and did not say.

- (d) It needed force to get her legs open but there was not the slightest bruise mark or pain.

See : P168

- (e) It is absolutely inconceivable that she only knows the name of the only male she had penetrative sex with in 8 years (in 2004) and the second overall. This when she phoned him and saw him again at another international conference (where everyone presumably walks around with name tags).
- (f) Her version of the rape allegedly by the boarding master to explain her pregnancy is just not worthy of credit. The fact that she discovers this 5 months later, that she had a feeling of being penetrated and a discharge, and that she cannot even remember the boarding master's name, rings wholly false. It was simply a very convenient lie which made everything negative for her disappear.

- (g) Her reaction to his first visit to her is simply incomprehensible and the coincidence of her not in bed startling.

See : P150-152

59.

THE FATHER/DAUGHTER RELATIONSHIP

The complainant's evidence that she had a very deep and intimate father/daughter relationship with the accused was wholly contrived and exaggerated especially by a verbal flood of Malumes and daughters in the beginning of her testimony (e.g. pg 17-18).

60.

The father/daughter relationship (designed to harm the accused even in the event of an acquittal) has been deliberately overstated. The facts hereof are stated hereafter.

61.

CONFLICTS BETWEEN HER AND OTHER WITNESSES

- (a) She accused Dockrat quite clearly of advising her to drop the case and pushing that. He has denied that.

- (b) She, according to various statements of witnesses, made it very clear that she went to the accused's house and did so to spend the night (to Mhlabe, Samkele, Dr. Likibi, Kasrils) - yet it now follows an invitation by the accused. Did they all get it wrong?

See : P110, 112 and 113

- (c) She told Dr. Likibi she had washed, douched, bathed as per his form and evidence. She denied this.

- (d) She told Dr. Likibi of the stinging pain as a result of the tear in her fauchette (a little fold of skin). He states he would have noted it if she complained. Earlier she stated that she did

not complain or mention any pain to him. Her statement also makes no mention of this. (Of course there is no indication that she knew of the finding at the time - Likibi nor she testified to being told about this)

See: P141, 171

- (e) In many other cases she simply diverted conflicts by the simple expedient of not remembering these.

62.

OTHER CONFLICTS BETWEEN THE COMPLAINANT'S VERSION AND THE TESTIMONY OF OTHER WITNESSES

Dr Likibi testified that the complainant was calm and he had no difficulty in taking instructions and correctly recorded these:

- (a) She told him that she had bathed, washed and douched since the incident - she testified to showering and that she did not douche etc.

- (b) She told him she had an abortion at 5 weeks - it was in fact 5 months.
- (c) She told him she went to the accused's place to sleep over - this contrasts with her version that she intended just to visit and then return.
- (d) He said she never complained of any pain, if she did he would have noted it. She states that she definitely did complain of the stinging pain.

63.

DEVIATIONS FROM HER STATEMENT

The following are pertinent especially given that the statement was made after she had carefully considered the content and was fully aware of the need for accuracy and completeness and had discussed difficulties in respect of a consent defence. See P123-126, 130.

- (a) The visit to the study of the accused is not mentioned. That clearly was important - she was dressed only in a kanga and was concerned about the effect. The statement has a logic to it which explains the first visit to her room. The reference to the urgent visitors is also absent.

See : P123, 194

- (b) The statement has her facing the accused in the initial stages. This would allow her a view of him and render shut eyes in response unlikely. This would lead to all sorts of questions. Then she turns away and faces the other way. Her version now has him at the curtains behind her and she never turns away her face.

See : P29-31, 155, 157-159

- (c) There is no mention in the statement that he held her hands. There is also no mention of this in any of the statements of people to whom she related her version at the time. Given the circumstances, the freezing claimed, the concern about

the consent issue, the need to address that fully, this omission is simply very difficult to explain.

See : P169, P183-185

- (d) The statement that after the post rape visit she curled up and slept till 5 o'clock is of course simply false - it was a lie. It is not what happened and this had to be conceded. This, of course, covered up the SMS messages which were at a variance with a rape having occurred. It was however apparent on reflecting that these would be uncovered. It is simply inconceivable that the complainant did not realise the significance of these SMS messages : she knew about the first report and its significance and these clearly were the first reports of the incident but not in terms that suited the case she was trying to make.

See : P126-129

64.

THE REFUSALS

The complainant refused to be psychologically assessed by a defence expert : she agreed to and co-operated with the prosecution's expert. This is highly significant especially in view of the psychological significance of:

- (a) She not showering after the rape incident.
- (b) She not showing any signs of depression etc, common consequences of rape.
- (c) Her very similar dreams which is a sign of malingering.

65.

The complainant refused to comment on the accused's immediate reaction that the accusation against him was politically inspired / influenced. Her averments that she had no idea in which camp Kasrils found himself, were at the very least, highly unbelievable. The

complainant's conduct and version were designed to present as small a target for cross-examination as possible. Inadvertently she refers to a political conspiracy against the Accused (p 289).

66.

The imperfections in the complainant's evidence cannot be cured by defects in the defence case. The defence case can at best be poor, it cannot bolster the State case.

67.

It is contended that this evidence is clearly so unreliable that it is to be rejected out of hand.

68.

The facts regarding the father/daughter relationship are the following:

- (a) She recalls him at the age of 5 (to at most 10) when he was a friendly uncle visiting her father. She has no idea for how

long she saw him or how long he stayed. She in any event had a father who was a father figure to her. Even then between 5-10 years of age she stayed away from her home for years.

- (b) From 10 years to 15 years (1985 - 1990) she saw him once or twice at most but did not speak to him.
- (c) From 15-22 she did not speak to him at all despite both being in KZN and she overcoming her father's death by close contact with his friends (pg 9).
- (d) In 1998 she spoke to him a few times on the telephone; she then lost his number (unconvincing) and could not find it till 2001 when she phoned him and met him. She did not contact him when she discovered her HIV status (pg 10).

69.

When she saw him in person in 2001 (save for a brief glimpse or two) for the first time in 16 years to speak to him; she told him of her HIV status because he was her father. This is absolutely contrived (Kimmi could not even say when the complainant started seeing him as such but the Accused was also her father).

70.

In 2001 she saw him a few times and stayed over at his house once or twice (with her mother once); she wanted the Accused to assist her at this time with her studies. Thereafter he heard nothing nor saw her for 1¹/₃ years whilst she was in London (pg 10).

71.

In the first six months she was back she phoned him once or twice. Thereafter in 2004 when she moved to Johannesburg (and she now again wanted his assistance to finance her studies through his influence) she saw him more often.

72.

He did not phone her on her birthday. He did not call her "my daughter" in front of witnesses and if he used 4 different terms to refer to her as conceded, why did the daughter one alone feature in every exchange she testified to?

73.

The greater contact after 2004 seemed to coincide with her move to Johannesburg and the desire to obtain assistance for studying abroad. Peaks of contact seem to coincide with mercenary motives.

74.

UNPROTECTED SEX

The protestation of never consensual unprotected sex is at best a strategic overstatement difficult to test given the shield of section 227(2) of the CPA. The complainant had unprotected sex 3 times in 1996 - that is after an unknown rapist with an STD had intercourse with her and she did not

receive adequate HIV testing. She moreover made it clear that unprotected sex is not a total taboo; it is a question of individual choice. She was also only at some risk if the other person was infected with a different HIV strain. It is not clear what the risk thereof is. See 199-200. She proffered no reason why the accused would be an HIV suspect - surely her "father" would have told her.

75.

MOTIVE

There are a myriad of motives which suggest themselves:

- (a) The possibility of compensation from the Accused. The suggested compensation was not bounteous. This avenue was kept open and the accused kept on a string with promises of a meeting etc. until after the 13th when the mother met him and discovered the meagre pickings. Clearly the complainant was told of this by her mother.

- (b) The lure of fame and fortune. A book or interview with the rape episode in it will sell well. Moreover, this was the ideal chance to do more for woman as she professed her aim was.
- (c) The complainant may well have persuaded herself that she was raped or that that was the better interpretation of the events.
- (d) The complainant may level such accusations because of a sexual pathology - because that is what she does. The refusal to undergo psychological assessment is of great importance here.
- (e) The possibility of a political plot to discredit the accused is certainly strong (a conspiracy against him is testified to p289). Her explanations of the 7 minute phone call to Kasrils, the long talk with his co-worker Kimmi before proceeding with the charge were not convincing. So too the mother's phone call to Kasrils which she first sought to avoid and then tried to explain away (there are no calls the

previous two months). So too the trip to Dar-es-Salaam, the missing passport and the shopping fervour. It is very odd that the Criminal Intelligence Unit held her in protective custody and help her lie to the press. That is not their function. The coyness of the complainant in respect of the political affiliations of Kasrils further strengthens this.

- (f) The complainant's mother would have been upset and angry with her if she had consensual sex, sex with him would be obviously wrong on her father/daughter construct and her reputation as an activist harmed based on hypocrisy.

76.

It is not for the defence to prove these probabilities and in any event they were denied the opportunity to do so.

77.

THE COMPLAINANT'S MOTHER

This evidence takes the matter no further. It indicates that the accused was willing to financially assist the complainant in her studies and apologise to the mother. The accused at no stage admitted to her that he raped the complainant nor did he apologise for that. He apologised for the incident (which featured in the Sunday Press). Moreover, this was raised by the mother and perhaps also Zweli Mkhize. The mere fact that charges were levied, that a prosecution may ensue, that allegations of sexual intercourse were raised, were highly prejudicial to the accused. There was every reason for him especially where he maintains his innocence, to seek to persuade the complainant to withdraw the charges. Indeed, it would have been odd for him not to try and do that.

78.

The mother's evidence does, however, take the accused's case further:

- (a) She testified clearly that she would have been upset and angry if the complainant and the accused had consensual sex.
- (b) She testified that the complainant had suffered from hallucinations in the past.
- (c) She was held in high respect by the accused.

79.

DR. FRIEDMAN

He answer to the vital question whether freezing was the usual response was based on more than 50% of women freezing based on statistics which she provided later. These statistics prove nothing of the sort:

- (a) The USA statistics show that 50% of woman do not fight - they submit. That has nothing to do with freezing - the word freezing does not even enter into it. Submission does not equal freezing. Moreover, there is absolutely no indication

whether to fight or call for help or flee was an option. If anything, these statistics destroy the premises of the witness.

- (b) The Australian statistics are just as incomplete. There is no indication how the survivors were selected, what kind of freezing they experienced, certainly less than 50% of the 35 experienced such freezing and under what conditions they froze - how many were raped by known or unknown persons, who could resist or call for help and who could not. These statistics do clearly not present a representative sample and are not in any way helpful save to demonstrate that Dr. Friedman's claims of statistic backing her is at best groundless. It is interesting to note that she gave no statistics in her report nor therein made the claim she was driven to make in court regarding these statistics (and why if you use statistics even interview the complainant? Which was claimed to be crucial for the opinion).

80.

Dr. Friedman's analysis further begs the question. The question is not really what % of woman freeze, but how likely it is that the complainant belongs to that category. In order to answer that one has to determine what distinguishes the one group from the other as to psychological make up or what circumstances induce freezing. No assessment of the complainant's psychological make up was made, no distinguishing features were identified nor were specific circumstances identified. In short, Dr. Friedman's real answer to the question is, she was likely to freeze because I say so. This transgresses the most basic rule which expert testimony must meet : the facts, circumstances and grounds for the opinion must be clearly set out.

81.

It is clear that Dr. Friedman's "freeze likely" diagnosis rested on total acceptance of the veracity of all the averments of the complainant being the absolutely truth. This in turn rested on the complete accordance of the complainant's version to her with the complainant's police statements. This she reluctantly conceded was clearly wrong.

82.

Dr. Friedman was ready to make her diagnosis of whether the complainant was likely to freeze on the strength of a 1¼ hour consultation. Her attempt to invoke the second consultation ended in an embarrassing disclaimer - she had no idea there was going to be a second consultation. To obtain her first statement took 1¼ hours - the second is more lengthy. In addition her sexual history was covered albeit inadequately. (Mashaya still did not feature). No psychometric testing was done. No attempt was made to establish what type of person the complainant was and how she would react. It was simply wholly inadequate - the basis for Dr. Friedman's opinions is Dr. Friedman.

83.

Dr. Friedman admitted that at the psychological level all people learn from experience and act accordingly. It is perfectly clear that the complainant's experience points to submission being very harmful and resistance or calling for assistance being very successful in rape situations. It is very difficult to attach any validity to her opinion in the light hereof.

84.

Indeed it is perfectly clear that the factors mentioned by Dr. Friedman as relevant to the freezing:

- (a) Being half asleep / woken from a deep sleep.
- (b) Being trapped.
- (c) The sexual overtures being unexpected were previously met with resistance and were not present in any significant degree in this instance.

85.

This is particularly relevant in that the instance of Godfrey has the complainant at the age of 13 very successfully putting an end to a rape in the very circumstances the witness would have her freeze : being woken from sleep, attacked by a trusted older person and truly trapped - there was no one in the house and he was very much bigger.

86.

Even more, the resistance offered at the age of 13 (now 31 and far more experienced in sexual matters) with no general sexual experience and where the rapist is a very trusted person (an uncle and a brother with whom she cuddled up) which gave absolutely no warning of his intentions which started when she was in a deep sleep and where both physically she was overpowered and there was no one to call out to. Did any of the 35 woman in Australia have this background?

87.

Dr. Friedman's attempt to introduce truth testing techniques and questions into the 1¼ hour interview also ended in embarrassment. The consistent dreams the complainant had differed from the rape description hence she was not malingering. It is not this difference which points to the absence of malingering - it is the differences between the dreams. The attempt to then say they were not exactly the same was a desperate attempt to negate what the true conclusion was : that the complainant by reason of her similar unvarying dreams was a malingerer.

88.

What was extremely relevant was Dr. Friedman's conclusions that:

- (a) The complainant's dreams being very similar - this pointed to malingering.
- (b) That it was extremely unusual for a rape victim not to wash/shower immediately afterwards so as to rid herself of the touch/semen/stain of the rapist.
- (c) For the complainant to show no other signs of depression as a result of the alleged rape.

89.

It was absolutely astonishing that she stated that her mandate was to simply comment on the complainant's conduct during and after the rape and not whether this was usual or predictable. Her consultation notes clearly show the latter as her mandate (and a very inadequate interview as well).

90.

Her diagnosis of PTS was with respect baseless.

- (a) Category F was baseless.
- (b) Category D was baseless.
- (c) Category E contained no proper time overlaps
- (d) Category C contained a number of very suspect criteria and was not satisfied.
- (e) The rape was assumed.
- (f) The effect of the prior rapes (with life long impact) and the trial was simply overlooked.

91.

THE POLICE EVIDENCE OF STATEMENTS MADE BY THE ACCUSED AT 8 EPPING ROAD

It is submitted that this evidence is both wholly inadmissible and also so unreliable that it is to be rejected out of hand.

92.

INADMISSIBLE

Section 35(1) of the Constitution provides:

"(1) Everyone who is arrested for allegedly committing an offence has the right-

(a) to remain silent;

(b) to be informed promptly-

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

- (c) *not to be compelled to make any confession or admission that could be used in evidence against that person"*

93.

Section 35(3) provides for the right to a fair trial which includes the right not to incriminate yourself.

94.

Section 2 of the Constitution provides:

"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

95.

In terms of the Judge's Rules a suspect had to be warned of his right to remain silent.

96.

It is in the hands of the police whether and when a suspected person becomes an arrested person. Where the suspect is confronted with the accusation, the right to be warned must obviously also extend to him once that happens.

97.

The relevant instructions in the police force regarding the obtainment of information from an accused by requesting a statement from him or questioning him, provide clearly and explicitly that a suspect must be warned each time he is questioned and that the answers must be taken down and reduced to writing and confirmed with the suspect.

See : Annexure "L"

98.

The warning given to the suspect specifically pertains to that present interview and no others : in short what the suspect is told is that what he

says from the onwards may be used as evidence - hence he must exercise his right of silence or carefully consider his answers in that interview on the basis that it can be used against him. In short, the suspect is told to watch what he says during the interview. Obviously if such a danger would again present itself - and to prevent an off the record response - the suspect would expect another warning.

See : Paragraph 3 of annexure "L"

99.

It had been held in a number of cases that a failure of police officials to give a warning to a suspect equivalent to one customarily covered by the Judge's Rules and later also by section 35(1) of the constitution, results as a rule in the exclusion of that evidence.

See : ***S v Melani 1996 (1) SACR 335 (E);***
S v Marx 1996 (2) SACR 140 (W);
S v Seseane 2000 (2) SACR 225 (O);
S v Monyane 2001 (1) SACR 115 (T);
S v Mathebula 1997 (1) SACR 10 (W)

100.

It is perfectly clear that the Order or Instruction to the police that a warning must be given on each occasion the suspect is interviewed or questioned, is an attempt to introduce a uniform practice of recognising and giving effect to the provisions of section 35 of the Constitution and not to allow an artificially prolonged status as a suspect, to undermine the rationale of the protection of section 35(1).

101.

A pointing out by a suspect or an accused is governed by section 218 which wording was always read down by the courts even before the constitutional dispensation. Since the advent of the constitution the equation of pointings out to admissions by conduct and susceptible to the same requirements of admissibility which was recognised first in **S v Sheehama 1991 (2) SA 860 (A)** and rendered pervasive by **S v Khumalo 1992 (2) SACR 411 (N)** and **S v January 1994 (2) SACR 801 (A)** has been allowed.

102.

The essential issues whether the admission made to a police officer, would infringe the accused's rights to a fair trial.

See : **S v Marx** (supra)
 Key v AG 1996 (4) SA 187 (CC)

103.

Such an infringement can clearly occur prior to the trial.

Compare also : **S v Socc 1998 (2) SACR 275 (E) 293-294;**
 S v Naidoo 1998 (1) SACR 479 (W) 499 L-I;
 S v Seseane 2000 (9) BCLR 1157 (N);
 The Law of Evidence, Zeffert et al
 P448-462;
 S v Sampson 1989 (3) SA 239 (A) 244B

104.

ADDITIONAL CONSIDERATIONSSingle Witness

The complainant is a single witness on the material elements of the alleged rape. Her evidence must be closely scrutinised and it must be clear and satisfactory in material aspects. This is so because other witnesses may indeed also have gainsaid her.

See : ***R v Mokoena 1956 (3) SA 81 (A) 85 F-G***
 S v French Beytagl 1972 (3) SA 430 (A)

105.

This must apply to a fortiori where the lack of other witnesses is due to a failure to invoke their observations when the single witness could and should have done so. The evidence of a single witness has to be approached with caution. Also in sexual matters where the motive can well be found in pathology.

Compare: ***S v V 2000 (1) SACR 453 (A)***

S v M 2000 (1) SACR 484 (W)

S v Van Der Ross 2002 (2) SACR 362 (C)

106.

Section 35(5) deals with the consequences of the obtainment of evidence contrary to the constitutional rights embodied inter alia in section 35.

See also : ***S v Moloutai 1996 (1) SACR 78 (C);***
S v Mayekiso 1996 (2) SACR 298 (C) as
to the prior position.

See on Section 35(5) : ***S v Naidoo 1998 (1) SACR 479 (N);***
S v Pillay 2004 (2) SACR 419 SCA

107.

THE FACTS

Two policeman, Commissioner Taioe and Sup. Linda went to Nkandla in KwaZulu-Natal to interview the suspect on 10 November 2005. The suspect was apprised of this and had in essence a warning statement in the hand of his attorney at the ready. Notwithstanding the presence of the attorney (Hulley) the officers insisted on warning the Accused (then suspect) formally by reading paragraph 3 of the "L" and confirming that he understood it (indeed the warning may have been given twice). All the formalities as to signatures and commission to authenticate the procedures were then undertaken.

108.

Before taking their leave after the interview it was agreed that on 15 November 2005 (6 days later) the parties would meet at 8 Epping Road (the suspect's Johannesburg home) so that the police could have access to it to familiarise themselves with it - it was not agreed or even mentioned that the

accused would point out or do anything in this regard - and the accused would be available to provide DNA samples.

109.

On the appointed day Commissioner Taioe told Hulley on meeting him outside the house "this is a follow up meeting".

110.

The follow up meeting statement made no sense in the specific context. Hulley and the suspect both knew what the police were there for - it was in pursuance of their arrangement and not to obtain a statement and ask questions. That had been done. Indeed it was clear to all concerned that that the suspect was not going to answer questions and none were asked at Nkandla - the statement drawn by Hulley was intended to be the suspect's sole and whole answer to any interview with him.

111.

Com. Taioe give the reason why he did not warn the suspect of the potential use and thus danger of any incriminating statement by him: He had already been warned at Nkandla - that warning persisted to the meeting on 15 November. It is obvious why he deliberately used the expression he did - to intimate a link between the meetings and so to avoid another warning. In short, he foresaw incriminating evidence being elicited by him by questions and wished to lay a basis for its admissibility. There was absolutely no need for such a cryptic allusion that the suspect must beware - he could easily have simply repeated the warning that he apparently knew off by heart. There can be no doubt that he did not do so in order to avoid placing the suspect on his guard, as he was required to do by the standing instructions and the common law.

112.

The next question revealed the stratagem : inside the house the suspect was asked to point out the scene of the alleged crime. Com Taioe knew exactly that this was where the complainant had slept on the night, that it was on the ground floor and that it was the guest bedroom. A question like

that is wholly at odds with the arranged purpose - to familiarise themselves with the house as opposed to extracting a definite version from the accused of the events. The next two questions (especially the last) left no doubt that this was a pure interrogation which had nothing to do with the layout of the house or any familiarisation thereof.

113.

Com Taioe's explanation that he chose this format of questioning "because it suited him" and his inability to explain why it suited him, leaves no doubt that he specifically elected this approach to elicit information from the suspect in an unguarded moment and did it in such a manner that the prospects of a response before interference by the attorney was good.

114.

It was a cynical stratagem aimed at the deliberate negation of the suspects right to be warned.

115.

Neither of the justifications seemingly advanced prevail.

- (a) A continuation of the Nkandla warning. As a matter of logic and principle the two occasions were wholly disparate:
- (i) they were separated by 6 days and some 600 kilometres.
 - (ii) the suspects had given his response to the request for a statement and questioning - a statement only with no questions. The situation is wholly different to that where a pointing out logically and immediately follows on a statement.
 - (iii) the Johannesburg meeting was not to obtain a statement or put questions to the suspect - that was over and done with.

(iv) the warning given to the suspect made it very clear that it related to that interview and that interview only. On the police version that interview was concluded. The position was otherwise misrepresented by the police reading the form.

(v) form L provides on each occasion a suspect is questioned its formalities must be followed - there cannot be a uniform practice and equal treatment of suspects if the provisions thereof are observed by some police officers and not by others.

(b) The presence of Hulley:

(i) in respect of procedural constitutional safeguards the represented and unrepresented suspect or accused is not differentiated between as a matter of principle.

See : **S v Legote (supra)**

- (ii) at Nkandla the warning for that meeting was given despite Hulley's presence and him presenting the statement. Why was Johannesburg different?
- (iii) there is no direct evidence that the accused heard the follow-up statement. He may or may not have done so - "L" requires him to acknowledge the warning.
- (iv) there is no evidence (the onus on all the issues being on the prosecution) that Hulley had an opportunity to intervene and stop any reply so that he can advise his client. In a structured interview or following a warning that opportunity exists.

116.

THE EFFECT HEREOF

The case law is clear:

- (a) If the negation of the suspect's rights is a deliberate invasion thereof, exclusion must follow unless there are compelling circumstances indicating the contrary. This must be so otherwise the police are encouraged to deliberately flout constitutional protections and trust that some judges sometimes may allow them to get away with it. It cannot be in the interests of justice. This policy consideration is paramount and well recognised in the case law.

Compare *January* (supra)

- (b) The approach of the police was deliberately misleading and indicative of cynical entrapment. It was intended to catch the suspect unawares.

- (c) It would have been extremely easy to comply with the constitutional requirements and the standing orders of the police implementing this.

- (d) In many cases the co-operation of suspects can lead to their elimination as suspects or of unnecessary evidence. This is unlikely to happen if they cannot take the police and the warnings they give as honest and reliable. This is extremely undesirable from a policy point of view.

- (e) It is perfectly clear that if Com Taioe had sat the suspect down and then said "I have 4 questions for you", this would have been preceded by a warning. It is also clear that Hulley would have intervened and that no questions would have been answered or only once he had approved the answer. Why it is different because the questions are asked on the walk? It is clear that it was done solely to avoid the aforesaid reaction of the suspect which would have frustrated the trap.

117.

THE RIGHT TO CROSS EXAMINATION

The right to cross-examination is a very important right. If an accused is not able to exercise his procedural and evidential rights in a fulsome manner, a fair trial is immediately imperilled.

118.

This right does not in practice exist of only the opportunity to rise in court and ask questions - it presupposes a state of preparedness where necessary. One does not cross-examine in the air - one does so as a rule based on facts and various material to the disputes and evidence of which had been investigated and collected. This aspect of a fair trial is also governed by section 35(3)(b) and (i).

See also : ***S v Motlabane 1995 (2) SACR 528 B;***
 S v Cele 1965 (1) SA 82 (A) 91B-D;
 S v Zuma (supra);
 Engels v Hoffman 1992 (2) SA 652 (C) 651 J;

R v Barret 1926 TPD 464;

S v Meyer (unreported)

119.

It is common cause that the prosecution:

- (a) Had the complainant psychologically assessed by Dr. Friedman to establish whether the complainant's failure to say no to the intercourse especially at the stage of the removal of the kanga, the touching of her private parts and the intercourse or to call for help at any stage could be said to be a usual reaction in such circumstances and to explain away what on the facts, would be apparently odd conduct as a manifestation of a refusal of consent.
- (b) Dr. Friedman's evidence was led and was supportive of the complainant's version.
- (c) Dr. Friedman testified that the complainant's psychological makeup was important and that she could never have

come to any conclusions in respect of the issue of her behaviour and the question of consent if she had not interviewed the complainant and if the complainant was not co-operative she could not have done her report.

- (d) It is common cause between the State and the defence that the defence made a request to have the complainant psychologically assessed by another psychologist it intended to use as an expert and this was refused by the complainant.
- (e) Since the complainant had a right to refuse to answer any questions based, if all else fails, on her right against self-incrimination and her honest co-operation is required, little else could be done.

120.

This is, however, not the end of the matter - whilst one can refuse to make yourself available for an interview with opposing counsel or for an interview with a doctor of psychologist, this does not mean it has no consequences.

See : **S v Boesak 2001 (1) SA 912 CC para 24**

121.

The following passage in **S v Sefadi 1995 (1) SA 433 (D)** is thus highly relevant
: P448G:

It is thus submitted that this direct refusal of the complainant is to make relevant evidential material available (compare blood tests regarding paternity) and indirectly hamper cross-examination, has a major effect on the outcome of the trial irrespective whether by way of adverse inference or unfair trial. In the light hereof the application for discharge should, with respect, succeed.

122.

The State clearly regarded the psychological state of the complainant and evidence thereof as vital to their case - it made it part of that case. Whether it is on the basis of simply a fair trial process (the defence was

precluded *inter alia* from establishing motive related to sexual pathology or to demonstrate that perception and reality are confused by the complainant) or an adverse inference on the basis of innocence is eager to speak whilst guilt seeks refuge in silence, the refusal of a psychological assessment must weight heavily against the State case.

123.

Whilst the gist of the application relates to the apparent manifestation of consent, this also has an impact on the actual consent issue. That is a psychological concept. Once again one should look at manifestations thereof : the fact that she says she did not consent is simply a *sine qua non* for the case. the only way to probe the subjective side, the actual psychological decision making process of the complainant, had been denied to the defence. The question is why? This question is the more telling given the clear psychological signals that the complainant is reacting in a psychologically out of kilter way - no depression, no washing away, unvarying dreams (obviously one would seek details of these). Moreover, on her own version and the State's version she has been raped 4 times and this has a lifelong psychological impact. Once again, the

opportunity of how that may warp her decision on whether she consented or not and how real that then becomes for her, is highly significant.

124.

It does not matter how much the complainant now says she did not consent or how she acted, if she in fact consented there can be no rape.

125.

Secondly, there is a considerable incongruity between the complainant's conduct and the absence of consent. In short, her reactions both pre, during and post were not that of a woman who deep down said no. It is clear that at some stage she decided that she had not consented but that is not the issue. Her conduct has been set out.

126.

Thirdly, the complainant has been demonstrated as an accomplished liar. There is no doubt that the entire court believed her when she twice said that she obtained her matric in 1992.

127.

It is surely not the material (and the accused can do nothing to improve this) on which a court concludes that this version is true beyond reasonable doubt.

128.

In respect of a discretion, it is submitted that since **Lubaxa** little remains in single accused matters. Insofar it does, the circumstances favour a discharge:

- (a) It is clear that simply testifying would provide an ideal opportunity for those eager to do so, to harm the accused! Whatever his version, he will be castigated for his conduct.

- (b) It will inevitably last another 2-3 weeks. This is an extremely costly affair for all concerned.

- (c) The evidence led by the defence must of necessity relate to the complainant's past sexual history given her testimony. There is no reason why everyone including the witnesses have to be led down that embarrassing spectacle simply because of the personalities involved in this matter.
- (c) Rape is a serious crime - it is also a very scary crime to be accused of. It pits you on a one on one basis against your accuser at her choice - if she fancies to be the better actor/actress and the better liar, jail beckons. By its very nature it becomes a dual where abilities to thwart the truth may be decisive.

129.

The Accused prays for a discharge and the inadmissibility of the Epping Road utterances by him.

K.J. KEMP SC

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26 March 2006