FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A290/09

In the matter between:-

LAMBERTUS HENDRIK NIENABER Appellant

and

MINISTER OF SAFETY AND SECURITY Respondent

CORAM: H.M. MUSI, JP *et* MOLEMELA, J *et* MTHEMBU, AJ

HEARD ON: 14 JUNE 2010

DELIVERED ON: 23 SEPTEMBER 2010

JUDGMENT

H.M. MUSI, JP

Introduction

[1] This is an appeal against a judgment of Ebrahim, J wherein the learned Judge dismissed with costs the appellant's claim for damages for unlawful arrest and detention. The appeal is with leave of the court *a quo*. The appellant sued the Minister of Safety and Security (the respondent) in his capacity as member of cabinet with responsibility over

members of the South African Police Service.

Factual background

[2] The facts giving rise to the appellant's claim are briefly that in the evening of 24 April 2003 the appellant was arrested by members of the South African Police Service stationed at the Virginia police station on charges of kidnapping and rape. He was kept in police custody for the night and brought before court the following day on 25 April 2003 when he was released on bail. Subsequently the charges against him were withdrawn. The arrest had been without a warrant. The appellant's arrest followed upon a complaint laid at the Virginia police station by a 15 year old African girl who was accompanied and supported by her parents.

[3] In laying the charges, the complainant gave details of what had happened to her, which are set out in a written police statement handed in at the trial as exhibit "G". It is important to give an outline of the salient features thereof. She reported that on 22 April 2003 she had been walking from her home in Virginia to the shops when she came across a white man who had parked his motor vehicle next to the road

with two black men standing outside it. As she was about to pass, the two black men confronted her, threatened her with a knife and forced her into the white man's motor vehicle. She was driven to an unknown destination (suspectedly Welkom) where she was taken into a house. The two black men then disappeared leaving her alone with the white man who then locked the doors and kept her in that house up to the 24th April 2003 when he drove her back to where she had been kidnapped and dropped her off. Throughout the period of her captivity in the unknown house, her captor had repeatedly raped her, day and night. She said that she would point out the culprit if she were to see him and gave a description of his physical features. She had taken down the registration number of the vehicle in which she was transported and gave this to the police (BHC 289 FS) and said it was a red bakkie. She estimated the age of the suspect at 30. A computer check done by the police confirmed that the vehicle with the registration number provided by the complainant is a red Ford bakkie and it is common cause that it belonged to the appellant.

The claims

[4] Now the appellant initially claimed damages in the separate amounts of R100 000,00 each for unlawful arrest, unlawful detention and malicious prosecution arising out of the same incident. However, the claim for malicious prosecution was abandoned at the trial, so that only the claims for unlawful arrest and detention remain. The appellant contended that his arrest had been unlawful on the ground that it transpired without a warrant in circumstances where the arresting officer did not have reasonable grounds to suspect that the appellant had committed an offence. A dispute also arose at the trial as to which police officer actually effected the arrest. With regard to the unlawful detention claim, the critical averment was that the appellant had provided the police officers who questioned him after his arrest with an alibi, which they had verified. It was argued that in these circumstances there had been no justification for the appellant's detention overnight.

The applicable law

[5] It is trite that for an arrest without a warrant to be lawful the requirements of section 40 of the Criminal Procedure Act, 51 of 1977, must be complied with. *In casu*, the applicable

provision of section 40 is subsection 1(2) which provides that any police officer may arrest without a warrant any person whom he reasonable suspects of having committed an offence referred to in schedule 1 to the Act. It is also trite that once the fact of arrest has been established, the onus rests on the arresting authority to show that it was lawful. *In casu*, this means that the onus was on the respondent to show that there had been compliance with the requirements of section 40(1)(b), in particular, that the arresting officer had reasonable grounds to suspect that the appellant had committed a schedule 1 offence. In this regard, it is common cause that the charges against the appellant related to schedule 1 offences. What is in dispute is the existence or absence of a reasonable suspicion that the appellant had committed such offences.

The issues

[6] The court *a quo* was called upon to decide four issues. First, which police officer should in law be regarded as having effected the arrest. Was it Inspector Pretorius or Inspector Monyane? If it was found that the arresting officer was Inspector Pretorius that would be the end of the respondent's

defence, because on the undisputed evidence Pretorius was not possessed of any information which could have provided a basis for the relevant suspicion. If the arrestor was Inspector Monyane, the second and all important question arises whether he could have had a reasonable suspicion that the appellant was the culprit. Third, whether the appellant's detention was justified in view of the alibi he had provided. Fourth, whether the arresting officer should have adopted a less drastic method of securing the attendance of the appellant before court.

[7] The court *a quo* ruled that Monyane was the arresting officer and that it had been shown that he had a reasonable suspicion that the appellant had committed the offences. The court *a quo* further decided that the appellant's detention had been justified, his alibi notwithstanding. On the question of whether the arresting officer should have adopted a less invasive method of securing the attendance of the appellant in court, the court *a quo* decided that the circumstances of this case justified the arrest method. The appellant has challenged all these findings, which means that the same issues confront us in this appeal.

Who was the arrestor?

[8] I deal first with the question of who in law arrested the appellant. This dispute arises from the fact that whereas it was Monyane who took the decision to arrest the appellant, it was Pretorius who physically touched the appellant pronouncing him arrested. Now, Monayne testified that he was aware that he was going to arrest a white man and that in his experience conflicts often arise when a black police officer has to arrest a white suspect and for that reason he thought it prudent to have a white officer present. He also said that he does not know Afrikaans and needed Pretorius to explain the suspect's rights in his language. Significantly Pretorius did not accompany Monyane to the scene. It is only after Monyane had located the appellant's house by the presence of the red bakkie, pointed out by the complainant, that he called Pretorius. Pretorius' role was confined to informing the appellant that he was being arrested, physically touching him and explaining to him his constitutional rights. This was all done in Monayane's presence and it is undisputed that from there Monyane took over. Pretorius then took his way and did not even accompany the suspect

to the police station. It is Monyane who transported the appellant to the police station and handed him over to the investigating officer, Inspector Deysel. Consistent with the fact that it was Monyane who had gone out to arrest the appellant it is he who handed in an affidavit to the investigating officer setting out the circumstances surrounding the arrest. This affidavit was handed in at the trial and appears at page 375 of the record.

[9] For his submission that Pretorius, rather than Monyane, should have been found to be the arrestor, Mr. Snellenburg, for the appellant, placed much reliance on the one concession Monyane made under cross-examination, that it was Pretorius who arrested the appellant. But this evidence should be viewed in its proper context. It is an isolated statement that runs against the grain of Monyane's whole evidence. The thrust of his evidence was that it was his mission to arrest and that he had called Pretorius merely to assist him. The main reason he gave for this is legitimate. It is rooted in the racial policies of the past where black officers in the old police force were prohibited from arresting white people. It is a historical practice that did not vanish overnight

with the advent of the constitutional order in South Africa. Monyane may not have admitted it, but it is not inconceivable that many black police officers who served in the old South African Police Force would still be apprehensive of arresting white people. The second reason Monyane gave, based as it was on language considerations, was equally valid. In my view, when Monyane said that he did not arrest the appellant, he was merely conveying that he did not physically touch him. Viewed in this context, he was not saying that he did not, in law, arrest the appellant.

[10] Mr. Snellenburg also sought to rely on the English case of **RAISSI v METROPOLITAN POLICE COMMISSIONER** [2009] 3 All ER. In this case the arresting officer had acted on the orders of a superior in effecting an arrest, but did not himself possess the information giving rise to a reasonable suspicion that the suspect had committed the relevant offences, relying instead on the assumption that his superior possessed the necessary information. It was held that the arrestor must himself have reasonable grounds for suspecting that the suspect had committed the relevant offences and could not rely on information not within his

knowledge.

Now, there is no doubt that the principle laid down in **RAISSI** is equally applicable in our law. Compare **RALEKWA v MINISTER OF SAFETY AND SECURITY** 2004 (1) SACR 13, 2004 (2) SA 342 (TPD) at 347 H. The point, however, is that it is not relevant to the present inquiry of whether the arrestor was Monyane or Pretorius.

[11] The court *a quo* endorsed the submission made by Mr. Madlanga, who represented the respondent in the trial and in this appeal, to the effect that Pretorius was acting as an agent of Monyane when arresting the appellant. I agree with Mr. Snellenburg that there is no place for the concept of agency in the law relating to unlawful arrest. However, the less said about it the better in view of the fact that in this appeal Mr. Mdlanga made no reference whatsoever to such concept, let alone relying on it. Instead he argued that in performing the physical act of touching the appellant and explaining his rights, Pretorius was merely assisting Monyane and that such act of assistance did not detract from the fact that Monyane was the arrestor. There is merit in this

submission.

[12] I can see no reason either in logic or common sense why a policeman possessed of the information giving rise to a reasonable suspicion that a suspect has committed a schedule 1 offence should not be able to seek the assistance of a colleague to effect an arrest. *In casu*, the evidence and objective facts point to Monyane being the arrestor. He had asked Pretorius to assist him and all that the latter did was to touch the appellant and explain his constitutional rights. This was done in Monyane's presence and as soon as that was done, Monyane took over. I may point out that section 39 of the Criminal Procedure Act dealing with how an arrest is to be effected, contains nothing that debars a policeman from assisting a colleague during arrest and it can be inferred from subsection 1 thereof that the act of touching a suspect is not a prerequisite for a valid arrest. It cannot therefore be said that because Monyane did not physically touch the appellant, he could not be the arrestor. Section 49(1) of the Criminal Procedure Act specifically recognises that the arresting officer may be assisted by another officer. I therefore agree with Mr. Madlanga that at the very least

Monyane and Pretorius together arrested the appellant and as long as one of them had the requisite reasonable suspicion, then the provisions of section 40 have been complied with. In the event, I hold that Monyane was the arresting officer.

The issue of reasonable suspicion

[13] The next question is whether Monyane had reasonable grounds for suspecting that the appellant had committed the relevant offences. This calls for a brief overview of Monyane's evidence. His evidence can be divided into three parts. The first part comprises what the complainant allegedly told him and which was captured in the complainant's written statement, but excluding two aspects, namely, a description of the physical features of the suspect and an estimate of his age. The second part comprises what the complainant allegedly told him at the police station, but which does not appear in the complainant's statement. The third part comprises the evidence of how Monyane found the appellant's place and what transpired there. I have already given a summary of what is contained in the appellant's statement. I need only mention that in her statement the

complainant described the suspect as tall, slender with a sharp nose and short light brown hair and further that he was about 30 years old, aspects that Monyane did not know about.

[14] In relation to the second part, Monyane testified that the complainant told him that prior to the day of the abduction, the suspect had approached her proposing to have sex with her and that he even offered her R200,00 which she declined. Further that she knew the street where the suspect stayed and will be able to direct the police thereto.

[15] In the third part, Monyane testified that he decided to go and arrest the suspect, following complaints that nothing was being done about the case. He first telephoned the investigating officer Deyzel telling her that he had new information and wanting to know whether he could go and effect the arrest. The latter gave him the green light. Monyane had already obtained a computer printout containing the particulars of the owner of the red bakkie, which would obviously contain the owner's address. He, however, said that he did not disclose this information to the

complainant, but rather relied on the latter to guide him to the suspect's street. Once this was found, he drove slowly and in the process the complainant spotted the red bakkie and they stopped in front of the gate of the premises in which the bakkie was. He then telephonically summoned Pretorius to the scene and they together entered the premises. The appellant was present in the yard and when the complainant saw him, she became hysterical telling Monyane that this was the culprit. She also pointed to the t-shirt that the appellant was wearing and stated that he had been wearing the same shirt when committing the offences. The appellant was asked who the owner of the bakkie was and he confirmed that it was his. It is the same bakkie with registration number BHC 289 FS that the complainant had given to the police. The appellant was arrested and Monyane took him to the police station where he handed him over to the investigating officer. He submitted to Inspector Deyzel an affidavit as the arresting officer, which was handed in as exhibit "H".

Submissions and assessment of the evidence

[16] Now the appellant challenged the judgment of the court *a*

quo essentially on the basis that the trial judge erred in finding that the respondent had discharged the onus resting on him to prove the lawfulness of the arrest. This challenge rested on two grounds. The first was premised on the argument that the arrestor was Pretorius and that since he was not possessed of any information providing any basis for a reasonable suspicion that the appellant was the culprit, the requirements of section 40 had not been complied with. It was pointed out that Pretorius did not even testify. This ground obviously falls away in view of my conclusion that Monyane was the arrestor. The second and alternative ground was that the information at Monyane's disposal was not sufficient to found a reasonable suspicion that the appellant had committed the offences. Now in his heads of argument and oral argument, Mr. Snellenburg took issue with several aspects of Monyane's evidence and questioned his credibility as a witness.

[17] Mr. Snellenburg referred to the fact that Monyane did not write down what the complainant told him and pointed to the fact that important information allegedly given to him does not appear in the complainant's statement. Counsel argued

that if the complainant had disclosed the information comprising the second part to referred to above, it should have featured in the written statement. Counsel suggested that Monyane fabricated the story. Indeed the record reveals that Mr. Snellenburg extensively questioned Monyane on his failure to record what the complainant had told him and the implications thereof.

Mr. Snellenburg also criticised Monyane for not reading the complainant's statement before embarking on the mission to arrest and submitted that this was a serious default, because had he read the statement, Monyane would have realised that the complainant may have been making a mistake in pointing out the appellant given that the appellant was much older than the person described in the statement.

[18] In my view, Monyane satisfactorily explained why he did not record what the complainant told him. It was not disputed that sexual and related offences were handled by a unit of specially trained detectives and once Monyane had heard the complainant's story he immediately contacted Deyzel, who promptly came to the police station, interviewed the

complainant, wrote down her statement and opened a docket. Moreover on his evidence, Monyane was not even in charge of the charge office. Nothing turns on the fact that he did not write down what the complainant told him.

[19] The difficulty I have with Monyane's evidence relates to the additional information not captured in the complainant's written statement. It can be accepted that it was not disclosed to Deyzel when she interviewed the complainant, because it is very important information which the investigating officer would not have missed. I say this because a glance at exhibit "G" reveals that Deyzel went about meticulously in recording the complainant's statement. It would appear that she recorded all the essential information that the complainant gave her. It is more likely that this additional information was provided later after Deyzel had already interviewed the complainant and left the police station. Monyane himself hinted at this. He testified that he told Deyzel telephonically that he had new information when seeking her permission to arrest. But when asked under cross-examination what was the new information, he became somewhat evasive and said that in

fact it was not new information as such. But I do not see why he would fabricate the story that the suspect had approached the complainant earlier and proposed a sexual relationship and also that the complainant knew the street where the suspect stayed. This evidence is consistent with the fact that the suspect had waylaid the complainant along the road she used when going to the shops. The suspect must have seen the complainant before. Besides, it is undisputed that the appellant's place is not far from the complainant's home. It is more likely that this additional information was given after Deyzel had taken the complainant's statement.

[20] Mr. Snellenburg also questioned the reliability of Monyane's evidence that he was directed to the appellant's place by the complainant. This criticism is based on the fact that Monyane already was armed with the computer information disclosing the particulars of the owner of the red bakkie and counsel submitted that it is more likely that Monyane relied on that information to get to the appellant's home. I think there is merit in this submission. If Monyane had said that he had relied on the computer generated information to get to the appellant's place and that when he got there, the

complainant immediately recognised the red bakkie and subsequently pointed out the complainant as the culprit, that would have made better sense, but to say that he was directed thereto street by street by the complainant, is not convincing, to say the least.

[21] The criticism relating to failure to read the complainant's statement before deciding to arrest the suspect, loses sight of the fact that Monyane did not have the docket in which that statement would have been placed. At any rate, the age given by the complainant was no more than an estimation and did not necessarily mean that the suspect was a young person. Nor could Monyane be faulted for assuming that the complainant would have told Deyzel the same story told to him.

[22] The discrepancies in Monyane's evidence, do not, in my view, detract from his credibility and the reliability as a witness. The court *a quo* observed him in the witness box and although it did not make any definite credibility findings, it clearly believed him and accepted his evidence. I am not persuaded that the court *a quo* was wrong in accepting his

evidence and finding that he had reasonably suspected that the appellant was the culprit. The following factors compel this conclusion:

(a) The thrust of what Monyane says the complainant told him was also told to Deyzel as the written statement, exhibit “G”, shows. One critical point emerging from the statement is that the complainant had all the opportunity to observe her abductor and rapist and would thus have been in a position to point him out and, importantly, she said so to both Deyzel and Monyane.

(b) She gave not only a description of the motor vehicle that the culprit drove, but also its registration number as well. Monyane’s evidence that the complainant recognised this bakkie when she saw it in the appellant’s yard, is undisputed and it is common cause that it is the appellant’s bakkie.

(c) There is no dispute that the complainant pointed out the appellant to Monyane as the culprit. The dispute relates to how the pointing out came about. The appellant’s version is that she pointed him out only after he (the appellant) had been asked about the

ownership of the bakkie. His evidence in this regard is rather bizarre and wholly unconvincing. He claimed that the complainant spoke Xhosa (a language that he understands) when pointing him out, saying “Nguye lo”. Yet the evidence is undisputed that this was a Sotho speaking girl from Lesotho who throughout communicated with Monyane in Sesotho. The appellant also said that the complainant pointed him out by nodding her head. How he saw the nodding is not clear, given that he testified that it was dark as the streetlights were not functioning. The appellant confirmed that Monyane confiscated the shirt that he was wearing, which corroborates Monyane’s evidence that the complainant had said that the appellant was wearing the same shirt when allegedly committing the offences.

(d) Monyane handed in an affidavit to the investigating officer as he was required to do in terms of police regulations. That affidavit contains the salient facts of what happened at the scene of arrest and is consistent with Monyane’s version of events thereat.

(e) In a nutshell, there was no doubt that serious schedule

1 offences had been committed (at any rate it was not seriously disputed, if at all, that the complainant had been kidnapped and raped) and the appellant was pointed out as the suspect consistent with the complainant's earlier statement that she would point out the suspect.

The discretion to arrest

[23] There is now ample authority for the proposition that the power to effect a warrantless arrest in terms of section 40(1) of the Criminal Procedure Act entails the exercise of a discretion, for the provision does not say that a police officer **must** arrest but rather that he/she **may** arrest. This means that a police officer acting in terms of the section has a choice whether to arrest or adopt one or the other milder methods of bringing the suspect before court. It has been held that the statement made by Schreiner JA in **TSOSE v MINISTER OF JUSTICE AND OTHERS** 1951 (3) SA 10 (A) at 17A to the effect that "there is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective..." can no longer be valid in view of the fact that the Constitution entrenches human rights, which

include the right to dignity and freedom. This requires that less evasive methods of procuring the attendance of the suspect in court should be considered and adopted where the circumstances of the case, objectively viewed, require it. Where the circumstances do not justify the more drastic method of arrest, then the arrest would be unlawful. See **RALEKWA v MINISTER OF SAFETY AND SECURITY**, *supra*; **LOUW AND ANOTHER v MINISTER OF SAFETY AND SECURITY AND OTHERS** 2006 (2) SACR 178 (T); **GELLMAN v MINISTER OF SAFETY AND SECURITY** 2008 (1) SACR 446 (WLD); **SERIA v MINISTER OF SAFETY AND SECURITY AND OTHERS** 2005 (5) SA 130 (CPD). In **MINISTER OF SAFETY AND SECURITY v SEKHOTO AND ANOTHER** 2010 (1) SACR 388 (FB) a full bench of this court came to a similar conclusion.

[24] I now turn to consider whether *in casu* the discretion to effect a warrantless arrest rather than either issuing a summons or simply warning the appellant to appear in court, was properly exercised. But before doing so, it is necessary to make a few observations. First, some of the judgments referred to above, have laid down various guidelines to be followed by a

police officer contemplating effecting an arrest in terms of section 40. Now guidelines will always be helpful in doing what they are meant to do, provide guidance. They cannot, however, be elevated to the status of hard and fast rules of law and instances are conceivable where they may not have been observed, yet the arrest may still be justified. The nature and gravity of the alleged offence will also play an important role. The bottom line is that each case must be decided on its particular facts and circumstances. Compare **MINISTER OF SAFETY AND SECURITY v VAN NIEKERK** 2008 (1) SACR 56 (CC); [2007] 10 BCLR 1102 par. [17]. As was said in **MINISTER OF SAFETY AND SECURITY v SEKHOTO AND ANOTHER**, *supra*, at 398g the inquiry in this regard is **fact specific**.

[25] Second, it has to be borne in mind that whilst the Constitution entrenches human rights and mandates the courts to interpret and apply all laws in conformity with its precepts and to promote its spirit and values, it also recognises that there are instances where violation of the rights of citizens may be justified. Arrest invariably entails a violation of human rights and yet it is specifically authorised

by section 35(1) of the Constitution, which provides that persons may be arrested for having "allegedly committed an offence". The provision also stipulates conditions meant to minimise its negative impact on the affected rights. It stipulates *inter alia* that the arrested person must be brought before a court as soon as possible but not later than 48 hours after the arrest. Section 40 of the Criminal Procedure Act must be viewed in the context of these constitutional provisions. This means that once an arrest has been effected properly in terms with this provision, it becomes a justifiable violation of rights and is lawful. The Constitution recognises arrest as a necessary and unavoidable violation of the affected rights. With respect, it cannot therefore be right to say that

> "When effecting an arrest, a police official must make basic enquiries to ensure that constitutional rights will not be infringed by an arrest."

(**MINISTER OF SAFETY AND SECURITY v SEKHOTO AND ANOTHER**, *supra*, at 401d.)

[26] Third, the inquiry into this issue of whether this or that method should have been employed and indeed the whole issue of whether there was a reasonable suspicion that the arrested person had committed the relevant offences, should not be tainted by the *ex post facto* knowledge that the arrested person was probably innocent or innocent, for that matter. The inquiry should objectively focus on the information that was available at the time of arrest and the circumstances then prevailing.

[27] In the hearing of this matter this issue was argued as part of the broader argument relating to whether there were reasonable grounds for suspecting that the appellant was the culprit. Mr. Snellenburg argued that it should have been clear to the arresting officer that the appellant was an elderly person with a fixed place of residence and that had he made proper inquiries the arresting officer would have found that the appellant posed no danger to anybody and that he would not abscond. Counsel further submitted that no reason was given why a warrant of arrest was not first obtained and that at any rate the appellant could have been issued with a summons or simply warned to appear in court. He submitted

therefore that the arrest had been unlawful on this basis.

[28] I am no persuaded that the arresting officer did not properly exercise his discretion in arresting the appellant. This matter is, on the facts, distinguishable from cases such as **RALEKWA**, **GELLMAN** and **SEKHOTO**, *supra*. Here we have strong *prima* facie evidence of commission of very serious schedule 1 offences and there was a strong basis for suspecting that the appellant was the perpetrator. The appellant was unknown to the police and they could not be expected to simply rely on his co-operation. Moreover, the charges were of a very sensitive nature, involving as they do, serious allegations of abuse of a girl child with racial connotations. The police would be justified in wanting to avoid the negative public perceptions that would follow if a suspect in such a case were to be seen to be treated with kid gloves. Moreover, the information at the disposal of the arresting officer marked the suspect as a danger to the community. It must also be borne in mind that Monyane intended to hand over the appellant to the investigating officer, who would obviously conduct further investigations. Arrest pending further investigations is permissible. See

DUNCAN v MINISTER OF LAW AND ORDER 1986 (2) SA 805 (A). The circumstances of the case justified immediate arrest and detention.

Detention

[29] Much was made in argument of the fact that the appellant disclosed an alibi to the investigating officer Deyzel and her superior Captain Strydom during the appellant's interrogation. He said that during the period when the complainant was allegedly held hostage and raped at an unknown destination, he had been at work and this was confirmed by his superior and a colleague with whom he had travelled to and from work in the relevant period. It was contended on behalf of the appellant that this had called for his immediate release from detention. Furthermore, the appellant had alleged that he was impotent and therefore could not have committed rape and he had told his captors that his doctor would confirm this. Counsel for the appellant argued that this further intimation should have been enough to warn the police that they were dealing with a case of mistaken identity and should have released the appellant.

[30] In my view, the explanation given by Captain Strydom in this regard is plausible. It is basically that alibis can be concocted and that even if an alibi seems plausible it is not prudent for a police officer to simply let a suspect go on the basis thereof. *In casu*, Strydom said that he had the complainant's statement wherein she not only gives a description of the culprit but also says that she will be able to point him out. He also had the affidavit of the arresting officer which disclosed that the complainant pointed out not only the vehicle that her captor had driven, the registration number of which had been given to the police, but importantly also pointed out the appellant himself as the perpetrator. In my view, Strydom's attitude that it was not up to him but rather the court to decide where the truth lied was justified. Besides, it can be accepted that the interrogation proceeded into the middle of the night and the appellant was to be brought to court the following morning, well within the 48 hours stipulated by the Constitution.

[31] A further factor to take into account is that further investigations had to be conducted, including DNA tests, the results of which had to be awaited. This is an important

consideration because a positive DNA result would have had a strong impact on the appellant's alibi. It is important to note that the court *a quo* saw and observed the appellant in the witness box and it remarked that the appellant's physical features fit the complainant's description of the culprit. It may be that Deyzel and Strydom also made a similar observation which would explain their reluctance to act on the appellant's alibi.

Conclusion and order

[32] I come to the conclusion that the appeal ought to be dismissed and the following order is made:

The appeal is dismissed with costs.

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H.M. MUSI, JP

I concur.

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J.B. MTHEMBU, AJ

On behalf of appellant: Adv. N. Snellenburg
Instructed by:
Rosendorff Reitz Barry
BLOEMFONTEIN

On behalf of respondent:	Adv. M.R. Madlanga SC Instructed by: State Attorney BLOEMFONTEIN

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