IN THE SUPREME COURT
OF APPEAL OF SOUTH AFRICA

CASE NUMBER: 389/99

In the matter between:

JONAS MATHLARE **APPELLANT**

AND

THE STATE **RESPONDENT**

CORAM : MARAIS, SCOTT and ZULMAN JJA

DATE OF HEARING : **WEDNESDAY 16 AUGUST 2000**

DATE OF JUDGMENT : **FRIDAY 29 SEPTEMBER 2000**

Subject : Criminal trial - whether admissions deducible from questions put in cross-examination by accused's legal representative.

JUDGMENT

ZULMAN JA

[1] The appellant was charged in the Regional Court Orlando with rape. He was

acquitted on the charge but was convicted of contravening section 14(1)(a) of Act 23 of 1957 in that he had intercourse with a girl under the age of 16. He was sentenced to four years imprisonment. On appeal to the WLD the conviction was confirmed but the sentence reduced from four years to eighteen months imprisonment. The appellant appeals, with leave, only against his conviction. The essential issue argued before this court was whether the State had proved beyond a reasonable doubt that the blood samples analysed by an expert witness called by the State were those taken from the appellant, the complainant and her child.

[2] At the time of the alleged offence the appellant was a sports teacher at a school in Diepkloof and the complainant a 15 year old pupil at the school. In brief the complainant's evidence was that after a sports event organised by the appellant on 25 August 1994 he arranged for the complainant and other pupils of the school to be taken by taxi to their respective homes. All the pupils, except for the complainant, were dropped off at their homes but the appellant instructed the taxi driver to take the complainant and himself to the appellant's home, where he allegedly raped her. It was only some months later in January 1995 after a doctor had examined the complainant and found that she was pregnant that she

complained of the alleged rape. The complainant subsequently gave birth to a child.

[3] The appellant admitted that he had accompanied the complainant in the taxi on the day in question. He denied that he had raped her or that he had sexual intercourse with her or that she had accompanied him to his home.

[4] During the course of the state case and in July 1996 after the complainant, her mother and another teacher at the school had given evidence, the prosecutor brought an application for an order in terms of section 37(1)(c) of the Criminal Procedure Act, 51 of 1977 for a blood sample of the appellant to be taken. In granting the application the magistrate delivered a brief judgment in which he recorded, inter alia that on 11 October 1995 the appellant had been ordered to undergo a blood test and that his appeal against that order had failed.

In the course of his judgment the magistrate said the following:

> "Placing himself in the position of the accused and if what accused says is true, would it be wonderful to undergo this test at this stage because that test would show if accused is correct that he is not the father and it will show that these people outside here who have already convicted accused, what fools they have made of themselves.
>
> On the other hand if the test is to the contrary justice will be served or not that justice will not be served both ways, it will of course be served both ways.

> Thus to solve this whole mystery and perhaps even to aid the accused the court deems it necessary and in accordance to justice to order that the accused at this stage submit himself for a blood test and hopefully he will do so freely and voluntary. If what he says is true I would hate to order policemen now to physically take him to the district surgeon for such a test but he is a teacher and I suspect a very wise, intelligent man and his attorney will no doubt also give him the correct advice.
>
> The court at this stage, in the light of what is now said, orders that the accused undergo the said blood test."

[5] The court thereafter placed on record that arrangements had been made with the district surgeon that a DNA test be conducted in respect of the accused, the complainant, as well as the child. The court further noted that the accused had voluntarily agreed to submit himself to the test. The trial was postponed to 15 August 1996. It does not appear from the record as to what happened on 15 August 1996. However on 16 November 1996, Mrs Olga Letitia Philips a senior superintendent in the South African Police Force and an expert biochemist, microbiologist and forensic analyst, with fifteen years experience, gave evidence. The following exchange occurred during her evidence in chief:-

> "AANKLAER : Is dit korrek dat u het op 17 September hierdie jaar 'n 'crime kit' ontvang van u administrasiekant? - - Dit is korrek.
>
> Blykbaar het u daardie "crime kit" ontleed en u uitslae het u in hierdie vorm geskryf, is dit korrek? - - Dit is korrek.
>
> HOF : U verwys na hierdie bloedmonsters wat u ontvang het, nè? - - Ja.
>
> Dit is van die beskuldigde, van die ... (tussenbei) - - Klaagster. Betrokke klaagster en die kind. - - En die kind.
>
> .....

So verstaan ek korrek dat volgens daardie bevinding is beskuldigde 99,04 persent daadwerklik, die waarskynlikhede dat hy wel die pa is? - - - Hy is ingesluit as 99,04 persent ”

[6] An affidavit by Philips was handed in and she referred to it during her evidence. Paragraphs 3 and 4 thereof read as follows:-

“3. Ek het, tydens die verrigting van my ampspligte, op 1996-09-17, drie (3) Crime Kit 2 ontvang, vanaf die Adminstrasie-eenheid van hierdie laboratorium. Elk was afsonderlik verseël en inter alia gemerk, soos volg:

3.1 ‘O.M., Diepkloof, CAS 226/01/95', verseël met ‘n metaalseël nommer 040044/5, bevattende twee (2) ongemerkte bloedmonsters, deur myself gemerk ‘1.95, O.M., Biologiese Moeder 36818/96';

3.2 ‘K. M., Diepkloof, CAS 226/01/95', verseël met ‘n metaalseël nommer 039950/1, bevattende twee (2) ongemerkte bloedmonsters, deur myself gemerk ‘1.96, K.M., Kind, 36818/96'; en

3.3 ‘Jonas Mahlare, Diepkloof, CAS 226/01/95', verseël met ‘n metaalseël nommer 040024/5, bevattende twee(2) ongemerkte bloedmonsters, deur myself gemerk ‘1.97, Jonas Mahlare, Beskuldigde, 36818/96'.

4. Ek was versoek om met behulp van DNA-analises te bepaal of die beskuldigde (Jonas Mahlare) in- of uitgesluit kan word as moontlike biologiese vader van die kind (K.) en het die volgende bevind met behulp van DNA-genotipering op sewe genetiese loki.....”

[7] After she completed her evidence in chief the appellant’s attorney asked for a postponement to enable him to get “some expert opinion”. The request was

granted. The trial was resumed approximately one month later on 12 December 1996. The appellant's attorney then cross-examined Philips. The line of cross-examination was directed solely towards attempting to show that the DNA finding of the witness did not conclusively establish that the appellant was the father of the child born to the complainant. Nowhere during the cross-examination was it suggested that the blood samples analysed by the witness were not those of the appellant, the complainant and her child on the contrary, it was implicit in the questions put that the blood samples were those of the appellant, the complainant and her child. The following extract from the cross-examination indicates as much:-

> "CROSS-EXAMINATION BY MR LEKABE: Miss Phillips .... (inaudible) as regard to the report in totality one gets an impression that there is a possibility that there could be somebody else with the same genetic constitution who could also be, have the same probability to be the father of the child as the accused.
>
> HOF: Verstaan u? - - Dit is korrek.
>
> MR LEKABE: There is talk in your report of about one in about 1 657 males or black males to be specific. - - Persons that could have that aleel-combination.
>
> Would you agree with me if I say to you that in a society where there is a concentration of black males, a high concentration of black males the possibility that somebody else could be the father becomes much more apparent? - - Dit is korrek.

> You still confirm it, according to you that, what you are really saying here is there is a possibility, what you are saying is that the accused cannot be excluded as the father of this child through your tests. - - Dit is korrek, hy kan nie uitgesluit word as pa van die kind nie."

Nor did the appellant suggest when giving evidence that the blood sample analysed by Philips was not his.

[8] The appellant's counsel drew attention to the fact that no formal evidence was presented as to the actual drawing of a sample of blood from the appellant and also that the State did not lead any direct evidence to show that the blood samples in the "crime kits" which the witness Philips received and analysed were those taken from the appellant, the complainant and her child. These facts were relied on by the appellant's counsel in contending that an essential element of the states' case had not been proved. I do not agree.

[9] It seems to me that the whole tenor of the cross-examination of Philips and particularly the passages which I have quoted above, especially viewed in the context of the events that occurred earlier in the trial, and not, I stress, before the trial commenced, indicates that it was accepted that the samples of blood were those of the three relevant parties. In my view there was a clear implied informal admission of this fact by the appellant's legal representative. I have detailed these events earlier in this judgment. In summary they are:-

(a) The magistrate's order that the appellant's blood be taken, despite his objection thereto.

(b) The subsequent postponement of the trial in order for this to be done.

(c) The evidence given some four months later in chief by the expert witness Philips resulting in the request for a postponement so that her evidence could be considered.

(d) The resumption of the trial approximately a month later and the cross-examination of the analyst in a manner consistent only with acceptance of the premise upon which her evidence was based, namely, that the samples she analysed were indeed those of the appellant, the complainant and the child born to her.

[10] That the last mentioned assertion is well-founded, is borne out by the fact that not only in his original notice of appeal from the judgment of the magistrate but also in a later amendment thereof, there was no suggestion that proof of such facts was lacking. The approach of the court in *S v Magubane* 1975 (3) SA 288 (N) is instructive in this regard. The court was there concerned with an appeal from a conviction of assault with intent to commit murder, in that the appellant had deliberately driven a car at speed through a police roadblock at night in spite of police officers waving torches up and down in front of him to cause him to stop. The appellant's legal representative questioned the State witnesses by putting to them what the accused would say in evidence concerning his driving of the car.

However the appellant's case was closed without the appellant giving evidence. The main ground of appeal was an alleged failure on the part of the state to prove an intent to murder. At the hearing of the appeal leave was given to add an additional ground of appeal to the effect that the State had failed to prove that the appellant was the driver of the car in question. As to the additional ground, the court held that the questions framed by the appellant's legal representative at the trial and put to the two police officers who gave evidence for the State amounted to an unequivocal admission by the accused that he was the driver of the car. Hoexter J, delivering the judgment of the Full Court, put the matter as follows at pages 291 G to 292 line 2:-

> "In dealing with this point, which was also raised at the conclusion of the trial, the regional magistrate pointed out, correctly in my view, that the line of cross-examination of the witnesses Venter and Majola was such that, while it joined issue on the question of intent to kill or recklessness on the part of the accused, the questions framed by the legal representative of the accused nevertheless was such as to involve an explicit assertion by the defence that the accused was the driver of the car. I agree with the trial court that, in the context of the evidence of Venter and Majola, the assertions in cross-examination by the legal representative of the accused, which I have quoted in reviewing the evidence, are to be accepted as unequivocal admissions by the accused of the matter so asserted. Furthermore, such admissions having

> been made during the course of the trial, in open court at the hearing thereof, require no formal proof. In my view, the additional point argued by *Mr Schutte* has no merit and the regional court properly decided that the State had proved beyond reasonable doubt that the accused was the driver of the car."

[11] Applying these remarks to the matters which I have set out above and even although there was no "explicit assertion" during the cross-examination of Philips, it was implicit in the questions put that it was the blood of the appellant, the complainant and her child which had been analysed. I am therefore satisfied that there was an unequivocal informal admission by implication during the course of the trial, requiring no formal proof, that the blood samples analysed by Philips were those taken from the three relevant persons. (See also *S v W* 1963 (3) SA 516 (A) at 523 C - F, *Rex v Modesa* 1948 (1) SA 1157 at 1159 (T))

[12] I am also satisfied, upon the basis of the expert testimony of Philips, which was not seriously challenged on appeal, that the appellant's genotype was found to correspond with that of the child born to the complainant, it being Philips' evidence that there was a mere 0.06% possibility that the appellant was not the biological father of the child.

[13] The appeal is accordingly dismissed and the conviction and sentence confirmed.

R H ZULMAN JA

MARAIS JA)
SCOTT JA) CONCUR