

SOUTH AFRICA / JUDGMENT

Koka v S (A35/2022) [2024]

ZALMPPHC 111 (17 September 2024)

[2024] ZALMPPHC 111

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago, Morgan

CASE / FILE NUMBER

A35/2022

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

LIMPOPO DIVISION,

POLOKWANE

CASE NO: A35/2022

REPORTABLE:

YES/NO

OF INTEREST

TO THE JUDGES: YES/NO

REVISED.

DATE:

SIGNATURE:

In

the matter between: THATO
 MOKETE
 KOKA
 APPELLANT
 And
 THE
 STATE
 RESPONDENT

JUDGEMENT

KGANYAGO J

[1] The appellant was arraigned in the regional court of Mokerong on one count of rape read with the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act 32 of 2007 (CLAA). He appeared before regional court magistrate Motubatse MJ. He pleaded not guilty to the charge and denied all the allegations levelled against him.

However, despite his not guilty plea, he was convicted as charged and sentenced to life imprisonment. Since the appellant has been

sentenced to life imprisonment by the regional court, he is having automatic right of appeal. The appellant is appealing against both conviction and sentence.

[2] The facts of the case are briefly as follows. The State first witness was Mapitso Victoria Ramohlale. She testified that she is working at Mokopane Hospital in Thuthuzela section as a forensic nurse. On 6th October 2019 she examined the complainant and thereafter completed a J88 for her. The condition of the complainant's clothes was that they looked dirty and torn. Her clinical findings were that a 78 years female gave a history that she was fast asleep on 5th October 2019 at plus minus 21h00 when an unknown person knocked at her door and told her that her grandson was dead at the butchery. The old lady woke up, only to find that he knows the suspect, and she asked the suspect about the whereabouts of her grandson's

brothers. The suspect told the complainant that the grandson's brothers have sent him to come and call her, only to find that he wanted to rape her and money from her. On arrival at the butchery there was nothing. The suspect started to fight the old lady, beat her and allegedly raped her without using a condom several times. The suspect accompanied the old lady to her homestead where on arrival the old lady screamed for help and the suspect ran away.

- [3] The old lady was swollen on the upper lip, back of the head and left ankle. A plaster of paris was applied to support the old lady's leg. There was no bleeding, no tears, no discharge and no erosion. No injuries seen did not exclude vaginal penetration. Specimen was taken from the complainant, sealed and handed over to constable Madinisa in an evidence bag. There were no injuries seen to conclude that there was anal penetration. The witness was cross-examined and nothing new came out.
- [4] The State called D[...] M[...] as its second witness. He testified that the complainant is his wife. On the date of the incident he and the complainant were sleeping together in the room. As they were sleeping, a boy knocked at the door calling the complainant's name. That boy told the complainant that her grandson E[...] was lying there. The complainant woke up and left with that boy to go where her grandson was lying. The complainant took some time to come back home, and arrived in the early hours of the morning.
- [5] On arrival the complainant entered into the house and screamed for help. After screaming the complainant opened the window of their room. The complainant's clothes were torn. When the complainant was screaming for help, this boy was outside the house telling the complainant that they must go to the back of their house. When the community members arrived, the complainant explained to the community members what had happened to her. The witness was present when the complainant explained to the community members about the incident. The community members decided to go and look for this boy. The complainant told the witness that the boy was lying to her when he told her that her grandson was lying there, and that this boy had lured her in order to rape her. The witness stated that he did not see the boy whom the complainant was talking about.
- [6] The witness was cross-examined and he stated that he could not accompany the complainant when called by the boy as he had just removed the plaster of paris from his leg. The witness stated that the complainant had told him that this boy had raped her at the butchery.
- [7] The State called the complainant as its third witness. She testified that the second State witness is her husband. On the date of the incident it was on Saturday and they have come back from attending a funeral. On arrival at home she and the second State witness went to sleep. As they were sleeping, she heard a knock at the door. The person who was knocking was saying "old lady wake-up your grandson is lying at the butchery". The butchery is where they sell alcohol. That person further told the complainant that her grandson was with his brothers J[...] and M[...].

[8] As the complainant was scared, she woke up and left without the second State witness. The second State witness could not walk as he was having problems with his legs, and also could not see properly. She walked to the butchery with this boy called Mokete Koka and he is the boy who had knocked at the door of their house. The witness stated that Mokete is her neighbour. When asked by the prosecution where Mokete was that day (date of trial), she responded by stating

that she did not know and she asked whether Mokete was not available. When asked further by the prosecution whether she was seeing Mokete in court, she stated that she did not know if ever Mokete was in the courtroom, and that she did not know. When asked whether she could be able to identify him when she sees him, she said yes. It was only when the prosecution told the complainant to stand up and look at each one of them inside the court, and also to go nearer to where she was looking, that the complainant pointed to the appellant in the accused box as Mokete Koka. She denied having eye problems, but stated that it was winter and that if she gets to a place where the lights are on, it becomes darker.

[9] The complainant stated that when she gets out of the house, she found the appellant waiting at the door, and that even though it was dark outside there were lights illuminating. However, as she was scared when she left her homestead, she did not check whether her outside lights were on. She only realised when she came back that her outside

lights were smashed. She was able identify the appellant when they arrive at the butchery, and she also saw that the appellant was holding a beer bottle. At the butchery electricity lights were on, and the appellant pointed at a certain spot as the place where complainant's grandson was allegedly lying, but he was no longer there. The complainant used her cell phone torch light to check where it was dark, but there was no one. The complainant told the appellant that she was going back home, and the appellant

volunteered to accompany her back home.

[10] The complainant told the appellant that they must use the main road to walk back home, but the appellant suggested that they use the other road as he was afraid that he will be arrested as he was in possession of a beer bottle. They used the road as suggested by the appellant. When they arrive at a place where the houses were scattered, the appellant started walking behind the complainant. The appellant grabbed the soil from the ground and told the complainant to check around as there were thugs around the area. As the complainant was trying to look back, the appellant poured the complainant with that soil into the complainant's eyes.

[11] When the complainant asks what was happening, the appellant grabbed the complainant from behind and started throttling her with the cord of the phone. The appellant told the complainant that he was lying to her, and that her grandson was asleep at his homestead, and that what he wanted from her was her vagina and money. They started fighting and both of them fell to the ground, but the appellant overpowered her. The appellant dragged the complainant with her left hand towards

the maize field. On arrival at the maize field, the appellant ordered the complainant to stand up. By then the appellant was still holding a beer bottle.

[12] The complainant stood up, and the appellant lifted the complainant's clothes and covered her on her face with them. Thereafter the appellant took off the complainant's panty, made her to lie on the ground and put his penis into her vagina, and had sexual intercourse with her. Later the appellant ordered the complainant to stand up, and position herself like a dog. The appellant pushed the complainant's clothes to the front and penetrated her vagina from the back with his penis. After the appellant had finished having sexual intercourse with the complainant, he asked her whether she was having money, and the complainant told him that the money was at her homestead. The appellant told the complainant that they should go to her homestead.

[13] As they were walking on the street, the appellant was holding the complainant by her torn dress. When they reach the butchery, the appellant made the complainant to lie on the street, lifted her clothes, and by then she did not put on her panty as they left it at the place where the first incident took place. The appellant took out his penis and put it into the complainant's vagina and had sexual intercourse with her. Thereafter they left, and on the way the appellant suggested that they should go to a certain shack and the complainant refused. By then the sun was about to rise, and the complainant asked the appellant how she was going to give him the money. The appellant asked the complainant whether she was sure about what she was saying, and when the complainant confirmed that, and they continued walking.

[14] When they arrive at the complainant's homestead, the appellant was still holding the complainant by her clothes. The appellant suggested that they go at the back of the complainant's homestead and the complainant refused. The complainant asked the appellant to allow her to enter her homestead so that she can be able to give him money. At that moment the complainant and the second State witness opened the door of the house at the same time. On entering the house, the complainant locked the door, opened the window and screamed for help. Some neighbours came, and when they arrive the appellant was no longer there. The complainant had sustained some injuries on her neck, upper lip, leg was painful and swollen. She was taken to hospital where a plaster of paris was placed on her.

- [15] The complainant was cross-examined, and when asked whether she had asked the person who was knocking at her door his name, the complainant stated that at first that person said he was John, later that person said he must not be asked questions because the person was injured. The complainant stated that she knew the appellant as he was her neighbour and that they were staying in the same block, and further that the appellant grew in front of her.
- [16] The complainant stated that during her evidence in chief she was not able to immediately identify the appellant as she was seated, but that when she stood up she was able to do so. She disputed that she was having eyes problems. The complainant denied that the neighbours had searched for the appellant after she had screamed for help. When it was put to the complainant that if indeed she had informed the neighbours that the person who had attacked her was the appellant, they would have gone to search for him and deal with him accordingly. Her response was that had she told the community members, they would have followed the appellant and attacked him, which means she was going to have a problem when it comes to the issue of proof. That concluded the evidence of the State and it closed its case.
- [17] The appellant took the witness stand and testified under oath. He testified that he knows the complainant. He denied all the allegations levelled against him. He stated that on the date of the incident in the morning he was attending his uncle's funeral. Around 12h00 he went to Shell Filling Station to buy electricity. At Shell he met with his friends, and he stayed with them until 19h00. From Shell he got a lift which dropped him at Mashupye Primary School. From Mashupye he walked to his homestead which is a long distance. On the way to his homestead he stopped at Busy Corner to buy a bunny chow. He waited for the bunny chow for about an hour and had left Busy Corner around past 21h00.
- [18] On arrival at his homestead, he started vomiting and decided not to leave his homestead, but rather to go and sleep. As he was sleeping, he heard people knocking at his door and describing a person who is like him, and there was no one of his similar complexion in his homestead. Those people were saying a person of light complexion and who is short had robbed an old woman. When he heard them talking like that he got angry as he had his own money and did not utter nice words towards them. Those people were forcing the appellant had robbed an old woman. The appellant told them that if he had done that they can go and lay charges against him. Those people were four in number, and they walked out of the appellant's homestead.
- [19] After those people have left, the appellant went to his friend's homestead, which is not far from his homestead. As he was at the friend's place, the appellant saw the police vehicle going to his homestead, and they talked to his uncle and left. The police officers came back after 20 minutes and arrested the appellant.
- [20] The appellant was cross examined and he conceded that he had known the complainant for a very long time. However, the appellant stated that the complainant started knowing his name after the incident when the complainant came to her homestead, and she heard his

grandmother calling him by his name. The appellant conceded that he is not residing far from the complainant's homestead. The appellant stated that the butchery is not far from his homestead, and that the butchery is a drinking place. The appellant conceded that before his arrest he used to frequent the butchery. The appellant conceded that

at the butchery there are lights from the premises and also street lights, and that visibility is clear to the extend that it is like during the day. The appellant stated that the person whom the complainant had seen was not him, he was at his homestead asleep and that on that day he did not go to the tavern. That concluded the evidence of the appellant and he closed his case.

[21] On 25th August 2023 this court granted the appellant an order in terms of section 19(b) of Act 10 of 2013 that further evidence be led in respect of DNA results. The matter was remitted back to the court a quo for hearing of further evidence regarding the manner on how the DNA samples was obtained, dispatched and the establishment of the chain evidence.

[22] Further evidence was led in the court a quo in compliance with the court order of the 25th August 2023. Before the evidence was led, the prosecution brought it to the attention of the court that they have commenced and finalised the trial against the appellant before they received the outcome of the DNA results, and that they have received the results after the matter has been finalised. Chelilo Mashudu Rambau the forensic analyst who did the DNA analysis in the appellant's case was called to testify about his report. His finding was that the DNA of the semen which was from the vaginal swabs obtained from the complainant's vagina did not include the appellant, which means that the DNA did not belong to the appellant. The witness was asked by the prosecution whether it was possible to encounter some difficulties in finding the DNA of the suspect even in the instance where the suspect had vaginally penetrated the complainant. His answer was that it was possible if the suspect has got a low sperm count cell, or abnormal sperm count, or the suspect used a condom, or if the suspect has penetrated the victim but he did not ejaculate into the victim's vagina. The defence did not cross-examine the witness.

[23] The presiding regional court magistrate in remitting the matter back to the high court has also written a memo. In his memo he still stands by his conviction of the appellant and has stated that he finds that according to the analyst and reporter warrant officer Rambau, the possibilities still exist that the appellant committed the offence. Further that there is direct evidence by the complainant implicating the appellant, and there is no mistaken identity.

[24] The appellant is appealing against both conviction and sentence. It is trite that the powers of the appeal court to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witnesses' evidence. A reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of

appeal will be entitled to interfere with a trial court's evaluation of oral testimony. (See *S v Francis*[1]).

[25] In *S v Chabalala*[2] Heher AJA said:

“The correct approach to evaluating evidence is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence”.

[26] The alleged rape which led to the appellant been arrested occurred on 05th October 2019, and the appellant was arrested on the same date. The complainant was examined at the hospital by the first State witness. During the examination of the complainant, the first State witness did some vaginal swabs and also completed the J88. The

vaginal swabs were put into an adult sexual assault evidence collection kit and handed over to constable Malendisa Olga of the

SAPS on 6th October 2019. The said kit was taken to Forensic Science Laboratory (FSL) for DNA analysis on 18th October 2019 free from any contamination.

[27] The appellant's matter was transferred from the district court to the regional court on 28th November 2019. The appellant made his first appearance in the regional court on 21st January 2020. A pre-trial conference in the regional court to determine whether the matter was ripe for trial was held on 18th February 2020. The matter was declared trial ready and the proposed date for the trial was the 22nd May 2020. However, on the minutes of the pre-trial, it has not been recorded that the results of the DNA were still outstanding, and why they were rushing to finalize the matter without those results whilst the investigating officer had delivered the evidence kit at FSL on 18th October 2019. The trial of the appellant started on 22nd May 2020 and was finalised without the DNA results. The DNA tests results was received by the prosecution during 2022 long after the appellant's trial has been finalized, hence an application by the appellant to lead further evidence.

[28] In terms of section 35(3) of the Constitution, an accused person is guaranteed a right to fair trial, which right includes the right to be informed of the charge with sufficient details to enable him to answer to it. Sufficient details in my view, includes all details that are favourable and unfavourable to the accused. That would enable the accused to make an informed decision of how he/she is going to prepare for his/her case. The duty of the prosecution is not just to secure a conviction of the accused at all costs. If there is any evidence that is beneficial to the accused and might exonerate him or her, it is the duty of the prosecution to bring that to the attention of the court to enable the court to make proper

analysis of

all the evidence before it. Matters should be properly investigated before they are declared trial ready. It is not desirable for the trial to start whilst there is still outstanding evidence which is vital for the determination of the matter for the sake statistics of finalizing matters speedily.

[29] It is not clear from the minutes of the pre-trial why the prosecution as the custodian of the docket has failed to bring it to the attention of the court a quo that DNA test results were still outstanding. The evidence kit was not long that it has been sent to FSL for analysis where it could have been held that the matter was unnecessarily been delayed. The DNA result was vital in this case since the complainant was a single witness regarding the actual rape and the appellant was disputing having had sexual intercourse with the complainant. It was also surprising during the trial that when the first State witness testified that she had taken the specimen from the complainant sealed it and handed it to the police officer, the court a quo did not find out what kind of specimen was taken and what had happened to them. Even during the argument of the appeal before this court, the respondent was unable to explain why the prosecution did not take the issue of the specimen further, except to submit that the State case was not solely based on the DNA results but direct evidence. The direct evidence was that of a single witness in relation to penetration, which had to be clear and satisfactory. The DNA test results was going to either strengthen the State case or exonerate the appellant, and there should have been plausible reasons why the trial was proceedings whilst the DNA tests

results were still outstanding, of which none has been presented.

[30] In *Key v Attorney-General, Cape Provincial Division, and Another*[3] Kriegler J said:

“A criminal trial court will of course always have to be mindful of the fundamental rights entrenched in chapter 3. It will in particular ensure that the accused enjoys the benefit of the right to fair trial guaranteed by the general introductory words in s 25(3) of the Constitution. In doing so, due regard will be had to the dictum of Kentridge AJ (speaking on behalf of this Court in its first reported judgment) in S v Zuma and Others:

‘The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In *State v Rudman and Another*; *S v Mthwana* 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire

“whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted”.

A court of appeal, it was said (377),

“does not enquire whether the trial was fair in accordance with the ‘notions of basic fairness and justice’, or with the ‘ideas underlying ... the concept of justice which are the basis of all civilised systems of criminal administration’”.

That was an authoritative statement of the law before 27th April 1994. Since that date s 25(3) has required criminal trials to be conducted in accordance with just those “notions of the basic fairness and justice”. It is now for all courts hearing criminal trials or appeals to give content to those notions”.

- [31] Section 25(3) referred in the Key matter refers to the Interim Constitution. That section has been retained as section 35(3) in the final Constitution which still guarantees an accused person a right to a fair trial. The manner in which the appellant’s case was finalised without the DNA test results was prejudicial to the appellant. If FSL was taking time to finalise the analysis of the samples, the remedy for the prosecution was to provisionally withdrew the charges against the appellant, and reinstate them on receipt of the results. What had happened in the appellant’s case is clear example of the danger of been more interested in the statistics of finalising matters speedily and at same time trampling the accused rights to a fair trial.
- [32] Warrant Officer Rambau the forensic analyst has testified that the DNA which was obtained from the semen found on the vaginal swabs of the complainant does not include the appellant. His conclusion was that the DNA found deposited in the complainant’s vagina did not belong to the appellant. The witness conceded to the prosecution’s question that it was possible that even if there was vaginal penetration, there might be instances where it will be difficult to find the DNA of the suspect. The witness stated that those circumstances are where (i) the suspect had a low sperm count cell; (ii) abnormal sperm count cell; (iii) used a condom; (iv) and if the suspect had penetrated but did not ejaculate into the victim’s vagina.
- [33] The presiding regional court magistrate his memo after taking further evidence, still stands by his conviction. His justification of the conviction is based on the four scenarios given by Rambau, which according to him the possibilities still exists that the appellant had committed the offence. Further that there is direct evidence by the complainant implicating the appellant, and therefore there is no question of mistaken identity. The State when arguing the appeal before this court has also advanced the arguments aligning themselves to what the regional court magistrate has stated in trying to justify the conviction.
- [34] The approach of both the regional court magistrate and the State is flawed. What they have failed to take into consideration is that it is the duty of the State to prove the guilt of the accused beyond reasonable doubt, and there is no duty upon the accused to prove his innocence. What Rambau did was give the four scenarios which according his experience can made it difficult to find the DNA of a suspect despite there being a vaginal penetration. He did not link any scenario to the appellant. It was the duty of the prosecution to lead evidence as which of the four scenarios was relevant and applicable to the appellant, but

had failed to do so. What is left now is for the court to speculate which scenario might be relevant and applicable to the appellant. An accused cannot be convicted based on speculation and suspicion.

[35] What is also worrisome is the manner in which the complainant had identified the appellant in the accused box. The transcribed record read as follows:

“PROSECUTOR: How do you know Mokete Koka?”

COMPLAINANT: We are neighbours.

PROSECUTOR: Where is he today?

COMPLAINANT: I do not know. Is he not available? Is it not I was called by the police?

PROSECUTOR: Just inside this court, can you see him anywhere, if he is here?

COMPLAINANT: I do not know if ever Mokete is in this courtroom. I do not know.

PROSECUTOR: If you can see him, will you be able to recognise him?

COMPLAINANT: Yes, I will

PROSECUTOR: Just stand up and look at each one of us inside this court. Just go nearer to where you are looking at.

INTERPRETER: The witness is pointing at the accused person in the dock your worship.

PROSECUTOR: Do you have problems with your eyes?

COMPLAINANT: No, not that much. Your worship, it is now winter. If you get to a place where the lights are on, it becomes darker”.

[36] Under cross-examination by the defence counsel when it was put to the complainant that the reason why she took some time to identify the appellant in the accused box was that she is having eye problems, she disputed that and stated that she did not have eye problems. The complainant has testified that she knew the person who had raped her, but on two follow up questions, she did not see the appellant in court. The prosecution went to the extent that the complainant must stand up and go nearer to where she was looking without the prosecution laying basis for the witness to leave the witness box and go to person she was looking at. It also does not appear from the record whether the complainant went to look at the appellant only. In the accused box it was only the appellant, and normally the person whom the witness will be required to identify will be an accused in the accused box.

[37] In terms of section 35(5) of the Constitution, evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. In my view, the manner in which the prosecution was leading the complainant, it was channelling and assisting her to point at the appellant as person who had raped her. Even though the

appellant was legally represented, and his counsel did not object to that, that did not justify the approach of the prosecution in the manner in which it was leading the complainant to identify the appellant. It was prejudicial to the appellant for the prosecution to request the complainant to go nearer the appellant without the prosecution having laid the basis for that, even after the complainant on two follow up questions from the prosecution has stated that she was not seeing the appellant in court. The court a quo should have intervened, and its failure to do so had prejudiced the appellant, as this was dock identification, and in the accused dock it was only the appellant. That has therefore violated the appellant's right to fair trial.

[38] The court a quo approach in assessing the evidence in this matter was not holistic. The evidence of the complainant in relation to the penetration was that of a single witness. The manner in which the complainant had identified the appellant in the accused box was not clear and satisfactory. Had the court a quo taken into consideration the irregularities I have pointed out above, that the appellant's matter was finalised without DNA test results which excludes the appellant as the person who might have deposited his sperms into the complainant's vagina, that the evidence of the complainant been that of a single witness in relation to penetration was not clear and satisfactory, and also that in the possible circumstances in which a suspect might be held liable despite the DNA results excluding him, the prosecution had failed to link any of those scenarios to the appellant, the court a quo should have found that the balance weighs so heavily against the prosecution as to exclude any reasonable doubt about the appellant's guilt. The appellant should therefore have been given the benefit of doubt as the prosecution has failed to prove his guilt beyond reasonable doubt. The court a quo has therefore misdirected itself in convicting the appellant. It follows that the appeal on conviction stands to succeed.

[39] Accordingly, the following order is made:

39.1 The appeal is upheld.

39.2 The order of the court a quo is set aside and substituted with the following:

"The accused if found not guilty and discharged on the charge of rape"

39.3 It is ordered that the appellant be immediately released from the correctional services which he might be held, unless he is still having some pending cases or serving other sentences.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

I AGREE

MORGAN AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

APPEARANCES:

Counsel for the appellant

: R Scott

Instructed by :

Legal Aid SA Polokwane Office

Counsel for the respondent

: Adv Ramuthaga

Instructed by

: DPP Polokwane Office

Date heard :

13th September 2024

Electronically circulated on

: 17th September 2024

[1] 1991

(1) SACR 198 (A)

[2] 2003

(1) SACR 134 (SCA) at para 15

[3]

[1996] ZACC 25; 1996

(4) SA 187 (CC) at para 12

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