

SOUTH AFRICA / JUDGMENT

S v Zuma (JPV325/05 , JPV325/05) [2006] ZAGPHC 45; [2006] 3 All SA 8 (W); 2006 (7) BCLR 790 (W); 2006 (2) SACR 191 (W) (8 May 2006) [2006] ZAGPHC 45

COURT

High Courts - Gauteng

BEFORE

Van der Merwe

CASE / FILE NUMBER

JPV 2005/0325

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: JPV 2005/0325

DATE: 8/5/2006

NOT REPORTABLE

IN THE MATTER BETWEEN

THE STATE

VERSUS

JACOB GEDLEYIHLEKISA ZUMA

GENERAL COMMENTS

Before starting with this judgment I want to make a few general comments.

This matter was not originally allocated to me. Three judges were for different reasons not available to hear the matter and it therefore became my responsibility as the next most senior available judge. I want to express my appreciation to the two legal teams, the media in general as well as the public in court for the courtesy shown to me. It must have been clear from the beginning that I would not allow myself to be influenced or distracted by anything or anybody. A judicial approach cannot be anything else than impartial, objective, fair and totally dedicated to the task lying ahead.

Whatever my conclusion at the end of this judgment may be, the outcome will not satisfy everybody. At no stage whatsoever did I intend satisfying anybody and I will certainly not do it now. As will be seen later herein criticism was at certain stages levelled at certain rulings I had made. I hope it will be seen from the reasons that are to follow that the criticism was unfounded. I hope that all concerned will carefully listen to the reasons for my rulings and findings and I sincerely hope that they understand the

reasons.

This trial created an unknown interest among the public at large and received enormous media coverage, printed as well as electronic. It was difficult not to see and hear some of the comments in spite of the fact that I try not to read, look or listen to news concerning a matter I am busy with in court. Some matters unfortunately did not escape my attention.

Different groups of people and organisations apparently tried to gain some mileage out of this trial. For example had I to deal with the application by three organisations who asked to be allowed as amici curiae in this matter. The organisations were represented by highly respected legal representatives and I therefore accept without hesitation that the application was genuine and serious and without any ulterior motive. The application was, however, doomed from the beginning and unnecessarily side-tracked everyone's attention at a time when it was not needed. The organisations, however, succeeded in informing the entire world of their existence and what they stand for. No doubt they do excellent work and may, when asked for, be of great assistance.

Pressure groups, non-governmental organisations, governmental organisations, politicians and in some instances some of the media, breached the sub judice rule. I have no problem with fair comment and the media's duty to keep the public informed of important matters, especially the case we are dealing with at present. The decision of Duduzile Ncobo to testify is an example of the benefits of reporting by the media. What, however, is disconcerting, is the fact that some pressure groups, organisations and individuals found the accused guilty and others found him not guilty in their comments on the case, without knowing what the evidence is and long before all the evidence was presented.

The pressure on a court in a matter like the present is big enough. It is not acceptable that a court be bombarded with political, personal or group agendas and comments. As one contributor to a daily newspaper very correctly put the matter in the following perspective: "This trial is more about sexual politics and gender relations than it is about rape." Wise words indeed but what a pity that it had to be said.

Radio and television approached me with a request that the judgment be broadcasted live. I discussed the request with a number of my colleagues. In spite of my repugnance against any form of publicity I had to realise and accept that times have changed. I hope that this live broadcast (which will unfortunately take long) will serve as an educational tool. I hope that the public will now realise what enormous effort goes into a trial like this and with what objectivity and dedication it is approached.

Not all the evidence tendered can be repeated and discussed in a judgment like this.

Because of the length of this judgment I will in respect of certain witnesses not read for example the entire summary of the cross-examination. Where reference is made to case law I will also read the most important part only. The judgment as a whole will be made available. Everything will be contained therein.

JUDGMENT

VAN DER MERWE, J

Mr Jacob Gedleyihlekisa Zuma (hereinafter called "the accused"), a 64 year old male, stands accused of the crime of rape as read with the provisions of section 51 of Act 51 of 1977 ("the Act") in that he allegedly upon or about 2 November 2005 and at or near Epping Street, Forest Town, Johannesburg intentionally assaulted Ms K, a lady whose name I do not want to disclose and to whom I will hereinafter refer to as "the complainant" and had sexual intercourse with her without her consent. The accused is represented in this trial by Advocates K J Kemp SC, J Brauns SC and T Mbongwa. The state is represented by Advocates C de Beer, H J Broodryk SC and W Ngabela.

The accused pleaded not guilty to the charge. A statement in terms of section 115 of the Act was read into the record and handed in as exhibit "A". For what is to follow and for purposes of clarity I quote the contents of this statement in full. It reads as follows:

"I, the undersigned,

the accused herein, plead not guilty to the charges as put to me by the Director of Public Prosecutions. In amplification of such plea I give the following explanation:

1. The complainant visited my home at Forest Town, Johannesburg on 2 November 2005 and stayed over for the night. This was of her own volition.
2. Late on that evening of November 2005 we had had sexual intercourse which lasted for some time. This was consensual. At no stage did the complainant say no to any of the actions we performed.
3. At no stage did I believe that the sexual intercourse was against the will of the complainant. She was at all times at liberty to say so and voice her disapproval.
4. My daughter, Duduzile, who is in her mid-twenties, was in the house and a policeman was on the premises outside at all relevant times of the incident.
5. The complainant had a cellular telephone with her and could leave the premises at any time.

6. Enquiries have revealed that the complainant has made similar false allegations of rape against a number of persons, some of which have been alluded to in a statement of a witness provided by the prosecution."

7.

As can be seen from paragraph 6 of exhibit "A", reference is made therein to previous sexual intercourse or experience by the complainant. That formed a basis for an application which was later brought on behalf of the accused in terms of section 227 of the Act. I will at the appropriate time deal with that application.

After exhibit "A" was handed in the state applied in terms of section 153(2)(a) and section 153(3) (a) of the Act that the complainant testify behind closed doors but that the court authorises the presence of certain named persons while she is giving her evidence. The state further applied for an order in terms of section 153(2)(b) of the Act that the complainant's identity not be revealed for the duration of the trial. There is now an application by the state to further protect the complainant's identity. That is why I did not mention her name earlier. The defence team agreed to the terms of the suggested order of court. A draft order was then made an order of court (exhibit "B"). The complainant was thereafter called by the state as its first witness.

The evidence, including cross-examination, of the complainant lasted for a number of days. As is the case with all other witnesses, the evidence of the complainant will not be summarised in minute detail. As the trial developed it became clear what the relevant issues were. I will therefore concentrate on the essential aspects of the complainant's evidence only.

The complainant is a 31 year old female, unmarried and with no biological children. She was diagnosed as being HIV positive during April 1999 and thereafter

became even more involved and interested than before in educating people in respect of HIV and other health issues.

The accused is well-known to the complainant. She met him in Swaziland where she was in exile with her parents. She was aware of the accused's existence from about the age of 5 years. She remembers him from these early days as a "very friendly uncle" who used to play with the children in exile and talk to them. It is common cause that the accused and the complainant's late father were good friends. They were together in the ANC as youth members and they were both sentenced to ten years imprisonment at Robben Island. Her father, JK, died in a motor collision on 1 May 1985 in Zimbabwe. After the complainant's father's death the accused kept in contact with the K family. The complainant was devastated by the death of her father and is now, even twenty years thereafter, not quite over it. Because the accused and her late father were such good friends and comrades she felt close to the accused. He was able to tell her stories about his and her father's youth. For that reason she liked being around him.

In referring to the accused the complainant used the Zulu word "malume" which means "uncle". During her evidence it was clear that the complainant also referred to other older men as "malume" such as the present Minister Ronnie Kasrils and others.

I will later deal in slight more detail with the contact the complainant had with the accused. According to her she came back to South Africa in December

1990. She phoned the accused "several times" around 1998. When she was employed in Pretoria in 2001 she talked to him over the phone and also visited him on a number of occasions. She saw the accused for the first time in person again in 2001 and then told him that she was HIV positive. She told him that because, according to her, she regarded him as a father and she thought that it was an important part of her life that he should know about. As a "father" he was also "a big source of support" to her.

In 2002 the complainant had contact with the accused until June 2002 when she left for the United Kingdom and returned in October

2003. In that period she had no contact with the accused at all.

Back in South Africa the complainant phoned the accused twice during the period October 2003 to May 2004. In May 2004 she was employed in Pretoria and had more frequent contact with the accused.

The complainant was interested in homeopathic medicine and made application to be accepted at a homeopathic college in Australia. When she was accepted there she asked for financial assistance. Because of the short period before the complainant had to start in February 2005 the accused could not arrange funding. According to the complainant the accused was also not very keen on her going to Australia because, according to him, it was too far away and she would also not have the necessary support there. She then told the accused that she had applied to a similar college in the United Kingdom. His reaction was that as soon as she was accepted there she should come and see him and he would then arrange the funding for her to go to the United Kingdom.

In June 2005 the accused was released of his duties as the Deputy President of the Republic of South Africa. She thereafter sent him several messages of support telling him that she supported him and, she added, "I love you very much malume". Her reason for doing that was that as his "daughter" it was important for him to know that she was on his side and that she was supporting him. According to the complainant she and a person whom she calls her sister, Kimi, as well as other children from exile and the accused's own children, invited him to his house for a lunch to show their support.

The complainant started working in Johannesburg in July 2005 and, according to her, she then contacted the accused more frequently.

At the end of July 2005 the complainant was accepted as a student in the homeopathic college in the United Kingdom. She called the accused and he tried to find money to pay for her tuition. The last day for paying the tuition fees was 9 September 2005. Money was not obtained.

The complainant visited the accused at his Johannesburg residence situated at 8 Epping Road, Forest Town, Johannesburg, at the beginning of August 2005. The accused welcomed the complainant and gave her a hug. She spent the next few hours talking to the children in the house and other people who were waiting to see the accused.

He told her that he had to see people and that as she was a child she was to be last on the list to be seen. That evening at about 22:00 he had the opportunity of seeing her when he was finished with all the other people. They spoke to each other in the accused's study. According to the complainant he wanted to know how she was and they also spoke about the progress with her scholarship and her social life in Johannesburg. According to her he had a sort of a question-mark on his face as if he wanted to tell her something else. The complainant then said to the accused "malume, you are not getting labola anytime soon". A discussion then ensued about a boy friend and she informed him that she had none. On a question why not she said that the boys of nowadays are not man enough and that in any event all the good ones are taken already.

The complainant elaborated on the question of labola and she then again stated that although the accused is not from the K family she regarded him as her father and that there is nobody else who could be her father but him. If ever she would decide to get married he would be the person who would be in the forefront to negotiate the labola.

The complainant said that when she heard that no money was available for her education in the United Kingdom she was devastated and her so-called CD4 count dropped, indicating that her immune system had taken a turn for the worse. She informed her friends and those she love about this, which included the accused. She informed the accused that she wanted to take life easier and that she was longing to see her mother.

He offered to pay for the airfare to go and see her mother. She collected the money from the accused at the end of September 2005.

The next visit to the accused's house was on 2 November 2005, the date on which she was allegedly raped by the accused.

During the morning of 2 November 2005 the complainant received a message from Nokozola, to whom she refers as her daughter, in Swaziland. Nokozola is her sister's daughter. The message was to the effect that Nokozola's son had been bitten by a snake and was in hospital. The complainant was upset about the news and sent text messages to various people including the accused. According to the complainant she was in the habit of sending sms messages to whoever she could when she wanted to convey something.

The complainant tried to contact the accused during the course of the day but could not reach him. Shortly before 17:00 and shortly before she was to leave for Swaziland, she once again phoned the accused and got hold of him. She then informed the accused that she was leaving for Swaziland. His reaction was that she was in too much of a hurry. He, according to her, invited her to his house where she arrived at approximately 18:00. As the complainant's mother was going to Swaziland the accused advised her that there was no need for her to go as well.

When the complainant arrived at the accused's home she informed the police that she was a child of the house but not staying there. She was allowed to go to the main entrance where the accused opened the door for her. According to her he again greeted her as "his daughter". He had people waiting for him in the sitting room and he introduced her as the daughter of a close friend of his and then told her to go to the kitchen and that he would see her later. In the kitchen she found a young man not older than 18 years. Later a young lady arrived also wanting to see the accused. Duduzani, the accused's son, arrived and still later Duduzile, Duduzani's twin sister. Another female also arrived.

Food was prepared in the kitchen by the complainant, Duduzile and the other female. When the visitors left they had their evening meal.

For certain reasons Duduzile had to take the other young female to her place of residence and the accused, according to the complainant, then remarked that the complainant was staying over. Duduzile and the other girl left and the accused and the complainant remained alone in the lounge. According to the complainant the accused then emphasised that whenever she was feeling down or upset that she should not be by herself and that she should always come home, referring to his home where he will console her. According to the complainant the accused again raised the topic of a boy friend and she again told him that there were no good ones left. At some point the accused advised her that she would have to lower her standards and then in particular stated that because she is HIV positive it was important for her to have a companion.

He then also added that because she is HIV positive it did not mean that she had no physical needs anymore. A telephone call interrupted the conversation and they thereafter started talking about herbs and other medication that could help with her HIV status.

According to the complainant a lady later arrived with whom the accused had a discussion about alterations to clothes. The lady then left. Thereafter the accused told the complainant to prepare for bed. He said he was going to his study to do some work for about forty five minutes and that he would see her when he was finished. As she was just sitting and watching TV the accused again told her "go my daughter, go prepare to sleep". She found it a bit strange. As it was about 21:20 and she normally goes to bed at 22:00 she decided to go to bed. After a short discussion the accused went with her to the guest room. The accused told her to make use of the double bed. The accused also said that when he had finished his work he would come to tuck her in. That, according to the complainant, did not mean anything at the time because she regarded him as her father who was merely telling her that he would tuck her in. She did not think there was anything wrong with it.

The accused left the bedroom and the complainant closed the door. She took a shower, put on a kanga, made a few phone calls and sent a few messages.

Shortly thereafter she heard a door open and some noises and she presumed that Duduzile had come back home. She went upstairs to Duduzile's room, knocked at the door and when Duduzile opened she found that she was already in her pyjamas. The complainant and Duduzile left the bedroom to go to the study to say goodnight to the accused. On their way thereto she asked for a book which was given to her by Duduzile. Thereafter the two of them went to the study and told the accused that they only came to say goodnight. The phone then rang and the accused indicated to the complainant to wait for a minute. Duduzile left and the complainant remained behind. When the phone call was finished the accused told the complainant that people would urgently come and see him. He then asked her at what time she would be leaving in the morning and then added "my daughter as I am finished with these people just come up to my room so that I can tuck you in". She then enquired what sort of tucking in that was. The accused only laughed and the complainant remarked that she had a book and that she was sure that after having read a paragraph or so she would be asleep. She said goodnight to the accused and informed him that she was going to sleep.

At the time the complainant thought that the accused's remark was a bit odd but she took it as a joke and did not think anything of it.

The complainant went back to the guest-room where she lay across the bed and sent messages with her cellphone and also made a call. She read a little bit and was feeling sleepy when the accused entered the bedroom. According to her he asked her "are you already asleep?" Her reply was that she was getting sleepy but that she was going to fall asleep soon. The accused then remarked "OK my daughter I am going to attend to my people." According to her he then left the room, she went under the bed covers and went to sleep. The light in the room was still on.

At that stage of the trial a kanga similar to the one the complainant wore the night of the alleged rape was wrapped by the complainant around her body. The piece of clothe overlapped and was tucked in between her breasts. The complainant did not have any underwear on that night.

The complainant fell asleep on her stomach facing away from the curtains. Some time during the night she heard a voice from behind, ie from the side of the curtains. It was the accused speaking and he asked the complainant whether she was already asleep. She only mumbled in the affirmative. The light was still on. Her eyes were closed. At that stage the complainant curled up a bit and covered her head with the duvet. According to her she wanted to sleep and to be left alone. The accused said that he thought that he would come to tuck her in and to massage her. The complainant's reaction was to say "no" she was already asleep and she would see the accused the following day. The accused's reaction was that he could even massage her whilst she is sleeping. The complainant again reacted by saying "no" she was already asleep.

According to the complainant the accused then removed the duvet and whilst she was lying on her left side he started to massage her shoulders after which he held her on her shoulders and turned her around so that she was facing upwards. She then felt the accused's knees on both sides

of her legs and the accused immediately started to massage her shoulders. While he was massaging her she again said no but the accused did not stop massaging her. At that stage she opened her eyes for the first time and saw that he was naked, she saw his naked body and his naked penis. She immediately thought that that could not be true, the accused being naked on top of her, in his own house. She said that she was confused and thought that it could not be happening to her. She immediately realised that he was about to rape her. She closed her eyes and turned her head sideways. At that stage the accused opened her kanga and with his right knee pushed her legs apart whilst he took both her hands and held it above her head. With his other hand he touched her vagina, opened it, moved with both his legs in between her legs and penetrated her whilst holding both her hands with both his hands.

According to the complainant the accused spoke to her whilst he was having intercourse with her. He told her that he had told her that he would take care of her and he called her "sweetheart". He said to her that she was a "real girl" and at some point gave her a peck on the lips and a peck on the cheek as she was facing away from him. The accused started thrushing harder and harder and he then asked her whether he should ejaculate inside her.

Once the accused was finished he got up and left. The complainant remained lying on the bed. She could not move. She found her kanga and tried to put it on top of her and covered herself with the duvet.

The accused did not use a condom when he raped her. She could feel his semen coming out of her vagina.

Sometime later that night the accused came back to her bedroom and asked her again whether she was already sleeping. The complainant did not respond. He also asked her whether she had money for transport the following morning and she abruptly confirmed that she had money. The accused also asked her to say goodbye to him on leaving the next morning. Thereafter the accused left her room.

The complainant tried to fall asleep but she could not. At approximately 02:00 she called Swaziland and spoke to her daughter just to check how she was and how the child was. A text message was sent to Kimi and Hlabe. In that sms she apparently just said that she was very uncomfortable as "Malume is starting to look at me sexually. There must be something in my drawers." By that she referred to her panties. She testified that she could not get herself to convey to her sisters what actually had happened. She was still trying to digest and to accept what had happened.

The complainant did not scream or try to attract anybody's attention before or during the rape. She explained that by saying that she was shocked, in a total daze and could not move or do anything.

I will later refer in more detail to this aspect when I discuss the evidence of Dr Merle Friedman who testified that it was very common for women to freeze under such circumstances.

The complainant explained her failure to leave the house immediately after the incident on the basis that she was still trying to process what had happened. Another reason was that it was in the middle of the night in Johannesburg which was still a strange place to her. She also did not want to go back to her own place and to be all by herself.

The complainant got up at about 05:10 or thereabout. She was still very confused about what had happened and was still in a daze. She had a bath, made a phone call from the landline in the house, took some food out of the refrigerator and left for work around 07:00.

During the course of the morning the complainant was still trying to gather her thoughts and was trying to get some assistance. She had a "horrible discomfort in between her legs" and felt a sting in her vagina. Approximately 11:00 she came back to her office after having gone out for a while and she then broke down and started sobbing.

Some time during the course of the morning a lady called aunt Pinkie (that is the witness Nosipho Mgudlwa) phoned the complainant and after some exchange of words the complainant said that "malume" raped her the previous night.

Arrangements were then made for the complainant to see a doctor. Round about 20:00 that evening the complainant was examined by Dr Likibi who also testified during the trial.

That evening the complainant spent with Nomthandazo Msibi also known as Kimi. This lady also testified.

The incident of rape was reported to the police on the Friday 4 November 2005 at approximately 14:00.

The complainant testified about the dangers of a person who is HIV positive having unprotected sex. I need not deal with that aspect at this stage as Prof Martin testified as an expert. It is, however, clear that the complainant had enough information available to understand the dangers to herself if she had unprotected sex with another HIV positive person. She was also aware of the dangers to the other person with whom she had unprotected sex if that person was HIV negative.

The complainant therefore reiterated that she would not have consented to intercourse without a condom. She also stated that the accused did not ask her for her consent before he had intercourse with her. The leading question was then put "Did you give him your consent or was there anything in your conduct which could have led the accused to believe that you gave him consent to have intercourse with you?" The answer was "No I did nothing to make him believe that, no."

The complainant left for Swaziland on Friday 4 November 2005 and returned on Monday 7 November

2005. That evening she was contacted by two people whom she described as Mam Samkele and Mam Jane. She explained that Mam Samkele is like a mother to her since she was a child in Swaziland whilst Mam Jane is an "auntie" from exile. Jane is related to the complainant's sisters Kimi and Hlabi, being their stepmother.

The complainant testified that these two ladies spoke to her about her safety after having laid the charge as well as the detrimental effect it would have on the ANC. From what they told the complainant it appears as if they were pro-Zuma and anti-Mbeki supporters. The discussion made the complainant feel very pressured.

The complainant was placed in a witness protection program. She was contacted by newspapers to enquire about the rape charge and on advice of her minders she denied that anything had happened between herself and the accused and she also denied having laid a charge.

The complainant's mother came to see the complainant on Monday 14 November 2005. The complainant's mother also testified and reference will be made to her evidence later. It is common cause that Dr Zwele Mkize arranged for the complainant's mother to come from Durban to Johannesburg. There was talk of compensation for the alleged rape with which I will deal later. The complainant decided to continue with the charge laid against the accused.

The complainant testified about telephone calls she received from the accused trying to arrange a meeting between him, the complainant and her mother. She also testified about a meeting she had with an attorney who turned out to be Attorney Docrat. Her evidence regarding the meeting with the attorney was that although he initially seemed objective he later tried to persuade her to drop the charge against the accused.

The complainant testified that the incident totally devastated and disrupted her whole life. She is in witness protection and separated from the people she desperately needs. She is also aware of certain allegations in newspapers which trouble her. She referred to a condition where her heartbeat goes low, she cannot move and saliva bubbles come out of her mouth. It is not an epileptic fit but she goes into a condition of shock and becomes emotionally upset. She calls it an attack. Her CD4 count is also not going higher and is an indication that her immune system is badly affected.

At the end of the complainant's evidence in chief the state applied for leave to ask the complainant a question concerning the last time she has had sexual intercourse with a man prior to 2 November 2005. The state handed in written heads of argument with which I will later deal in more detail. The defence did not oppose the application. From the contents of paragraph 6 of exhibit "A", referred to above, it was clear that the defence would bring a similar application. The application was brought practically immediately after the state's application.

Leave was granted to the state to ask the complainant the following question: "How long before this incident did you last have sexual intercourse?"

The complainant answered that it was during July 2004.

The relevance of this question and answer will later become clear.

Before the cross-examination of the complainant started an application was brought by the defence in terms of section 227 of the Act not only to cross-examine her on her past sexual history but also to lead evidence in connection therewith.

The application was heard in camera, ie in the absence of the press and the agreed fifteen family members and friends on each side. The complainant herself also left the court room.

After having heard argument I gave a short judgment and granted an order granting leave to the defence to cross-examine the complainant about her past sexual history and to lead evidence in respect thereof.

I stated that I would give reasons for the ruling at an appropriate time. Before giving the reasons a few general remarks need again be made.

A disconcerting aspect in this trial is the fact that all and sundry were prepared to and apparently claimed the right to, comment on my decision in terms of section 227 of the Act even before they knew the bases on which and the reasons why leave was granted to cross-examine the complainant on her past sexual experience and to lead evidence concerning aspects of that past. People commented on the ruling without having been in court or knowing anything about the contents of the application or the provisions of section 227 of the Act. The application was supported by an affidavit by Mr Michael Andrew Thomas Hulley, Mr Zuma's attorney of record. When the ruling was made I specifically stated that for obvious reasons no reasons ought to be given. Over and above the reasons to be furnished for the ruling the evidence in this matter will also be discussed and the question will also then be answered as to whether the evidence dealing with the complainant's previous sexual experience is relevant and therefore admissible as evidence or not.

Section 227(2) of the Act reads as follows:

"(2) Evidence as to sexual intercourse by, or any sexual experience of any female against or in connection with whom any offence of a sexual nature is alleged to have been committed, shall not be adduced, and such female shall not be questioned regarding such sexual intercourse or sexual experience, except with the leave of the court, which leave shall not be

granted unless the court is satisfied that such evidence or questioning is relevant: Provided that such evidence may be adduced and such female may be so questioned in respect of the offence which is being tried."

Two things must be clear from the provisions of this subsection. Questions can be asked and evidence can be adduced regarding the complainant's sexual experience or sexual intercourse:

1. only with the leave of the court; and
2. if the court is satisfied that the questions or evidence are relevant.

At the time when the application was brought I referred to what was said by SCHREINER JA in R v Matthews and Another 1960 1 SA 752 (A) at 758A-B:

"Relevancy is based on a blend of logic and experience lying outside the law."

In the law of evidence much time is usually spent on the question what evidence is relevant and admissible and what is irrelevant and therefore inadmissible. See eg Zeffert, Paizes and Skeen *The South African Law of Evidence* p219-225; Schwikkard and Van der Merwe *Principles of Evidence* 2nd edition p45-55; Schmidt *Bewysreg* 4th ed p387-392.

What is clear though is that the question of relevancy can never be divorced from the facts of a particular matter before court.

The state submitted in its heads of argument that the question it wanted to put to the complainant is relevant on the basis of what is contained in the report of the medical examination. That submission was correct as is borne out by the evidence.

The bases for the application by the defence as set out in Hulley's affidavit and as amplified by Mr Kemp's submissions can be summarised as follows. (In what is to follow I will not refer to the allegations in Mr Hulley's affidavit and Mr Kemp's submissions individually where not necessary.)

Mr Kemp argued that the complainant testified that she knew since April 1999 that she was HIV positive and that she would not willingly have unprotected sex and would not consent to such intercourse. The inference is therefore that the complainant would not have had intercourse with a male without a condom since 1999, and as in this case a condom was not used, the further inference therefore is that intercourse did not take place with the complainant's consent. Mr Kemp further argued that if the complainant is asked about it she will say that on each and every occasion she had had sex since 1999 a condom was used. The question posed by Mr Kemp was therefore: How can the credibility of the complainant on this aspect be properly tested without going into her sexual history since April 1999? It was therefore submitted that the evidence led by the state logically and naturally requires that the complainant be cross-examined on her sexual history at least between the period April 1999 and November 2005.

A further reason advanced by Mr Kemp was the evidence led by the state itself about the complainant's sexual history by asking her (with the leave of the court) when last, prior to November 2005, she had had sexual intercourse. That in itself, so it was argued, entitled the defence to ask questions about the complainant's sexual history at least between the period July 2004 and November 2005.

Mr Kemp referred to a witness statement handed by the state to the defence in which reference is made (so I understood the argument) to an incident of rape where the complainant had fainted. Apparently the complainant had hinted to the witness that in casu the same had happened. This, it was submitted, made it necessary to investigate the particular incident referred to in the witness statement.

Reference is apparently also made in the witness statement to two other incidents where the complainant was raped but the matters were not pursued. From a motive point of view, Mr Kemp argued, it was necessary to investigate the two incidents to find out why the present incident is hotly pursued but the two others were not.

Reference was made to exhibit "E3", apparently part of a book the complainant intended writing. I do not want to deal with the contents thereof in detail at this stage. What is clear is that reference is made therein to a number of instances of rape. I was told that the defence intends leading evidence of a lady who sat as a member of a commission which investigated two of the incidents and who will say that the complainant conceded that whatever took place was with her consent in both instances.

In respect of further allegations of rape made in exhibit "3", some of the men accused were traced who will say that the allegations are false. Mr Kemp therefore submitted that in order to put forward a proper defence, he need to obtain permission to cross-examine the complainant about these incidents and to lead evidence about them.

The state referred at length to the matter of *S v M* 2002(2) SACR 411 where the supreme court of appeal had the opportunity of considering section 227 of the Act. In that matter a court of appeal had granted leave to re-open the trial before a lower court in order to lead evidence concerning a complainant's previous sexual behaviour. The supreme court of appeal was critical of the court of appeal's order in that regard and referred to the common law position regarding evidence to attack a complainant's character. In paragraph [17](6) at p422c-g the following is said in this respect:

"(6) The purpose of adducing the evidence of Ngema could only be to attack the credibility or character of the complainant. However, as Du Toit et al Commentary on the Criminal Procedure Act at 24-100A, note, 'conventional wisdom' in relation to the common law is that

'the accused may not lead evidence of the complainant's acts of misconduct with other men (see *R v Adamstein* 1937 CPD 331) unless those acts have a relevance to an issue other than by way of character, but such acts may be put to her in cross-examination, since they may be relevant to her credibility. It is true that such evidence will usually be irrelevant to the substantive issues confronting the court; but not always.'

Faced with that statement of the common law, the court must necessarily have experienced difficulty in allowing the application to reopen to in order to call Ngema."

After having referred to section 227(2) and (3) HEHER AJA (as he then was) continues as follows in paragraph [17](6) at p422h:

"The members of this court are not aware of any instance where s 227(2) has been applied in this country. It seems likely that it is more honoured in the breach than in the observance. Since it requires of the courts that it be applied in the manner in which it was no doubt intended, namely to militate against offensive, hostile and irrelevant questioning of complainants without thereby diminishing a full and just investigation of the real issues in the case, it may be as well to make certain comments concerning the proper application of the section."

The learned judge then refers to the position in Australia, England and Canada.

It is worthwhile quoting at length what is stated at p422j-426a:

"So-called 'rapeshield' legislation, as s 227(2) is, has been passed in many jurisdictions, inter alia the United States, the United Kingdom, Canada, New Zealand and the Australian States. Ligertwood Australian Evidence 3rd ed at 165 summarises what appears to be the common background to such enactments: 'Cross-examination is normally permitted on grounds of relevance, either to the issues in the case, or to determining the witness's general creditworthiness. Courts have allowed cross-examination of a victim regarding past sexual history

on both grounds. It is worth noting at the outset that, where the cross-examination is of relevance to the issues in the case, matters raised in cross-examination may be taken further by the defence and made the subject of separate and perhaps contradictory evidence called as part of the accused's case. On the other hand, matters of general creditworthiness are regarded as collateral matters which cannot be pursued beyond cross-examination. The witness's answer is final.

The difficulty is in determining when sexual experiences are relevant, either to the issues or to the general creditworthiness of the victim. Controversy has arisen because (male) common law judges have allegedly been all too willing to allow the (female) victim's previous sexual character to be revealed, most often in cross-examination. In consequence, victims wanting to prosecute their assailants have had to be prepared to subject themselves to the ordeal, at both committal and trial, of a long and searching cross-examination on their sexual experiences and attitudes. Needless to say, the potential humiliation and embarrassment of this ordeal, whereby the victim is effectively also put on trial to defend her moral character, has discouraged victims from prosecuting their assailants. This controversy has led to legislative protection against gratuitous revelation of a victim's character.'

Section 227(2) is in substantially the same terms as s 2(1) of the English Sexual Offences (Amendment) Act 1976. In *R v Viola* [1982] 3 All ER 73 (CA) at 77 Lord Lane CJ said of s 2:

'Having said that, [that it is wrong to speak of the exercise of a discretion in the context] when one considers the purpose which lay behind the passing of the 1976 Act, as expounded by Roskill LJ [in *R v Mills* (1979) 68 Cr App R 327], it is clear that it was aimed primarily at protecting complainants from cross-examination as to credit, from questions which went merely to credit and no more. The result is that generally speaking (I use these words advisedly, of course there will always be exceptions) if the proposed questions merely seek to establish that the

complainant has had sexual experience with other men to whom she was not married, so as to suggest that for that reason she ought not to be believed under oath, the judge will exclude the evidence. In the present climate of opinion a jury is unlikely to be influenced by such considerations, nor should it be influenced. In other words questions of this sort going simply to credit will seldom be allowed. That is borne out by the cases to which we have been referred, not only those which I have cited, but other unreported cases which have been before this court, to which perhaps it is not necessary to make reference.

On the other hand, if the questions are relevant to an issue in the trial in the light of the way the case is being run, for instance relevant to the issue of consent, as opposed merely to credit, they are likely to be admitted, because to exclude a relevant question on an issue in the trial as the trial is being run will usually mean that the jury are prevented from hearing something which, if they did hear it, might cause them to change their minds about the evidence given by the complainant. But, I repeat, we are very far from laying down any hard and fast rule.

Inevitably in this situation, as in so many similar situations in the law, there is a grey area which exists between the two types of relevance, namely relevance to credit and relevance to an issue in the case. On one hand evidence of sexual promiscuity may be so strong or so closely contemporaneous in time to the event in issue as to come near to, or indeed to reach the border between mere credit and an issue in the case. Conversely, the relevance of the evidence to an issue in the case may be so slight as to lead the judge to the conclusion that he is far from satisfied that the exclusion of the evidence or the question from the consideration of the jury would be unfair to the defendant.'

(Although the restriction on the judge giving leave to adduce evidence or ask questions only if he is satisfied that it would be unfair to the defendant to refuse to allow the evidence to be adduced or the question to be asked, is not included in our Act as it was in s 2(2) of the English statute, such a consideration is, no doubt, a matter to be taken into account in the exercise of a proper judgment on s 227(2).)

The dictum of Lord Lane applies with equal force to s 227(2).

...

In Canada, s 276 of the Criminal Code sets out specific aspects which a court is obliged to take into account in determining admissibility of evidence relating to sexual activity of a complainant. See the discussion in Martin's Annual Criminal Code 2000 at CC/510 et seq. These aspects are:

- '(a) The interests of justice, including the right of the accused to make a full answer and defence;
- (b) society's interest in encouraging the reporting of sexual assault offences;
- (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (d) the need to remove from the fact-finding process any discriminatory belief or bias;

- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f) the potential prejudice to the complainant's personal dignity and right of privacy;
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law;
- (h) any other factor that the judge, provincial court judge or justice considers relevant.'

These are matters which would *mutatis mutandis* be proper for a South African court to consider in judging the admissibility of evidence under s 227(2) in our constitutional dispensation, even in the absence of specific statutory prescriptions.

It can be noted that if the trial court had applied tests of this nature (over and above a plain enquiry as to relevance) the evidence of Ngema could hardly have been admitted.

The South African Law Commission published Discussion Paper 102 relating to Project 107, 'Sexual Offences: Process and Procedure' in December 2001. Chapter 32 concerns 'Evidence of the previous sexual history of the complainant' and surveys the state of law directed to similar ends as those of s 227 in many other jurisdictions. In their evaluation the researchers conclude (at 501) that s 227 has to some extent failed of its purpose and that '(t)he unfettered discretion given to presiding officers to determine the admissibility of such evidence on the broad and subjective basis of relevance seems to be a large part of the problem'. Accordingly, they propose that s 227 be amended 'to clearly delineate the circumstances under which evidence of previous sexual history may be adduced'. In the draft amendment a subsection is included which provides that a court shall grant an application to adduce evidence of or put questions about previous sexual experience or conduct of a complainant if it is satisfied that such evidence or questioning:

- '(a) relates to a specific instance of sexual activity relevant to a fact in issue;
- (b) is likely to rebut evidence previously adduced by the prosecution;
- (c) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant where it is relevant to a fact in issue; or
- (d)
- (e) is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or
- (f) is fundamental to the accused's defence.'

Whether or not the proposal becomes in due course the subject of legislation, the matters identified must, even in the present state of the law, be regarded as considerations of great importance in arriving at a properly-considered judgment on admissibility in terms of s 227(2). The proposed evidence of Ngema would have not been admitted after due regard to any of these considerations either.

It follows that I agree with Du Toit et al (op cit at 24-100B) that in deciding whether to allow evidence of such a nature,

'several ... policy concerns which militate against admissibility ... must be taken to the balance. These include the need to protect witnesses from hurtful, harassing and humiliating attacks, the recognition of a person's right to privacy in the highly sensitive area of sexuality and the realisation that the exposure of their sexual history may deter many victims of sexual offences from testifying.'

One is here dealing with an issue which requires of a trial court great sensitivity and about which strongly conflicting views may be held. See, for example, J Temkin 'Sexual History Evidence – The Ravishment of Section 2' [1993] Crim LR 3. There is a responsibility on practitioners and the courts to uphold the spirit of the legislation."

I am in full agreement with what is said by Ligertwood Australian Evidence, and Lord Lane CJ in R v Viola (supra). The restriction referred to by the learned judge at p424c-d was also kept in mind when I exercised my discretion as well as the aspects referred to in the Canadian Criminal Code referred to. I have also considered the South African Law Commission's proposed amendments to section 227 of the Act. Since the judgment in S v M (supra) the Law Commission's final report was published as well as the Criminal Law (Sexual Offences) Amendment Bill of which I have also taken note. See also S v Latoo 2005(1) SACR 522 (SCA).

In the course of a short judgment in terms of which I granted leave to the defence to cross-examine the complainant about her past sexual history and to lead evidence in respect thereof I referred to a judgment reported in the Canadian Rights Reporter vol 6 1992 in the case of R v Seaboyer. I referred to two quotations referred to by McLACHLIN J from other judgments. The first quotation deals with the question of relevance and reads as follows:

"It is difficult and arguably undesirable to lay down stringent rules for the determination of the relevance of a particular category of evidence. Relevance is very much a function of the other evidence and issues in the case. in the past

to define the criteria for the admission of similar facts have not met with much success ... The test must be sufficiently flexible to accommodate the variance circumstances in which it must be applied."

The second quotation reads as follows:

"Every possible procedural step should be taken to minimise the encroachment on the witness' privacy, but in the end if evidence has sufficient cogency the witness must endure a degree of embarrassment and perhaps psychological trauma. This harsh reality must be accepted as part of the price to be paid to ensure that only the guilty are convicted."

For the above reasons I granted leave to the defence to cross-examine the complainant and to lead evidence concerning her past sexual history.

The accused's application in terms of section 227 of the Act was supported by Hulley's affidavit setting out facts on which the application was based. Part of the facts relied on is the information obtained from the statement of the state witness. The facts were not disputed by the state.

In my judgment the purpose of the cross-examination and the evidence the defence wanted to lead concerning the complainant's behaviour in the past was not to show that she misbehaved with other men. In fact it was aimed at showing misconduct in the sense of falsely accusing men in the past. The cross-examination and evidence are relevant to the issue of consent in the present matter, the question of motive and indeed credibility as well. It was not aimed at showing that the complainant was a woman of questionable morals. It was aimed at the investigation of the real issues in this matter and was fundamental to the accused's defence.

I will later herein refer to her answers in cross-examination and the evidence tendered by the defence.

The complainant was cross-examined at length. The cross-examination was thorough but she had not been badgered or tricked during the cross-examination. The cross-examination was fair. I do not intend dealing with the cross-examination in detail. I will try to highlight aspects in the cross-examination that is worth mentioning when considering the evidence as a whole.

The complainant's evidence that she regarded the accused as a father or father figure was thoroughly investigated. Throughout her evidence she referred to him as "malume". Other older people in exile were also referred to as "malumes". She also referred to people who are presently in South Africa but who were also in exile as "malumes". The word for "father" in Zulu is "baba". She said that she used that word for the accused very occasionally.

The contact between the complainant and accused was also investigated. As stated before she has a recollection of the accused since she was 5 years of age. That would have been round about 1979 or 1980. During the period 1980 to 1985 when her father passed away the accused visited the K family from time to time. The complainant remained in exile until 1990. During the period 1985 to 1990 the

complainant can recall having seen the accused once or twice either in Lusaka or in Harare.

Since the complainant's return from exile in 1990 she for the first time spoke over the phone with the accused in 1998 and saw him for the first time in 2001.

As stated before the complainant was diagnosed as being HIV positive in April 1999. She did not advise the accused of her condition immediately. That was only done in 2001 when she for the first time again met him in person.

It was then put to the complainant that the person whom she regarded as her father had no contact with her for approximately fourteen years since 1985. She then explained about the reference to older people as "malumes" and "aunties". The complainant was also taxed about the fact that she did not phone the accused in 1999 when she learnt about her HIV status. Her explanation was that she probably lost his phone number. She, however, conceded that she

phoned him during 1998 and she also confirmed that she could have obtained his telephone number either from the ANC office in Natal or in Johannesburg.

After the contact with the accused in 2001 the complainant left for overseas during the period June 2002 to October 2003. She was confronted with the fact that the lack of contact between father and daughter during that period is strange.

The complainant had some difficulty in telling the court on how many occasions she made contact with the accused since her return from the United Kingdom in October 2003 till May 2004. She said that she did call him a few times. From May 2004 she was employed in Pretoria and therefore had more frequent contact with the accused.

As stated earlier the complainant asked the accused for financial assistance to go to the United Kingdom for further studies. A certain Linda Makhathini, who worked for the accused, tried to get funding. Linda Makhathini was somewhat negative about the complainant's going to the United Kingdom firstly because according to Makhathini it was difficult to get funding for the specific course and secondly that the number of hours a student had to attend on that course, even fulltime, were not enough for the immigration department in the United Kingdom to grant a study permit. When funding was not forthcoming the complainant confirmed that she was devastated and blamed that disappointment for the deterioration of her health.

It was put to the complainant that the accused had never introduced her to anyone as his daughter or called her "daughter". She admitted that he never phoned her on her birthday.

The complainant denied that she had asked the accused whether she could come and visit him at his home. She also denied that she decided to stay over for the night.

The complainant conceded that it is possible that she could have said on the evening of 2 November 2005 that she always carries a panty and a toothbrush with her. She could, however, not remember that. She admitted, however, that it is true that she always carries a toothbrush, a face cloth, a panty and a kanga in her bag.

The complainant denied that Duduzile offered her a lift home the evening of 2 November 2005 at the same time she took another visitor back home.

The complainant stated that the day before she laid the complaint against the accused she had a telephone conversation with Minister Ronnie Kasrils whom she called "malume Ronnie". Her close friend, Kimi, with whom she spent the night after the alleged rape, worked for Kasrils at the time. She stated that she wanted to discuss her safety with Kasrils. Before the incident she was in regular contact with Kasrils as he was also a person trying to find funding for her tertiary education.

Kasrils was not called as a witness by the state though a statement by him was provided to the defence. As Kasrils could not be tested on the contents of his statement I am not going to discuss the cross-examination that flowed from that statement. During the cross-examination on Kasrils' statement it, however, appears that the complainant apparently knew one of the accused's daughters fairly well from the time they were in exile in Zimbabwe. That was not Duduzile whom she met on an occasion before 2 November

2005. I will later return to the complainant's alleged friendship with this daughter.

The complainant stated that she started school around June 1991 after her return from exile. When asked what standard she achieved in school she stated "I finished standard 10". That was in 1992 at the Phambile high school in Durban. Thereafter as from 1993 to 1997 she mainly did voluntary work with different non-governmental organisations. She had a keen interest in HIV work at the time. By the end of 1997 she knew quite a lot about HIV as she was educating young people in secondary schools about HIV. She did a lot of training for educators and councillors and did some advocacy work. She therefore knew how a person could contract HIV and at the time advised one person whom she suspected infected her through sexual intercourse.

It was put to the complainant that Duduzile's evidence would be that the complainant informed her that she wanted to talk to the accused and therefore took her to the study where the accused was. The complainant said that she could not remember that she had something to say to the accused or that she asked Duduzile to take her to him.

The complainant confirmed that she had only a kanga on without any underwear when she went to the accused in the study. When it was put to her that Duduzile will say that according to her (Duduzile) the complainant was inappropriately dressed, the complainant did not want to comment thereon.

The statement made by the complainant to the police on 4 November 2005 was put to her during cross-examination. According to her she thought about the incident and

discussed various aspects thereof with her friend Kimi. She was aware of the fact that the accused would deny raping her and she also assumed that he would say that consensual intercourse took place. She therefore considered and discussed these aspects with Kimi. She furthermore considered the fact that she did not scream and shout when she was allegedly raped. Furthermore she thought about the fact that there were only two people in the bedroom where intercourse took place and she therefore expected that there could be two different versions of what had happened. She knew that consent would be a major issue in this matter. With all these aspects in mind the statement was made. She said that the policeman who took down the statement listened to her version, asked her a few questions and then started writing. It appears that while he was writing the statement he asked her a few more questions.

Without going into all the detail that was put to the complainant in cross-examination regarding her statement it appears that she said that after the alleged rape she fell asleep and woke up at about 05:00, had a shower, went to the kitchen, took some fruit and put it into her bag. It was put

to the complainant that in that version no reference is made to text messages sent to people in Swaziland, the reason therefore being that she did not inform her sisters that she had been raped. In her statement she furthermore referred to a telephone call to Nokozola in Swaziland and it was specifically stated that she did not tell her about the rape.

The complainant testified that when she and the accused remained in the sitting room when Duduzile took the visitor back home she did not at that stage understand the

conversation to have any sexual undertone. Only after the alleged rape did she think back about any sign that could have warned her of what was going to happen. She then thought that the accused's reference to a boy friend and to her physical needs in spite of her HIV status might have had sexual undertones.

The complainant stated that it was Duduzile's suggestion that the two of them say goodnight to the accused after Duduzile had given a book to the complainant. She conceded that it would have been strange of Duduzile to have suggested that had she said goodnight to the accused at an earlier stage. It is clear, however, that when the complainant went to Duduzile's room, Duduzile had already changed into her pyjamas and she was obviously either in bed or going to bed.

It appears that the complainant was aware of the different rooms in the accused's house. She admitted that Duduzile on a previous occasion took her on a tour through the house. She denied, however, of having gone into the accused's bedroom at that time. She further stated that when she collected the money for the airfare to Durban to visit her mother it was getting dark and she then drew the curtains in the accused's house and therefore also went through the house. She knew where the guest-room was because there was talk of her sleeping over on a previous occasion but she could not because a visitor was sleeping in that bedroom. She, however, did not spend the night with Duduzile in her room.

When cross-examined about her position when the accused entered the bedroom she reiterated that she was lying facing the bathroom. When he started massaging her shoulders she curled up a little bit and turned completely on her left hand side. In terms of her statement to the police the complainant stated that the accused was standing on the bed side when he initially came in. When she said that she was asleep she turned away from him and he was then behind her. The complainant was cross-examined on the basis that she described her position and that of the accused in the police statement quite differently from her testimony. She recognised that fact and stated that she was in court telling what had happened.

The complainant could not explain why she did not sit upright and tell the accused to leave her room because she wanted to sleep. The initial massage lasted for approximately a minute, perhaps less than a minute. She at the time did not think of the reason why he was massaging her and when taxed about it she conceded that that was a way of making physical contact between man and woman.

The complainant conceded that at the time of the alleged rape she weighed 85kg and are 1,65 metres tall. She was 31 years of age. She accepted that the accused was at the time 63 years of age and weighed approximately 90 kilograms. It was suggested to her that she could have resisted easily and that she could have broken the hold the accused had on her two hands. She then explained that she did not pull her hands away because she did not move. She could not move as she froze at some point when she saw he was naked. The only thing she did and could do was to turn her head away and keep

her eyes closed. She could not resist him pushing her legs apart because she was not moving anymore.

The complainant estimated the duration of the intercourse at approximately ten minutes. She made that deduction because of what he told her and what he did to her.

She felt discomfort when he penetrated her. That was because of the friction.

At no stage did she tell anybody of this discomfort.

During the intercourse the complainant did not tell the accused to stop. The reason being that she could not talk, she could not move and she could not do anything.

The complainant conceded that she was concerned about the fact that she was only wearing a kanga and no underwear. This aspect concerned her when she on 3 November 2005 realised what had happened to her. She also discussed that with her friend Kimi.

The complainant further conceded that the fact that she had not said anything to the accused during the intercourse to convey her refusal to him, would be an issue in the matter.

The complainant conceded that at the time of the alleged rape a uniformed policeman was on the premises and that Duduzile was in the house.

In cross-examination the complainant was asked the following question: "You gave no indication during this process to your rapist that you are objecting to what is going on. Is that right?" The answer is: "That is correct yes." It was thereafter again put to the complainant that with the policeman ten metres away from where intercourse took place she could have screamed to notify the policeman of her distress. The reply was that her body's response to the shock was to freeze and not to move. Thereafter the following question was asked: "Well he could have thought that you are not objecting to this whole process. Is that not so?" The answer was: "He could have." It was also put to the complainant that the mere fact that the accused after the intercourse came back to her room to ask her about money, etc indicates a mindset that consensual intercourse

had taken place. The complainant reacted by saying that she tried to think about what the accused thought of everything but as she could not come up with answers she had stopped thinking about it.

The complainant conceded that while intercourse was taking place the accused did whisper things to her. She confirmed that he did say that he would take care of her, that he called her sweetheart and that he said that she was a real lady. She could not recall that he had said that she was delicious. She can recall that he asked her whether he could ejaculate in her.

The complainant conceded that the accused was aware of the fact that she had her cellphone with her, that a Telkom landline was available for her use and that she could

leave at any time she wanted to. She also conceded that the accused could not have foreseen that she would freeze if he attempts to have sexual intercourse with her, or that she would not scream. She further conceded that the accused would have realised that she could notify Duduzile and/or the policeman about any unwanted advances and that under normal circumstances she could have wrestled a hand free and push the accused away from her.

The complainant testified that although she prefers not to have unprotected sex being HIV positive, as an activist and as an educator of people living with HIV, she takes the stance that it is a person's own choice to have protected or unprotected sex. She personally has a point of view but she does not accept that people can be criticised for what choices they make.

The complainant testified that she started tertiary education at the University of Natal in 1998. She did not complete her studies.

It was put to the complainant that nobody phoned the accused the evening of 2 November 2005 and informed him that they had to see them urgently. In particular it was put that only three phone calls were made after 20:30 and that the people who did phone the accused deny that they wanted to see him. Reference will later be made to the particular witnesses.

Mr Kemp SC then cross-examined the complainant about her past sexual experiences. At the time when the application in terms of section 227 of the Act was brought it was clearly stated by Mr Kemp that he did not want to embarrass the complainant. He emphasised that he only needed to cross-examine in order to put up a proper defence for the accused. It therefore happened on occasion, with the co-operation of the state, that a question was put in writing and the reply was received in writing so that nobody could hear what was being asked and answered. That was obviously to prevent any embarrassment for the complainant. When Mr Kemp started his cross-examination on this point he also said that unless he specifically asked for the names of people or dates or places there will be no need to refer thereto.

The complainant conceded that she has some previous sexual experience. She can recall having had sexual relations with approximately five men. When she referred to men as such she was asked whether the qualification was given because she is bi-sexual. The answer was "I have sexually been with men and women, I consider my sexual orientation to be a lesbian". I refer to this aspect in particular as during the cross-examination of the accused it was on more than one occasion put to him that the complainant is a lesbian. It is clear that the complainant is bi-sexual with a lesbian orientation. She did not testify in chief that she is lesbian orientated.

The complainant clarified her answer to the single question posed by the state concerning her previous sexual experience in that she confirmed that the intercourse in July 2004 was with a male.

Reference was also made to the book that is being written by the complainant.

Part of that book was handed in as exhibit "E2".

The complainant was most upset about the production of sixteen pages of this document. She said that although she intended publishing it, it would have appeared in a completely different form. She was merely writing down her thoughts as it was coming and going and she was upset about the names that do appear in the script. The complainant was given the assurance that the defence team has in fact discussed certain allegations with some of the people referred to in the document.

In the document at p7 thereof the complainant refers to a rape in Swaziland when she was 5 years old. I need not go into detail as far as that is concerned as the complainant said that rape did not take place on that occasion. It was merely "an experience with a penis". She stated, however, that she was in fact raped at the age of 5 but on a different occasion. It was not taken any further by the defence.

Reference was made to an incident where a person named Godfrey was involved when the complainant was approximately 13 years old. The document describes how Godfrey raped the complainant. She confirmed that that had happened. The rape was stopped when the complainant wriggled out from under Godfrey. She also told him to stop and he did. She confirmed that at that stage she did not freeze.

Reference was also made in the document to an incident with a person called Mashaya. According to the complainant Mashaya and a friend of his kidnapped her, bundled her in a car and took her to his house. According to the complainant Mashaya attempted to have sex with her but when he discovered that she was menstruating he did not do so. That, according to her, was an attempted rape. She denied ever having had sex with Mashaya. The question about any sex at any stage between her and Mashaya was again put and her reaction was that she cannot remember whether she did have sex with him. She at a stage took some time to answer and I asked her whether she was thinking about the question which she confirmed. She then said that she knows that she did not have sex with Mashaya in Lusaka. She also saw him in Zimbabwe but she could not remember having had sex with him there though she had spent some time with him.

It was then put that what had happened between the two of them in Mashaya's house happened with her consent. The complainant reacted by saying that the situation is somewhat complicated in that any type of sexual relationship with a 13 year old person, even with consent, will be an offence. She therefore said that whatever Mashaya might say it does not necessarily mean that she knew what was going on or understood the situation because she was young. She then reiterated that she unwillingly went by car to Mashaya's house, that she did not want to go into

the bedroom and that she did not want him to do what he was about to do and that he at no stage asked her permission. She can, however, not recall what happened in the bedroom.

The complainant confirmed that she was found in Mashaya's house by Godfrey's girl friend and that she was administered a severe beating.

Reference was also made to a person called Charles and the complainant confirmed that he did have sex with her without her consent. She described that as rape. When she was confronted with the question whether she describes it as rape because of her young age she answered by saying that she had always regarded it as rape because she was 13 years of age. She again said that it was hard to remember what actually happened.

The complainant then referred to an investigation by two ladies from the ANC in exile into the actions of Godfrey and Charles. She said that she told her story to the ladies. A sort of a court case was held where the two men were charged with rape based on what the complainant's version was, namely that they had had sex with her without her consent. Both were found guilty of rape. She denied having told the committee that Charles and Godfrey were her boy friends.

The complainant referred to one of the two ladies as aunt Nomswakazi. A lady in court was pointed out to the complainant and she identified her as aunt Nomswakazi. It was put to the complainant that this lady will testify that she said that Charles and Godfrey were her boy friends, which was denied by the complainant. Eventually the complainant said that Godfrey was found guilty of rape but Charles not.

When it was put to the complainant that Charles would deny that he had had sex with her the complainant maintain that he did have. The complainant in fact referred to a "very uncomfortable, horrible feeling of having ... been penetrated".

The complainant also denied that her mother, as far as Godfrey was concerned, was satisfied that the complainant and Godfrey could do what they wanted to do.

The complainant confirmed that before she came to South Africa in 1990 she had a boy friend in Harare by the name of Bheki.

The complainant testified that since her return from exile she was raped once. The questioning then turned around the complainant's desire to join the ministry. She was a member of the African Methodist church. To join the ministry she had to have a matric certificate. It then transpired that the complainant did not pass matric although she was in matric but did not obtain the certificate. The questioning also turned around the complainant's involvement with the Council of Churches. Reference was then made to a person by the name of Sandile Sithole. The complainant denied that she ever knew a person by that name. When it was put to her that she had accused Sandile Sithole of raping her she said that that was not true and that she cannot even remember such a person.

The complainant also denied that there was ever a committee set up to investigate allegations of rape against Sandile Sithole.

The complainant related to the incident of rape subsequent to her return from exile. She said that at the beginning of 1995 she was involved with a young man when she went to school to study to be a priest. During that time she had attacks during which she would faint and have bubbles from her mouth. She related to an incident or two where a particular young man at the school touched her and wanted to have sex with her where she wrestled with him. This, the complainant said, together with her history of rapes and attempted rapes, was most disturbing and she started having more attacks and also nightmares. She described herself as being

really disturbed. During the period Easter to June of that year ie 1995 she got extremely ill and was sent home. She said that at the time her nightmares were related to rapes and attempted rapes and she can then distinctly remember when she was sent home, a feeling of having been penetrated. She also had a discharge from her vagina. It was later discovered that she was pregnant. She testified that looking back, she was at the time not pregnant from her young friend. She said together with her mother she came to the only logical conclusion namely that somebody at the seminary had sex with her without her knowing it. She said that when she started fainting she used to spend the week-ends at the boarding master's house. The young men at the college stayed together in groups and they had keys for their rooms. She then deduced that somebody who could be with her alone without fear of being interrupted had intercourse with her while she was unconscious. She expected the boarding master to have been the culprit. In any event she said that when her pregnancy was terminated her mother saw the five month old fetus and that resembled the boarding master.

The complainant could not remember the boarding master's name.

An attempt was made by Mr Kemp to obtain the name of the young man who troubled the complainant and wrestled with her on two occasions. She, however, denied that she had had any intimate session of a sexual nature with him. In fact she said "I did not have any intimate sessions with anybody in the school in the time that I was there."

The complainant also testified about an attempted rape at a stage when she was with the Council of Churches and she was alone with a young man. She could, however, not remember his name.

Another incident happened during Easter of 1994 at Chesterville. A young man then attempted to rape her. That she reported to her priest whom she described as "the Mbambo character".

The complainant said that Mbambo walked in on what was happening so that when she told him he already knew what the position was. She said that the young man who attempted to rape her was interrupted by Mbambo walking into "the house". She then told Mbambo that the young man came naked and he was pulling or trying to pull the blanket off her whilst she was in bed. She then tucked herself in the blankets and when the priest, Mbambo, walked in she was in the process of telling this young man to

go away. At that stage the complainant was, according to her, wearing the clothes that she had been wearing to church.

When it was put to her that this young man's name was Nestor the complainant recalled it.

I do not intend repeating Mbambo's evidence at this stage. It was, however, put to her that Mbambo woke up at about 04:00 and he went to Nestor's room and he then found Nestor naked next to her on the bed while she was clothed in a T-shirt with a panty, both fast asleep. She denied that version as well as that Nestor was that same morning introduced to her mother.

The complainant denied that she and her mother at about 18:00 that evening reported an attempted rape by Nestor. She further said that if the incident was reported to Mbambo or Pastor Mayakizo, she was not present.

It was put to the complainant that she accused Mbambo of having raped her. That was denied by the complainant. She said that she can, however, recall that at a stage when Mbambo's wife was absent, he said to her that he needed a girl friend and he thought about asking her but he decided not to do so as it would affect her faith. This incident was reported to the elders in the church but it was not alleged by the complainant that it was rape or an attempted rape.

The complainant confirmed that there was a meeting to discuss her complaint but she denied that she said that she was no longer interested in this stupid or dirty church and that she was leaving.

It was also put to the complainant that a certain Modise would suggest that they had an intimate relationship in the sense that they had all sorts of sexual interplay but never intercourse. The complainant denied that anything like that had happened.

In general, concerning the college, the complainant denied that she had ever alleged that she was raped there.

The only person the complainant could think of who could have transmitted the HIV disease to her was a person referred to in cross-examination as Z. He was the only man with whom she had consensual penetrative sex. The only other possibility was the rape at the college to which reference had already been made.

The complainant said that she had unprotected sex with Z about three times in 1996 and never thereafter. She only had sex with a male again in July 2004.

Earlier in the complainant's cross-examination she referred to sex with five males. She said that the only occasion when there was penetrative sex was with Z and not with the others.

The complainant gave more information about the man Z. A condom was used and it was not in South Africa. It became clear that she met him in Thailand at an international Aids conference. She met him for the first time in 1992 but did not see him for the next two years. She again saw him in 1994.

The gynaecological findings of the doctor who examined the complainant after the alleged rape by the accused was put to her where it is stated that the "hymen ring disappeared or disappearing". There was some uncertainty whether it had disappeared or is disappearing. It was

put to the complainant that such a finding is only associated with frequent penetrative sexual intercourse. She had no explanation for that finding. This question and answer is relevant to a question that was put to the complainant on paper. It is not necessary to refer in detail to the contents of that question because it was regarded as part of the in camera documents. The aim of the question was to find out whether there was any other reason for a disappeared hymen ring if it was not for penetrative sexual intercourse. From the contents of the answer there was no other reason why such a finding could be made.

The complainant was asked whether she realised that her action of charging the accused with rape would be very popular with the anti-Zuma camp at a political level. Her reply was as follows: "What I realised was that my rape would be turned into a political issue and joined in with the conspiracy against malume Zuma at some point."

The accused's version was then put to the complainant. It is not necessary for me to deal in detail therewith. What is, however, of some significance is that the complainant admitted that in the time before 2 November 2005 she had often sent sms messages to the accused ending with words like "hugs" or "love" or similar words. She also denied that the accused invited her to his room.

That completed the complainant's evidence.

The next witness for the state was the complainant's mother Ms K.

It is not necessary to summarise Ms K's evidence in detail. According to her the complainant regarded the accused as her father.

When she heard about the snake incident in Swaziland she went there. The following week-end she saw the complainant who made a report to her. That made her cry and she felt very bad. She was shocked. She did not anticipate the actions she were told about from her comrade, the accused. She confirmed that the accused knew that the complainant was HIV positive.

As a result of the report she had to do two things. The first thing was to get rid of the heavy load by carrying it to and giving it to God. Secondly she had to confront the accused. The complainant's mother therefore contacted the accused and told him that she wanted to see him. He was unable to come to her and she therefore saw him in

Johannesburg on a Sunday evening. She started by asking him "why he did such a thing". She said that the answer he gave her was not clear because according to him he did not also know. He, however, apologised and said that he was sorry but he did not say for what he apologised.

The witness started explaining to the accused that the complainant wanted to continue with her studies and he remarked that he would assist her. He also referred to a fence around her property, something the complainant testified about and for which the complainant had apparently saved money.

When she saw the accused she described him as very sad, he looked somber.

The witness felt a bit of relief after the apology, also because she thought he was really sorry.

It appeared that Dr Zweli Mkize arranged for the visit and he also arranged for a lawyer, Attorney Docrat, to be seen. Mkize gave her money for the airfare as well as money for food in Johannesburg.

During cross-examination it appeared that had there been a love relationship between the complainant and the accused the witness would have been surprised about it but if the accused had said that he loved the daughter she would not be that distressed. It also transpired during cross-examination that the witness was the first person who

spoke about the complainant's further education. That was even discussed with Dr Mkize in KwaZulu Natal. That would have been some reparation for the wrong done.

The witness returned from exile in 1991. Mbambo is known to her. It is true that her daughter developed an interest in becoming a church minister. That was discussed with Mbambo. She is also aware of the congress in Chesterville in 1994. Reverend Mayakizo is also known to her. She can also recall an incident of an attempted rape that was reported to her in Chesterville.

The report to Mbambo about Nestor's attempted rape was put to the witness but she could not remember that.

The witness could remember Godfrey, Charles and Mashaya while they were in exile. She also remembers a lady Promise and Nzwake, also from exile. The witness could, however, not recall a relationship between the complainant and any of Mashaya, Godfrey or Charles. She can, however, remember an incident where Godfrey was tried for rape. She was present and she knows that he was convicted and punished.

When it was put to her that she would have allowed her daughter to have intercourse with Godfrey she stated that that was an insult to her. I had to calm her down because she was obviously upset and repeatedly stated that she was insulted.

When the witness was confronted with her approval of the relationship with Mashaya she referred to her upbringing by her parents. She again stated that had she allowed that she would be insulting her parents.

The witness was referred to the existence of a mental institution not far from where the family lived in Zambia called Chamaima. She confirmed that. She, however, denied that the complainant attended that institution and said that she in fact attended one in Zimbabwe. The witness also stated that as far as she can recall the complainant was treated and was mentally not sound.

The complainant's mother then gave a short history of her illness. She said that after the complainant's father's death she experienced hallucinations and nightmares. Medication was prescribed. She became better after seeing a psychologist in Zimbabwe. As far as she knows the complainant still visits a psychologist today.

The complainant's mother described the complainant as a person who had been raped on a number of occasions from a young age and whose father died tragically in a motor accident. That was the cause of her problems. It was also caused by the complainant seeing her comrades die, her uncles die in exile, attacks being carried out on the people in exile and then you finally come home with a number of problems. Some of the problems are the fact that the complainant did not have a matric certificate and that she could not go to university. She tried to write exams and failed and finally she got expelled from university. Then she finds out that she is HIV positive, she is given tablets

that make her a zombi, and all these problems add up to a confused and troubled person. The witness said that she herself may need a psychologist.

The witness was also asked about her friendship and relationship with Kasrils. According to her he was with her husband on Robben Island. She very seldom phones him. As will be seen from the evidence of the accused Kasrils was not in custody on Robben Island. The witness could not remember that she phoned Kasrils on 12 November 2002. The witness is also in a witness protection program.

The next witness was an expert, Dr Merle Friedman, a clinical psychologist with a doctorate in psychology. She is a trauma expert. The witness prepared a report which was handed in as exhibit "I".

In her evidence Dr Friedman recited her report and then dealt with certain aspects thereof. The contents of the report therefore forms part of the record and I do not intend dealing with it in detail. It is, however, necessary that I refer to specific aspects relied on by Dr Friedman and the state.

The witness had two consultations with the complainant. The first was on 6 February 2006 and the second on 8 February. The witness was also briefed on the matter in two meetings with the public prosecutor. She also saw two police statements made by the complainant.

The reason for the referral was described as follows:

"The Director of Public Prosecutions and prosecutor in the matter requested an opinion regarding her (ie the complainant's) behaviour during and after she was allegedly raped. An added request was made regarding the possible impact of the experience on her."

The assessment was based on the clinical interview and on the material presented in the interviews as well as the police statements made by the complainant.

Dr Friedman referred to the complainant's own version of the alleged rape and described that as follows:

"She reports that she was completely overwhelmed and shocked by the rape, and that she said 'no' twice but to no avail. She reports that she froze during the incident and closed her eyes, as she was not able to believe what was happening. After the rape she tried to look for some support by sending sms messages, but was so distressed that she could not use the word rape. She describes

the time after the rape and until she arrived at work the following morning as if she was in a 'trance'. She was only able to take further steps to seek medical help and report the rape when she had support to do so."

Dr Friedman then discussed the complainant's behaviour during the event. Her conclusion is as follows:

"It is therefore entirely consistent with the literature, as well as with my personal experience in dealing with rape directly as well as supervising therapists and psychologists treating patients who have been raped, that there is a variation in response. However, when the attack is completely unexpected and the victim is woken from sleep and perceives herself to be trapped, it is probable that her response would be to freeze and submit rather than to fight. In addition, the history of the relationship, as that of father/daughter, and the respect in which she held him, would further reduce the chance of her fighting. She did say 'no' twice to him and turned her face away and closed her eyes, which was some attempt at not being there or fleeing."

In summary the conclusion was as follows:

"... the shock at being awoken from sleep by the man she regarded as a father figure, naked with an erect penis, and his intentions clear, was such a shock, she was trapped, terrified and helpless and was unable to respond in any way other than freeze. This is typical of the response to rape and consistent with what I would expect in these circumstances."

Regarding the complainant's behaviour after the event Dr Friedman stated that the sms' were confused and she did not want to use the word "rape" as that would mean that she would be facing reality. She was traumatised and could therefore not act as one would under normal circumstances expect.

Dr Friedman's conclusion was therefore as follows:

"In general, the conclusions may be drawn in relation to the behaviour of the victim/survivor both during and after the alleged rape. Freezing and submitting during the course of the rape, and confusion, inability to take decisions, great distress and avoidance of initial help seeking, including reporting to the police after the rape, are both entirely consistent with what may be expected from someone who is exposed to this kind of traumatic experience."

The so-called "added request" concerned the impact of the incident on the complainant's life. The witness came to the conclusion that the complainant is suffering from post-traumatic stress disorder. I do not deal with the requirements of such a condition but will, in the passing, refer thereto when I deal with the witness' cross- examination.

The witness also listened to the complainant's evidence in court. I understood Dr Friedman to say that the evidence was in line with what she found during her interviews.

In cross-examination it was put to Dr Friedman that the only test she did was to establish whether what the complainant had told her was consistent with the complainant's statements. The witness answered "yes". On a question whether the witness had concluded that because what the complainant said to her did not deviate at all from her statements, therefore the version must be true. The reply thereto was that the

conclusion the witness came to was that the complainant had been through a serious traumatic episode.

In order to find out what kind of person the complainant is Dr Friedman said that she used her clinical skills which she has been using for a number of years. In using those skills the witness tries to establish how the "patient" connects with the world and engages with her as the interviewer, she looks at evasions, emotional tone and whether the story told is too glib or not. She also went into her background and how she grew up. It, however, became clear under cross-examination that Dr Friedman was not aware that the complainant attended sessions at a mental hospital. Dr Friedman, however, did speak to the complainant's

therapist. During cross-examination of Dr Olivier reference was made to a Dr Fourie.

The complainant told Dr Friedman about her past sexual history. Dr Friedman said, however, that that history was not needed to be in the report and she therefore did not note it. The history was, however, not traversed in detail because Dr Friedman did not regard that as of relevance to the court. It was only of importance to indicate to the expert who the complainant is and where she is coming from.

The witness was cross-examined at length about her finding of post-traumatic stress disorder. I am not going to deal with that.

What is, however, of some importance to me is that no psychometric tests were done to find out more about the complainant's personality.

Dr Friedman concluded that in view of the complainant's background and history it was not abnormal for her to freeze during the alleged rape and not to cry out but rather to submit.

Dr Friedman was also cross-examined in detail on the effect previous sexual experience might have had on the complainant. It is clear that Dr Friedman did not have all the evidence concerning previous incidents of rape or allegations of rape. It is so that an expert in the position of Dr Friedman must rely on what she is told by the complainant. That is exactly what happened here too.

I was also, as stated, not favoured with any psychometric test results to be able to make deductions therefrom.

I will later herein refer to my view of the value of the expert's evidence.

Dr M L Likibi is the doctor who examined the complainant on 3 November 2005 at the Ntabiseng clinic at the Baragwanath hospital. Form J88 was completed and tendered as exhibit "K". Dr Likibi testified that the complainant informed him that she was raped by a family member, an uncle, when she was at his house to sleep over. No physical injuries were found. The doctor only found a small fresh tear on the

posterior fourchette. There was no bleeding. Nothing of further importance was found during the examination.

Dr Likibi was asked about the tear he found and stated that there can be a few reasons for such a tear. One he immediately mentioned was that the complainant did not have penetrative sexual intercourse for a fairly long period. The doctor recalled that he was told that for a period of more than seven months prior the complainant did not have any intercourse. According to the doctor "any type of intercourse at that moment would have provoked that tear". Another reason for the tear could have been lack of proper preparation before intercourse so that there was not enough lubrication. An instrument like a fingernail could have caused that tear as well. Passionate intercourse between the two participants could also have caused the tear.

From his examination the doctor concluded that the complainant was sexually active.

The tear was less than 5mm and was estimated by the doctor to be between 2 and 5mm and it was caused within the last three days.

Certain samples were taken from the complainant. Dr Likibi testified that semen could be found from one to three days after intercourse.

The complainant told Dr Likibi that she was HIV positive.

In cross-examination the doctor stated that if a woman douches, the use of a finger can also create a tear in the posterior fourchette.

Dr Likibi testified that because of anatomical differences between male and female it is easier for a woman to contract HIV than a man.

Ms Nosipho Mgudlwa is a 46 year old lady also known as Pinkie. She knows the complainant well as the complainant stayed with her in a house during August and September 2005. On 3 November 2005 she sent an sms message to the complainant asking her for an Indian outfit. The complainant phoned her at her work in reaction to this message. The phone call came through round about 11:45.

The witness testified that during the discussion of the outfit she noticed that the complainant was not "her giggling self". The witness asked the complainant whether she was all right and received the answer "yes ma". According to the witness the complainant was more subdued than normal and later told her that she was not all right. The complainant then said to her "ma I was raped". She started crying. The witness wanted to know by whom she was raped and the reply was "it is

uncle in his house last night". The witness knew that she referred to the accused. According to the witness the relationship between complainant and the accused was one of respect. The complainant always referred to the accused as malume without mentioning his name.

The witness asked the complainant to put her through to a colleague of the complainant which she then did.

Ms Nomthandazo Msibi is a 30 year old lady also known as Kimi. She is employed at the Ministry for Intelligence Services at Pretoria.

She knows the complainant well. They were together as children in exile in Swaziland and had become very close friends. The witness described the complainant as a friend and her sister. They had regular contact with each other. At a stage they were staying together and they phoned each other four to five times a day.

The accused is also well-known to the witness. She knows him from exile. Since she came back from exile she had been in regular contact with the accused.

The witness said that the complainant regarded the accused as a father. She is aware of the friendship between the accused and the complainant's late father.

She had contact with the complainant during the day of 2 November 2005. Towards the end of the day she told her that her nephew or grandson had been bitten by a snake in Swaziland. The witness tried to persuade her not to rush to Swaziland.

Later that afternoon after Ms Msibi had arrived home from work she received an sms message from the complainant informing her that she was going "to malume's place because he asked her to come over and he also discouraged her to go to Swaziland".

The next time she heard from the complainant was when she received an sms round 02:00-02:30 which she read when she some time during the early morning woke up. She was then told that the complainant could not sleep because she was disturbed by the fact that the child had been bitten by a snake. The message also stated "malume had been looking at me sexually". The witness said that in brackets it was then stated "there must be something in my drawers" and that "the mothers must not be told". She understood the reference to drawers to be a reference to panties. The witness also understood that there was some negative sexual energy coming to the complainant because she knew she had been through a rape before. Therefore the witness understood that the complainant was conveying to her that she had attracted negative sexual energy towards her.

The witness spoke to the complainant the next morning. According to her she was dismissive and very abrupt. She then said to the witness "I hate that man, I never want to see him ever again". That, according to the witness, was abnormal. The complainant, however, did not want to discuss her sms with the witness in any more detail.

Later that morning around 11:00 or 12:00 the complainant phoned the witness and told her that she had been penetrated by him, obviously referring to the accused.

The necessity to be examined by a doctor was raised. The complainant that night stayed at the witness' place. She found her to be extremely unsettled and she kept on talking. She was restless. She appeared not to be wanting to go to sleep.

The witness was present when the complainant met the attorney. Also present was the complainant's mother and the witness' boy friend. According to the witness the attorney on more than one occasion advised the complainant to drop the charges.

In cross-examination the witness was asked about the so-called father/daughter relationship between the complainant and the accused. She said that when the people came back from exile the relationship shifted from that of comrade to uncle. The witness left Mozambique in the years 1984/1985. She again met the complainant during the years 2000/2001. She then became aware of the fact that the complainant was referring to the accused as malume. She referred to other older men as malume as well.

The witness never heard the accused calling the complainant his daughter.

It was pointed out to the witness that she never referred in her statement to the fact that the complainant told her that she hated the accused. That is in spite of the fact that she at an earlier stage said that what was standing out from the first report was the

fact that the complainant said she did not want to see the accused ever and that she hated him.

The witness confirmed that she discussed with the complainant the difficulties that might be encountered during the trial. During these discussions reference was made to the fact that the complainant froze.

The witness said that the complainant's mother was worried about a possible forthcoming trial and wanted the complainant to withdraw the charges. She eventually had to concede that it is therefore reasonable to accept that that would have been discussed with Attorney Docrat, in spite of the fact that she in chief testified that the attorney wanted to force the complainant to withdraw the charges.

Commissioner Norman Othniel Taioe is a commissioner in the South African Police Services and the provincial head detective in Gauteng. He is a police officer with thirty two years service. He assisted the investigation officer in this matter, being Superintendent Linda. Commissioner Taioe together with Superintendent Linda saw the accused on 10 November 2005 at Nkhandla to obtain a warning statement from the accused. During the interview Mr Mike Hulley and the accused were present.

When the police officers eventually met the accused and his attorney a prepared statement was handed to them. The commissioner then decided to warn the accused first

and did so. Thereafter Superintendent Linda completed a document headed "statement regarding interview with suspect" tendered as exhibit "L". The warning statement contained in the exhibit was again read to the accused. The accused's warning statement was then signed by him.

The contents of the warning statement was read into the record. For purposes of clarity it should be referred to in this judgment again. It reads as follows:

"I the undersigned

do hereby make oath and state:

1. I am an adult male presently residing at 8 Epping Street, Forest Town, Johannesburg.
2. I further reside at my traditional home at Mkandla, with my wife and extended family.
3. I have been made aware that a charge of rape has been brought against me by one Ms K.
4. I protest my innocence and vehemently deny the charge, to which, if the matter proceeds, I intend to plead not guilty.
5. I have known Ms K for a long period of time.
6. Initially I became acquainted with her through her family. Both her parents were comrades in the African National Congress.
7. I continued to maintain our friendship after the death of Ms K's father.
- 8.
9. Ms K would frequently visit at my official residence in Pretoria and later at my present residence in Forest Town, Johannesburg. In fact, it had occurred on previous occasions that she had slept over at my residence.
10. Initially our friendship had been of a general nature, with me playing a supportive role.
11. Later, through the many conversations we had as well as the nature of the sms text messages that I received from her, I became aware of her affection for me.
12. On Tuesday 1 November 2005 arising out of a telephone conversation Ms K suggested that she visit me at my Forest Town residence. I agreed and she duly arrived at approximately 17h00.
13. During the course of the evening we had supper together with a friend and another member of my family.
14. Later that evening after I had finished work in my study we again began to converse and share in each other's company privately.
15. Much later that evening at approximately 11h30 she retired to the room prepared for her where she spent the night.

16. It was only some days later that I was advised that a charge of rape had been laid against me and that Ms K was the complainant.
17. As stated previously I deny the charge against me."

The commissioner said that he had some difficulty with the date as it was referred to as 1 November and it was pointed out to the accused and his attorney. While the police officers were at Nkhandla arrangements were made to meet the accused again in Johannesburg at his Epping Street home. The purpose of the visit was for the police officers to familiarise themselves with the house and to obtain samples for DNA tests.

The meeting took place on 15 November 2005. According to the commissioner he and Superintendent Linda together with the photographer and other police officers were met by Mr Hulley. The commissioner then told Hulley in the presence of the accused that it was "a follow up meeting".

At all stages the accused and Hulley were together with the police officers. At no stage did Hulley advise the accused not to say anything or not to point out any place.

The commissioner did not warn the accused again of his rights. The reason for that was, according to the commissioner, that the attorney was aware of the purpose of the meeting and he was present. He could have warned the accused not to say anything or not to point out anything if the accused was doing something against the attorney's instructions. The question then was: "Then what did you do there on the alleged crime scene?" The answer is as follows: "The accused pointed the guest room to us as the room of the alleged crime scene." The relevance of this will later become clear. When the group of people entered the guest room the commissioner asked the accused whether that is the room "where it happened". A positive answer was given and the photographer was instructed to take photos of the room. That room was on the ground floor.

As the police officers wanted to have an overview of the house and also because the commissioner said he wanted to know how far the accused's bedroom was from the guest-room they went to the study and also to the accused's bedroom. In the accused's bedroom he asked him what took place there. The reply was "nothing happened".

Later samples were taken by Dr Nkobi.

On his way from the accused's house the commissioner overheard a radio report that the complainant had filed a withdrawal statement. He managed to trace her and he confronted the attorney, Docrat, about his business with the complainant. I need not go into anymore detail as far as this is concerned.

The commissioner's cross-examination is of some importance. I will comment later herein on the evidence of the commissioner because the defence, during the application in terms of section 174 of the Act, as well as at the end of the case, asked me to rule that part of the commissioner's evidence be declared inadmissible. I will try to highlight aspects which are important to me in the cross-examination.

It appears that because the matter was serious and because of the profile of the accused immediate steps were taken once the complaint was laid. The commissioner was notified of the complaint and he met the complainant. He said that a statement had already been taken from her when he arrived at the police station and he "confirmed all

the data that were mentioned in the statement". The commissioner had a lot of difficulties with this piece of evidence. He had to concede that at that stage he had not read the complainant's statement and he could therefore not confirm the data contained therein. He only read her statement the following morning but he tried to persist with his initial statement that he had confirmed the data. This caused the commissioner, when he was asked when he had confirmed all the data to say "listen to me what I said". He then repeated his previous answer. He was referred to the fact that he only read the statement on the Saturday and he then replied "on Saturday in the morning I took the statement and read it again". He later on replied as follows: "What I said is that I only confirmed the data that I read her statement in full on Saturday morning."

The commissioner refused to concede that his written statement did not accord with his evidence in court.

The commissioner was also questioned at length about the so-called follow up meeting and why he had to tell Hulley again on 15 November that it was a follow up meeting. He was pertinently asked why he did not only warn the accused again. He persisted with his statement that it was a follow up meeting and that he did not regard it necessary to again warn the accused.

The commissioner was also questioned at length about the question that was put to the accused as to the location of the alleged crime scene. It was pointed out to the commissioner that the question was totally unwarranted in terms of the accused's

statement. If one looks at exhibit "L" there is no crime scene and reference could not be made to any crime scene. In fact if one reads the contents of paragraphs 13 and 14 of the warning statement together, it becomes clear that the accused and the complainant conversed and shared in each other's company privately. Much later that evening she retired to the room prepared for her where she spent the night. This last-mentioned room could only have been the guest room. The commissioner must have been aware of the fact that the complainant referred to the guest room as the place where the rape took place. If one reads the accused's warning statement objectively it appears that wherever the two of them were together the complainant left that place to go to bed. The commissioner was questioned on the basis that it was an unwarranted question designed to trap the accused. That was denied but the commissioner could do no better than saying that he wanted to ask the question that way.

The commissioner regarded that specific pointing out and statement made to him as of the utmost importance though he stated that he only learnt in court that, according to the accused, intercourse took place in his own bedroom. In spite of the importance of that pointing out in the mind of the commissioner it was not referred to in his statement and no follow up written statement was made.

A photo album marked "D" was handed in as an exhibit. It depicts inter alia the photo taken of the guest room and the key merely refers to it as the guest room and not as the alleged crime scene.

Mr J C G le Roux is a private consultant in the information technology systems software product and development field. He was asked to trace and analyse certain phone calls and sms text messages between different cellphones belonging to different people. A very impressive exercise was done and different exhibits were handed in to show the results. I need not deal in any detail with Mr Le Roux's evidence as in the end it appeared to be common cause.

Mr Yusuf Ismail Docrat is the attorney referred to earlier herein. A colleague of his, a certain Mr Latib, referred a matter concerning a rape to him. He was later contacted by a lady Ramjene Moonsamy who gave him certain background information. This lady was concerned about the allegations of rape and was according to Docrat hopeful that it would amount to naught. Discussions took place between Docrat and the complainant's mother as well as Dr Mkize and Moonsamy on various different occasions. It eventually transpired that the complainant needed some legal advice and a meeting was arranged.

The discussion was apparently of a general nature because certain questions were asked about the criminal process, the media, possible difficulties in relation to the matter at both personal and legal as well as social level. There was also discussion about a withdrawal of the matter. Docrat also confirmed that Commissioner Taioe appeared at the scene at a stage and that he was upset about the consultation that was taking place. It appears that the end result was that the complainant would think about the situation. A report was made to Dr Mkize and eventually Docrat got rid of the entire matter.

Prof Desmond James Martin is a professor specialising in virology associated with HIV Aids.

It is not necessary to summarise Prof Martin's evidence in detail. It appears as if his evidence is common cause. He confirms that intercourse without a condom creates a risk of acquiring HIV infection. He referred to what is called super infection if a HIV positive person has unprotected sex with another HIV positive person. He estimates the risk of a male to contract HIV in a single case of unprotected sex at ,03% to ,1%. There are, however, various factors that will influence the risk. I need not deal with all those risks. He stated that a circumcised man's risk is smaller than that of a man who is not circumcised. Unlubricated sex and a visible tear in a woman's genital mucosa will increase the risk too.

What Prof Martin's evidence does show is that HIV Aids is a terrible pandemic with which one should not take the slightest risk at all.

Superintendent Bafana Peter Linda is a detective in the South African Police Service attached to the family violence, child protection and sexual offences specialised unit. He has twenty years experience. Linda is the investigating officer in this case. Linda accompanied Commissioner Taioe when they went to Nkhandla to obtain the warning statement from the accused. He supports Taioe as to what occurred on that occasion. There is a slight difference in that he testified that the accused greeted him and

Taioe first whereas Taioe stated that Hulley met them first. He also confirmed that a further meeting was arranged for 15 November in Johannesburg. There is also a difference between the two police witnesses as to who met them on this occasion and exactly where it was said that it was a follow up meeting. Linda supported Commissioner Taioe as to what was said in the guest room and the main bedroom.

When the differences between him and the commissioner were pointed out the witness stated that he was still a young man with a good memory and that he was satisfied that he was right.

After the evidence of Linda Mr Kemp stated that he had put to the complainant that a certain student by the name of Goeieman had been expelled from the college as a result of the rape allegation and that Goeieman had in the meantime passed away. He rectified the position by saying that the person's name is in fact Matsoko and that he is still alive. The state confirmed that the name of Matsoko was also cleared with the complainant and that she stands by her version that Matsoko did not rape her, that she does not know such a person and that she is not aware of any person that was expelled.

Certain further exhibits were handed in including exhibit "CC" which is a transcript of an interview Cape Talk Radio held on 14 November 2005 with Mr Hulley, the attorney. A transcript was handed in.

Thereafter the state closed its case.

When the matter resumed on 27 March 2006 the application was made by the three organisations to be allowed as amici curiae in the matter. I have already dealt with that application earlier herein and gave a short judgment at the time. I do not intend amplifying that judgment in any way.

An application in terms of section 174 of the Act was then brought for the discharge of the accused. I have already referred to this application as well. I made a ruling and gave short reasons therefore. I indicated that I would at the appropriate time give more detailed reasons.

In the short judgment refusing the accused's discharge I dealt with the principles to be applied in such an application. I referred in some detail to the judgment in *S v Lubaxa* 2001(2) SACR 703 (SCA). I will not repeat the principles laid down in Lubaxa's case and as set out in the short judgment.

Before dealing with some factual aspects, reference should be made to mens rea. Mr Kemp spent most of his argument in the section 174 application on the absence of mens rea on the part of the accused. He argued that the state must prove that the accused had the intent to rape the complainant and must do so beyond reasonable doubt. He further argued that the state must thus negate beyond reasonable doubt any belief of the accused that the complainant had consented to intercourse. He developed that argument with great skill and in great detail. I do not intend burdening this judgment

with a long and learned discussion of the argument and reference to the law in all detail. It is, however, necessary for me to refer to a few principles in this respect, because Mr Kemp again argued at the end of the case that, depending on my final finding on the facts, the absence of mens rea remains relevant.

At present rape consists, by definition, in a male having unlawful and intentional sexual intercourse with a female without her consent. See Snyman Criminal Law 4th edition p445. See also Burchell Principles of Criminal Law 3rd edition p699.

The element of intention is vital because rape can only be committed intentionally. A principle of our criminal justice system is expressed in the maxim *actus non facit reum nisi mens sit rea* – the act is not wrongful unless the mind is guilty. In casu it means that the intentional sexual intercourse had to take place with the accused knowing that there was no consent by the complainant. See *R v Mosago and Another* 1935 AD 32 at 34; *R v K* 1958 3 SA 420 (A) at 421F:

"The offence (of rape) consists in having connection with a woman, other than a man's wife, without her consent, from which it follows that if the crown proves that there was no consent, and also, of course, that the accused knew this, it has established his guilt."

See also p423A; p426D-E; *S v S* 1971 2 SA 591 (A) at 596E-597H; *R v Z* 1960 1 SA 739

(A) at 743A-C and 744H-745H; *S v J* 1989 1 SA 525 (A) at 529D-E and 531B-D and 531B-F.

(B)

In the United Kingdom the legal position was exactly the same as in South Africa.

An important judgment in the United Kingdom in the history of the development of mens rea in that legal system is that of *Director of Public Prosecutions v Morgan* [1975] UKHL 3; [1975] 2 All ER 347 (HL). At the time the Sexual Offences Act, 1956, was in force. Section 1(1) of that Act reads as follows:

"(1) It is a felony for a man to rape a woman."

In the course of his speech in the *Morgan* case supra, Lord CROSS of Chelsea states as follows at p352e-g:

"But, as I have said, s 1 of the 1956 Act does not say that a man who has sexual intercourse with a woman who does not consent to it commits an offence; it says that a man who rapes a woman commits an offence. Rape is not a word in the use of which lawyers have a monopoly and the

question to be answered in this case, as I see it, is whether according to the ordinary use of the English language a man can be said to have committed rape if he believed that the woman was consenting to the intercourse and would not have attempted to have it but for his belief, whatever his grounds for so believing. I do not think that he can. Rape, to my mind, imports at least indifference as to the woman's consent. ... On the other hand, to the question whether a man, who has intercourse with a woman believing on inadequate grounds that she is consenting to it, though she is not, commits rape, I think that he would reply, 'No. If he was grossly careless then he may deserve to be punished but not for rape.'

See also the speech of Lord HAILSHAM of St Marylebone at 357b-h:

"If it be true, as the learned judge says 'in the first place', that the prosecution have to prove that 'each defendant intended to have sexual intercourse without her consent. Not merely that he intended to have intercourse with her but that he intended to have intercourse without her consent', the defendant must be entitled to an acquittal if the prosecution fail to prove just that. The necessary mental ingredient will be lacking and the only possible verdict is 'not guilty'. If, on the other hand, as is asserted in the passage beginning 'secondly', it is necessary for any belief in the woman's consent to be 'a reasonable belief' before the defendant is entitled to an acquittal, it must either be because the mental ingredient in rape is not 'to have intercourse and to have it without her consent' but simply 'to have intercourse' subject to a special defence of 'honest and reasonable belief', or alternatively to have intercourse without a reasonable belief in her consent. ... No doubt it would be possible, by statute, to devise a law by which intercourse, voluntarily entered into, was an absolute offence, subject to a 'defence' of belief whether honest or honest and reasonable, of which the 'evidential' burden is primarily on the defence and the 'probative' burden on the

prosecution. But in my opinion such is not the crime of rape as it has hitherto been understood. The prohibited act in rape is to have intercourse without the victim's consent. The minimum mens rea or guilty mind in most common law offences, including rape, is the intention to do the prohibited act, ...

... I believe that 'mens rea' means 'guilty or criminal mind', and if it be the case, as seems to be accepted here, that mental element in rape is not knowledge but intent, to insist that a belief must be reasonable to excuse it is to insist that either the accused is to be found guilty of intending to do that which in truth he did not intend to do, or that his state of mind, though innocent of evil intent, can convict

him if it be honest but not rational."

See also p361g-h where the following is said:

"Once one has accepted, what seems to me abundantly clear, that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic that there is no room either for a 'defence' of honest belief or mistake, or of a defence of honest and reasonable belief and mistake. Either the

prosecution proves that the accused had the requisite intent, or it does not. In the former case it succeeds, and in the latter it fails. Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence for or against the view that the belief and therefore the intent was actually held, ..."

The same approach was adopted by Lord FRASER of Tullybelton at 381h.

The judgment in the Morgan case *supra* led to an amendment of the Sexual Offences Act, 1956, in terms of the Sexual Offences (Amendment) Act

1976. Section 1 of the 1976 Act reads as follows:

"1.-(1) For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if-

- (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
- (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it;

and references to rape in other enactments (including the following provisions of this Act) shall be construed accordingly.

- (2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed."

A new Sexual Offences Act 2003 was subsequently introduced in the United Kingdom. According to its preamble it is "an Act to make new provision about sexual offences, their prevention and the protection of children from harm from other sexual acts, and for connected purposes".

Section 1 of the 2003 Act deals with rape and reads as follows: "1. Rape

- (1) A person (A) commits an offence if-
 - (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
 - (b) B does not consent to the penetration, and
 - (c) A does not reasonably believe that B consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
- (3) Sections 75 and 76 apply to an offence under this section.

..."

Sections 74, 75 and 76 of the 2003 Act are of importance in respect of consent. Section 74 defines the concept "consent". Section 75 deals with evidential presumptions about consent and section 76 deals with conclusive presumptions about consent. It is not necessary to deal with those provisions in any detail, save to say that the sections contain provisions our courts deal with daily in order to decide whether there was in fact consent or not.

It is clear that the 2003 Act in the United Kingdom changed the position drastically after the Morgan case and the 1976 amendment to the 1956 Act.

The Criminal Law (Sexual Offences) Amendment Bill referred to earlier deals in section 2 thereof with the offence of rape. I do not intend dealing with the entire section 2. Subsections (8) and (9) are of importance and read as follows:

"(8) Subject to the provisions of this Act, any reference to 'rape' in any law shall be construed as a reference to the offence of rape under this section, unless it is a reference to rape committed before the commencement of this Act in which case it must be construed to be a reference to the common law offence of rape.

(9) Nothing in this section may be construed as precluding any person charged with the offence of rape from raising any defence at common law to such charge, nor does it adjust the standard of proof required for adducing evidence in rebuttal."

I am not aware of any further amendments to this bill. As far as I know the proposed legal situation in South Africa will be as set out in this bill.

This bill, even when it becomes law, will in all respects be a major step forward to combat the ghastly offence of rape and other sexual offences. It will also be in line with similar acts in modern countries. It is not the judiciary's fault that the bill has not been made law. Even if this trial was heard in terms of the proposed new Act the result would have been the same. The proposed amendment to section 227 of the Act will give a trial court a discretion to allow cross-examination on a complainant's sexual history as well as

evidence regarding that history on certain conditions. Those very same principles were applied by me in the exercise of my discretion as already stated above. It also appears as if the position concerning mens rea will in the proposed new Act not be changed. The legal position concerning mens rea is at present as contained in the judgments referred to and it appears that it will remain the same in terms of the proposed Act.

As far as the factual position is concerned I decided not to grant the application in terms of section 174 because of inter alia the following.

The complainant's evidence, as stated in the short judgment, was not so broken down that it could be disregarded. In terms of her evidence she saw the accused naked, massaging her, while he was already on top of the bed and on top of her. From her evidence alone it appears as if the accused came into the guest room naked or undressed himself before he started massaging her. Therefrom it appears as if there was an intent to have intercourse whether with or without

consent. I am aware of indications to the contrary such as that there was a policeman on site and the accused's daughter close by. I am aware of the argument that the complainant could have summoned help but the evidence of Dr Friedman, uncontested at that stage, could not be disregarded because, according to her, there was merit in the complainant's version that she froze at the sight of the naked accused.

The reference to false charges that had been laid in the past were at that stage also only mere suggestions.

The evidence of Dr Likibi, though open for different interpretations, may be an indication of rape. The evidence of the witnesses Kimi and Pinkie, read with that of the complainant's mother, is indicative of the fact that the complainant was upset about what the accused had done to her and that he had apologised to her mother. One can also not lose sight of the fact that the complainant's evidence is to the effect that she would not have consented to unprotected sex. Though she is not an out and out lesbian, the fact that she is inclined to lesbianism cannot be lost sight of. If one looks at the evidence of Docrat it appears as if various people were keen to have the charge of rape withdrawn. I could therefore not find beyond reasonable doubt that the accused did not have the required mens rea.

With the foregoing in mind I concluded that the application in terms of section 174 of the Act should be dismissed which I did.

The accused thereafter testified.

The accused spent the first part of his evidence describing his association with the ANC and his political career.

The accused was born on 12 April 1942. He became involved in the freedom struggle during 1958 when he was 16 years of age. He was then an ordinary member of a branch of the ANC. In 1962 Umkhonto we Sizwe was formed and the accused became a

member thereof. In 1963 he was arrested by the police and was placed under ninety days detention. He was later convicted and sentenced to ten years imprisonment.

The accused met JK, the complainant's father, in 1958 when he (JK) also became a member of the ANC youth league. The two of them worked together in the freedom struggle. The accused realised that JK was also a member of Umkhonto we Sizwe when they again met at Durban station when a group of young men had to undergo certain training. They were arrested together, were in detention together and were sentenced during the same trial. They spent their ten years of imprisonment together at Robben Island. Once they were out of prison both the accused and JK continued with their participation in the freedom struggle. Asked whether Ronnie Kasrils was also on Robben Island, as suggested by the complainant, the accused denied that Kasrils was ever with him on Robben Island.

Kasrils was not arrested in 1963 because he had already left the country.

In 1975 Mozambique became independent and young recruits of the ANC were then trained there. The accused left South Africa and was initially based in Mozambique from where work in Swaziland, Lesotho and South Africa was directed. JK and his family also left South Africa and was initially based in Swaziland. Because of good work done he was sent to Lesotho and later to Zimbabwe. JK was killed in a motor car accident on his way from Harare to Lusaka.

In 1990 the accused was one of the first people to come back to South Africa to start negotiations between the ANC and the then government. The negotiations eventually led to democratic elections. At the time, however, there was violence in the then called Natal. The accused played a prominent role in trying to resolve the problems between the ANC and Inkhata.

Since the accused joined the ANC Youth League he had held various positions in the ANC. He was a group leader while in prison and later became the public relations officer. He was a cell leader, a section leader and later the chairman of the political committee. After his release from Robben Island he was the secretary of the underground movement of the ANC in Natal. In 1977 he became a member of the national executive committee of the ANC. In 1990 he became the elected chairman of the southern Natal region of the ANC. He was also chairman of the ANC in the province of Natal as well as the MEC for Economic Affairs and Tourism.

In 1999 the accused was appointed the Deputy President of the Republic of South Africa, a position which he held until mid 2005 when certain corruption charges were brought against him. Those charges will be tried mid 2006 and the accused has already pleaded not guilty to those charges.

The accused testified that his political career put him in the public spotlight. A charge of rape will affect any person but especially a person in the accused's position. The trial has received enormous publicity and as the accused put it most of the reports

were very damaging to his image. The accused is also aware of people working against him in the sense that there is an anti-Zuma camp. The accused did not go into detail regarding this aspect but he did mention two names of people whom he knows work against him.

The accused had been the deputy president of the ANC since 1997 and still holds that position. He volunteered to stand down and not to perform certain duties in that capacity pending the outcome of this trial.

The accused testified that it is true that he had had contact with the complainant as a child in the early parts of the 1980's. While JK was in Lesotho and in Zimbabwe the accused had contact with him only. While JK was in Swaziland the accused saw him at his home and would have seen the complainant as well.

The role of Dr Mkize was also touched on. Mkize stayed in South Africa for some time while JK was in Swaziland and reported to him in Swaziland. Later Mkize also went to Swaziland with his family. While JK was in Lesotho Mkize took care of both families.

The accused saw the complainant while they were in Zambia but only as part of the children of the people in exile.

He said that it is possible that he spoke to the complainant some time in 1998. Had she lost his telephone number during or about 2001 it would have been the easiest thing to get hold of him because he was playing a prominent role in Natal and anyone of the offices in Natal and Johannesburg could have provided the complainant with his telephone number.

The accused next dealt with the so-called father/daughter relationship between himself and the complainant. In the Zulu language "malume" refers to the brother of your mother. There is a different word for your father's brother. In exile the situation was slightly different. Older men folk were in general referred to as "malume". Once the younger people grew up and did the work of the ANC they would then be called comrades.

The accused denied that he had ever referred to the complainant as his daughter. He said that he not even refer to his own daughters in that manner. He called them by name.

On the few occasions the complainant had visited the accused's home she was introduced to people present but never as his daughter.

During the last two months before 2 November 2005 the complainant had sent a large number of sms messages to the accused. She never referred to herself as his

daughter but called herself by name. There was also a new trend in those messages in that it ended off by referring to love, hugs and kisses.

The accused conceded that on 2 November 2005, and on an occasion prior to that, he had discussions with the complainant about a boy friend and he even referred to the fact that she will still have physical needs in spite of her HIV status. He denied that such discussions ever take place between a father and a daughter and he had never discussed that with his own daughters. In fact he says that in Zulu culture an older girl is allocated to a younger girl to educate her as far as relationships and sexual behaviour are concerned.

Reference was made to the fact that the complainant was overseas for a period of approximately sixteen months during 2002 and 2003. During that period she had no contact with the accused at all. The accused said that that would not have happened with his own daughters. He would not have allowed them not to contact him and in any event he would have contacted them.

The accused denied that the complainant had a close relationship with one of his daughters in Zambia or Zimbabwe. She had never been a friend of any of his daughters. Duduzile was in Zimbabwe but the complainant did not even recognise her. The other daughter Pumzile, who is presently 18 years of age, was too young and could not have been a friend of the complainant.

The accused denied that he had ever had any discussion with the complainant about labola negotiations. He heard of such alleged discussions in court. The accused said that discussions about boy friends were introduced by the complainant and not by him.

On 2 November 2005 the accused received a telephone call from the complainant telling him about the incident in Swaziland. At a stage he discovered that she had sent an sms earlier that day which he did not see at the time. The complainant indicated to the accused that she was in a hurry to leave for Swaziland. She also said that her mother was en route to Swaziland. The accused tried to persuade her not to go in a hurry but rather to wait until the next week. Later that day the complainant phoned the accused again and then informed him that she had decided not to go to Swaziland. She then added that she would like to see him at his home because she had something to discuss with him. He agreed.

When the complainant arrived at the accused's home he was in a meeting with people. He was downstairs in the sitting room and opened the door for her. He denied having greeted her as his daughter but he merely said "hello big girl". As he was still busy with people he said she could go through to the kitchen.

Later the accused had dinner with the other people present namely his daughter Duduzile, his son Duduzani, a person known as Kadusha, a child of one of his comrades, and the complainant. Later Duduzani left.

After dinner there was again mention of the child in Swaziland.

Kadusha was to be fetched by a person who phoned and said that she could not fetch Kadusha. Duduzile therefore had to take Kadusha home. At that stage the accused enquired from the complainant whether she would be leaving with Duduzile and Kadusha. The complainant then said "I am not leaving, I am sleeping tonight." There was talk about a taxi because normally when the complainant visited the Zuma home she was picked up by a taxi.

While Duduzile was away the accused and the complainant had a discussion. The complainant raised the discussion of a boy friend again. It developed into a discussion about the complainant's physical needs and that she had to lower her standards to get a suitable boy friend. There was also talk of medication for people with HIV Aids. The accused explained that many people come to him with ideas of how to treat such people.

The accused told the complainant that he had work to do and as she was to stay over he asked her whether she knew where the guest-room was. She confirmed that she knew. The accused then said that he would go on with his work and once he is finished they can start discussing whatever the complainant wanted to discuss. The accused noticed that the complainant had not come to a point where something in particular was discussed.

The accused went to his study and continued with his work. Some time later Duduzile came back. At a stage she came to his study to bid him goodnight.

Still some time later somebody knocked at the study door and Duduzile and the complainant came in. The accused was then informed by Duduzile that the complainant wanted to discuss something with him. Duduzile left.

The complainant remained behind in the study where the accused informed her that he still had to do some work. The complainant said that she was going to read and if she was asleep when the accused finished his work he must wake her up. The accused also said that at that stage the complainant was wearing a kanga, something he had not seen her in before.

The accused could not remember a lady fetching clothes the evening of 2 November 2005. He also denied having received a telephone call while the complainant and Duduzile were with him in the study. He said he could not recall such a phone call. In any event his evidence was to the effect that nobody phoned him to come and see him urgently.

Once the accused had finished his work he went to the guest-room. He found the door slightly open and as the light was switched on he went inside. He found the complainant lying on her stomach on the bed with her thumb in her mouth, fast asleep on top of the bedding.

The accused woke the complainant and asked whether she still wanted to discuss something with him. She said she did and he then said that he would meet her in his bedroom.

In his bedroom the accused was busy preparing the bed when the complainant entered. She was still wearing the kanga. She sat down on the bed. The accused took off his shoes and leaned against the pillows. The complainant again spoke about the child in Swaziland. She said she was getting cold and asked if she could get underneath the duvet. She did so. The accused then decided to put on his pyjamas and undressed in the room and put on his pyjamas. He also got into bed. The complainant then said that her body was tired and asked the accused to massage her. He fetched baby oil in the bathroom and started massaging her back while she was lying on her stomach. She loosened her kanga to allow him to rub her entire back and he noticed that she had no underwear on. He also rubbed her legs at the back and he noticed that she had no problem when he was rubbing her legs close to her private parts. She also asked him to massage her body in front. She turned around and the accused complied with the request. Once finished she thanked him, he washed his hands and came back to bed. In bed she covered him with her arm and as the accused noticed that something was now to happen he took off his pyjamas. When he got back into bed they started touching and kissing and eventually he asked her whether she had a condom because he had none. She did not have one. He said that he hesitated a bit which caused the complainant to say that he could not leave her in that situation and they continued to have sexual intercourse.

He said that he spoke to her during that process. She laughed and she said that she was fine and the discussion about the ejaculation took place.

Once finished the accused went to the bathroom and took a shower. When he was finished with the shower he realised that the complainant was no longer in the bedroom. He got dressed and went downstairs. She was lying on the bed with her kanga on and in answer to his question whether she was alright she said that she was fine and that nothing was wrong. They talked about her leaving the following morning, they kissed each other goodnight and the accused left.

The accused said that had the complainant at any stage informed him that she did not want to have sex or to continue with it he would have stopped and left. Later this "left" was explained that the accused would have left it there, ie left what he was doing.

The accused was not aware of any illness suffered by the complainant such as the attacks, referred to, during which she lost consciousness. The accused also said that if the complainant did not want him to have intercourse with her she could have pushed him away. She is not a submissive woman. She is assertive and independent and she does not beat about the bush. She will say if she does not want anything.

There was a policeman on duty not far away from the main bedroom and the guest room.

The accused knew that the complainant was HIV positive. As Deputy President of the Republic of South Africa he was the chairperson of the Aids Council. He knew that the chances for a man was less than that of a woman to be infected during sexual intercourse.

The accused learnt that there was a problem when he was told by members of the protection unit at his house that the police wanted to investigate an alleged rape at his home.

The accused was shocked on learning this and wanted to contact the complainant, but seeing that she had laid a charge he was not prepared to see her alone. He tried to get hold of Kimi's mother which he eventually succeeded in doing. Though Kimi's mother was prepared to come to the accused she later withdrew. That was strange to him. He then contacted Kimi's stepmother, a certain Ellen Molekane, also known as Jane. Jane later contacted the accused and said that she had made contact with a person known as Samkelisiwe Mhlanga, referred to as Samkele, an acquaintance of the complainant. The two ladies, Jane and Samkele, then tried to make contact with the complainant and her mother. It is not necessary to deal in all detail with the efforts testified about. It eventually transpired that the complainant's mother was of the opinion that she could not decide for her daughter what to do and that she would abide her daughter's decision. It was also reported to the accused by the two ladies individually that the complainant was

inter alia upset because of the fact that the accused did not phone her after the night of 2 November 2005 to enquire about how she had travelled to work, etc. The ladies also

spoke about labola negotiations as they were of the opinion that there was a love relationship between the complainant and the accused. The accused was prepared to start such negotiations.

As a result of the report of the complainant's unhappiness about his failure to contact her the accused phoned the complainant on 9 November 2005. It was arranged that the accused would see her and her mother in Durban. That meeting did not take place.

As indicated earlier the accused was a good friend of Dr Mkize who also knew JK and his family. During an ANC meeting in New Castle between the period 5 to 7 November 2005 Dr Mkize was warned by the accused about reports that would appear in newspapers concerning the alleged rape.

It is common cause that the complainant's mother visited the accused on 13 November 2005. Mkize was instrumental in that visit.

The accused said that the complainant's mother was upset about what had happened. She also said that she was troubled by the fact that her daughter had to go to school and that she was not well. The accused apologised to the complainant's mother for hurting her emotionally. He was still prepared to assist the complainant to go to London for further studies. He was also willing to assist with the fence at the complainant's parental home in KwaZulu Natal.

The complainant's mother did not accuse the accused of having raped her daughter.

The accused next testified about the statement obtained in Nkhandla. It is not necessary to deal in detail therewith. The accused said that there was an express denial of rape. There was, however, no express statement concerning sex or no sex. It was decided that the only reference would be to the two people sharing each other's company privately as stated in the statement.

There was no discussion of a wrong date being referred to in the statement.

It was only during the trial that the accused became aware of the contents of the discussion his attorney had with the Cape Talk Radio. He knew about a discussion but not about the contents.

The meeting on 15 November 2005 at the Epping Road house was also dealt with. The accused denied that there was any word about a follow up meeting. He also denied that he was asked to point out a scene of an alleged crime. He said that the idea of the visit was to have an overview of the house and to take certain samples for DNA tests. What he was required to do was to point out the room where the complainant slept, the room where he slept and the study. He was never asked whether the guest-room was the

place where "it" happened. No question was asked about anything having happened in the main bedroom.

At the end of his evidence the accused referred to certain "indications" that the complainant was interested in something else than a mere discussion. In that respect he referred to the skirt she wore when she visited him on 2 November 2005 instead of pants as she used to wear. He also referred to the type of discussion that took place. The accused stated that he would have had no problem having sexual intercourse with the complainant.

Under cross-examination the accused reiterated that a condom was not used. He said that when he pre-plans sexual intercourse he normally has a condom. Neither he nor the complainant had a condom and they both wanted sexual intercourse. He was aware of her HIV status and he was aware of his own status as well. He was tested in London in 1988 and thereafter in 1998 again and then one month ago. He is HIV negative and he knew that at the time because he normally does not take any risks when having intercourse.

The accused was criticised for the fact that he in his responsible position in government took the chance of being infected with HIV. He was also criticized for running the risk of infecting his wives. The accused conceded all that and indicated that he has suffered a lot because of the publicity of what had happened between him and the complainant in private. He also agreed that he wanted to stop proceedings.

He therefore wanted to make contact with the complainant, but once she had laid a charge, he was not prepared to interfere with the law. The state put it to the accused that the complainant's evidence was that she would never have consented to unprotected sex. His reaction was that they did have unprotected sex and that the complainant was in fact the person who took the initiative.

The accused was cross-examined at length about the relationship between himself and the K family and the complainant in particular. He again stated that he regarded the complainant's father as a comrade and as a friend. He never regarded the complainant as his child. The allegation about a father/daughter relationship is not true.

The state cross-examined the accused about his power and authority in politics and in government structures. The state thereby wanted to indicate that the complainant, as a much younger person, the daughter of a comrade, would never have expected the accused to be sexually interested in her. The accused stated that she started discussing sexual aspects with him.

It was put to the accused that the complainant is a lesbian. I have earlier in the discussion of the complainant's evidence referred to the fact that she is bisexual and that she regards her orientation as being lesbian. From the evidence it cannot be said that the complainant is a lesbian and only a lesbian.

During the cross-examination various aspects were put to the accused and asked why the complainant would lie about it. One example is that it was put to him why would she lie about who invited who to the house. Obviously the accused said that he did not know. Another example is who raised the fact of sleeping over. I do not intend dealing with each and every of those aspects because it is clear that the cross-examination was directed at showing to the accused that each and every step in the process up to sexual intercourse was pre-planned by him and intended to lead thereto. That is also the reason why much was made of the accused's evidence concerning the complainant's attire on 2 November, the way she sat and what was discussed between them. The accused said that he was sensing that there was something else in the complainant's mind, he noticed certain actions on her part and did not mind having sexual intercourse with her.

It was put to the accused that he was running a huge risk to have sex with the complainant because in case of an emergency the police could come rushing in or even his daughter. I really did not understand the question at the time because one can hardly imagine the accused and complainant continuing with intercourse in a case of an emergency. If the reference was to shouting and screaming by the complainant as being the emergency, the question can be asked whether the accused would have run the risk of the complainant screaming in the event of non-consensual sex, with the police and his daughter so close by.

It was also put to the accused that the sexual intercourse took place in the guest- room and not in his bedroom. It was therefore put to him that he did not invite her to his bedroom but raped her in the guest-room.

One must not lose sight of the fact that whatever happened between the accused and the complainant happened in the accused's house where there is more than one bedroom available for them to do whatever he or they wanted to do. The guest-room had a double bed and a bathroom, the same as the main bedroom. It is true that the accused's case sounds better once he says that the complainant came to his bedroom. On the other hand consensual intercourse could have taken place in the guest-room as well. In fact the one bedroom could have been just as risky as the other and just as convenient as the other.

It was suggested in cross-examination to the accused that he went down to the guest-room to see whether the complainant was asleep or not. When she was awake the accused again left the bedroom. It was also suggested that because she was not paying attention to his suggestions all evening he had to catch her when she was asleep. I will deal with this later but wish to say now already that I have difficulty in understanding that approach. Had the accused started raping the complainant whilst asleep there was a much bigger danger that she would have screamed or shouted for help the moment she was awakened by the rape. There would then also be no sense in the accused talking to the complainant in trying to get her attention when she was not reacting to the intercourse.

It was put to the accused that there can be no logic reason to have unprotected sex with an HIV positive person. The accused's reaction was that if two people have agreed to do a certain thing while knowing the risks involved it is possible to proceed therewith. The complainant herself said it is every individual's own choice to have unprotected sex with an HIV positive person.

It appears from the cross-examination that the accused was somewhat surprised to find that the complainant had left his bedroom while he was having a shower. That is why he went down to the guest-room to find out whether everything was in order and he was assured that it was.

The accused was questioned about his warning statement prepared by Mr Hulley. He was asked why the word "consent" or the words "consensual sex" were not used in the statement. The answer was that the statement clearly contains a denial of any guilt and then refers to something that happened privately. That was the accused's statement on advice of his attorney.

The accused was asked why he did not deny the rape to the media. He said that there was no need to discuss anything with the media at all.

Duduzile Zuma, the accused's 23 year old daughter, also testified. During November 2005 as well as at present she is living with her father.

Ms Zuma met the complainant approximately a month or six weeks before 2 November

2005. It happened on a day when she arrived home at about 17:00 and saw the complainant with her father in the lounge or TV-room as she called it. The witness proceeded to the kitchen whereafter her father called her to introduce her to the complainant. The complainant was introduced by name and referred to as the child of a comrade. The witness denied that the complainant was at any stage introduced as the accused's daughter or that she was ever referred to as his daughter by the accused.

Ms Zuma was also in exile and returned to South Africa approximately 1990 or 1991. She lived in Mozambique and Zimbabwe during her years in exile. She cannot recall having seen the complainant in Zimbabwe while she was there. There was also one other sister, a younger child, with her in Zimbabwe. She denied that the complainant had been friendly with either herself or her sister while in exile.

On that first meeting the complainant passed a remark about the house the Zuma's were staying in and asked to be taken on a tour. The witness did so and pointed out all the rooms. When they got to the accused's room the complainant asked to see that and she went in. That is in contradiction with what the complainant herself testified.

The witness denied that she and the complainant spent three to four hours in each other's company and said that it was approximately one hour.

On 2 November 2005 the witness again arrived home after 17:00. She found the complainant and Kadusha sitting at the dining room table. The witness was immediately irritated. The reason for her irritation was because she immediately thought that the complainant was looking for money from her dad because, according to her, everyone does that. Because of the irritation the witness immediately went into the kitchen and a lady, Mamzezani, walked in to help her cook. Mamzezani is a family friend. Later the complainant joined them in the kitchen and she inter alia related to a child of hers who had been bitten by a snake. The witness said that the complainant did not look too concerned as a

mother. Later the complainant asked Kadusha to turn on the lights in the house, something that worried the witness as well. She formed the opinion the complainant was getting too comfortable. The witness herself then put on the lights.

After Mamzezani had left, the witness' brother, Duduzani, joined them and the family enjoyed their meal. While having the meal the complainant apparently again referred to the child in Swaziland and also spoke about a book she was writing. After dinner the complainant helped the witness wash the dishes where the complainant spoke about a show at the civic theatre and the witness deducted that she was living close by. The witness said that she was getting an uneasy feeling about the complainant and then offered her a ride home. She said that the uneasy feeling was that there was something not right. The complainant accepted the ride home and then, with the accused's permission, phoned Swaziland.

At a stage the complainant took a lunch-box out of her back pack and said that she wanted to wash it because it would be too late when she gets home and she also liked samp and beans which they had as part of their meal that night. She wanted to take some home.

The person who was supposed to take Kadusha home could not do so any longer. The accused therefore asked Duduzile to do so, she fetched her car keys and while walking to her room overheard the complainant saying that she always carries a toothbrush and a panty in her bag. Ms Zuma was not happy about that because she now formed the opinion that the complainant was trying to stay the night at the Zuma residence. She again said that there was something just not right about the complainant and she was very protective of her father.

The witness in general told Kadusha and the complainant that she was ready to go and she noticed that the complainant was also saying goodbye to Kadusha. The witness remarked "but am I not taking you home" whereafter the complainant reacted "no I had decided to spend the night".

She took Kadusha home and when she returned she saw that the guest room light was on and the shower was running. The accused was working in the study.

Some time later there was a knock on her bedroom door, she opened and saw the complainant who said that she could not sleep and asked for a book to read. She gave her

one whereafter the complainant said she wanted to have a discussion with the accused. The witness took her to the study.

The complainant was wearing a sarong which is a kanga. The witness said that she could clearly see that the complainant did not wear any underwear and thought it was most inappropriate in other people's house.

Whilst in the study the phone rang and the witness left the study. The complainant stayed behind.

After having left the complainant in the study, the witness said that she laid in bed trying to listen if she could hear footsteps going down the stairs to the guest room. She fell asleep without hearing any footsteps. She did that because she was convinced that the complainant was trying to entice her father.

The witness was in the house all night but did not hear anything. She confirmed that there was a policeman on duty. She referred to an incident where her sister screamed about a huge cockroach in the bedroom and she said "like in two seconds" the police was downstairs knocking on the door.

Nothing much came out of the cross-examination of this witness. The reason why the witness thought the complainant was going to ask for money is because the moment a person is referred to as a comrade's child they always need help.

The witness said her feeling of uneasiness was as a result of women's intuition.

The witness did not ask her father about rumours of rape and discussions thereof in newspapers. Shortly before the allegation of rape was made public she overheard mention thereof in the house from people who visited her father.

Ntswaki Sigxashe is a lady who testified about the allegations concerning Charles, Godfrey and Mashaya. She was also in exile. She knows the complainant as a child in exile in the 1980's.

She came to hear of an incident between the complainant and Godfrey when the complainant complained about an assault by a lady called Ndileka, Godfrey's girl friend. The witness, a certain Promise and the complainant's mother was working at the South African Council of Trade Unions. Comrade Nkadimeng was the secretary of SACTU and requested the witness and Promise to investigate the assault. They asked the complainant for the reason for the assault but she said she did not know. Later she said she was assaulted because Godfrey had raped her.

The two ladies, ie the witness and Promise, then consulted Godfrey. Eventually after more consultations with the two people involved, Godfrey admitted that there was an intimate relationship between him and the complainant. He stated that whatever had occurred between them was consensual.

The two ladies were upset about an affair with a 13 year old girl and recommended to the regional political committee and the legal department of the ANC that Godfrey be punished for having had an affair with a 13 year old girl, but not for rape. The punishment was six months without allowance and labour at the ANC's small farm. Godfrey, however, went overseas for studies and on his return served his punishment.

The witness is also aware of an allegation against Charles. Charles' name was mentioned when the two ladies asked the complainant who else had given her trouble. She then said that Charles had also raped her. The witness immediately conceded that Charles did not have a fair trial because Charles denied the allegation of rape and he was not given an opportunity to explain exactly what the position was. He was punished in the same way as Godfrey was.

The witness is also aware of allegations about Mashaya. She said that Mashaya's situation is completely different. He was a fairly young man at the time and it was clear that he and the complainant were in love and they reprimanded him not to do anything untoward and he promised not to do anything until the child was grown up and ripe for whatever adults do.

The most important aspect that came out of cross-examination was that the complainant was taken to a doctor to be examined. It was clear from the doctor's examination, according to the witness, that the complainant had not been penetrated prior

to the examination. It was therefore clear that no intercourse had taken place between the complainant and either Godfrey or Charles. It was then explained that what had happened between the complainant and Godfrey was what is called "metcha". That is the situation where the man puts his penis between the girl's thighs but not penetrating her.

Mbuso Ncube, also known as Mashaya, then told his part of the story.

I will refer to this witness as Mashaya. Mashaya left South Africa in 1983 and returned in 1993. He is at present 43 years of age.

When he went into exile he went through Lesotho and settled mostly in Zambia and Zimbabwe. He met the complainant for the first time at a wedding in Lusaka. He immediately fell in love with her. That must have been during or about 1988. She was looking beautiful to the witness and he proposed to her. They thereafter met on various occasions. At a stage he was no longer based in Zambia and only saw the complainant when he went to Zimbabwe.

At the time the witness stayed with a couple of friends and the complainant with her mother. On one occasion he, together with a friend Jabu, fetched the complainant with the witness' car. The complainant accompanied them voluntarily. Arriving at his house he went to buy drinks and when he returned he was told that Godfrey and his girl friend had taken the complainant away.

The witness denied having attempted to rape the complainant at the time. He also denied that he desisted from raping her because she was menstruating. He said when he came back she was no longer there.

A relationship later developed between Mashaya and the complainant and they were intimate in that they had penetrative sex. It happened mostly in the car (on three or four occasions) and once in the house. No condoms were used.

The witness saw the complainant again in Durban at her workplace in St Andrews Street. They had a general discussion but the relationship was at an end.

The cross-examination turned to a great extent on establishing whether the complainant was under 16 when intercourse took place between her and Mashaya. That did not take the matter further and I need not go into that in any further detail.

Sitembele Wellington Masoka is a pastor presently at the parish at Upington. He attended the theological school in Vereeniging where he met the complainant during 1995. He fell in love with her and together with a friend, Ndumiso Conco, went to the place where she was living. He proposed love to her, meaning that he wanted to have an affair with her. She rejected his proposal.

The next day the witness was called to the office of Pastor Mahlabe who informed him that the complainant had alleged that he had raped her. The witness was

immediately expelled from the college. He tried to explain but was not given an opportunity. He was most upset and had to attend another college to complete his studies. He said that he did not touch the complainant and he did not persist with his proposal when she rejected it. He and his friend left the complainant's room.

Duduzile Ncobo met the complainant during 1993/1994 when she was introduced to the witness by Pastor Mbambo. The witness was at the time based at 20 St Andrews Street in Durban and was involved with the Council of Churches. The place where she worked was also known as Deaconia.

The witness was a youth worker and had to co-ordinate the affairs of the youth from various church denominations. The complainant was a representative of the youth from her church. She was initially brought to the witness because according to Mbambo she had to complete St 10 so that she could go to a seminary to study for ministry. The complainant was enrolled at the Phambile high school.

The witness had regular contact with the complainant through her involvement with the youth. She therefore became aware that the complainant was keeping the company of a person known as Sandile Sithole, a person representing the youth of the Anglican church.

Sandile Sithole was, according to the witness, a person with feminine features. He was a small bodied, thin person, much smaller than the complainant. It was clear to the witness that the complainant and Sithole got along very well.

During 1994 the complainant on an occasion approached the witness, crying, telling her that Sandile Sithole had tried to rape her. The witness was upset and telephoned Father Lazarus, the chairperson of the Council of Churches to report the incident to him. A committee was immediately formed to investigate and Pastor Mbambo was appointed as the chairperson of that committee.

The complainant was the first female who wanted to enter the ministry and she was well-liked. The witness therefore wanted to ensure that Sandile be arrested if he was guilty of the complaint against him. It was arranged that the complainant and her mother would attend the meeting of the committee but they failed to arrive. The complainant completely disappeared. She said that the complainant's disappearance shocked all of them.

The witness later learnt that the complainant had in fact gone to the ministry college. She, however, did not report to the witness or the Council of Churches and they were all worried about the complainant. One day she bumped into the complainant in West Street in Durban and asked her how it was going at school. The complainant then reported to her that she had abandoned her studies because the pastors at the ministry wanted to rape her. The witness asked the complainant whether she had reported that to Pastor Mbambo whom the witness regarded as a sort of a father figure. The complainant's reaction was that she and her mother do not want to see the very sight of that pastor ever again because he also raped her. The witness said that three allegations

regarding rape were made by the complainant. The first was that of Sandile Sithole as well as another attempted rape at the college and then the allegation of rape against Mbambo. All these allegations made the witness tender her evidence to the accused's legal representatives. She saw them the Saturday before she testified and well after the complainant had testified. The witness said that she read in the newspapers about the allegations that had been made by the complainant and then realised that it must have been the complainant who laid the charge against the accused. In the meantime, she said, Sandile Sithole had also phoned her and referred to the allegations against himself. Sithole was worried about the complainant, saying that she was mixed up and that she needed help.

The witness herself said in court that after having heard of the various allegations from the complainant and reading about it in the newspaper and because she loves the complainant, she just wanted to reveal all she testified about in court because it may be that the complainant has a problem. She said that if the court can, she will appreciate it if the child, the complainant, can be helped.

It is not necessary to deal with the cross-examination in any detail. It was interesting to note that the witness said that when she told Sithole about the allegation against him he initially laughed and asked her whether the complainant was making a joke. Later he was upset and wanted to clear his name and wanted the committee to meet to investigate the allegations.

Pastor Peete April Mbambo is a pastor in the African Methodist Church from the parish at New Castle. He graduated in the year 1988 from the Wilberforce Institute in Vereeniging. He was the pastor of the parish at KwaMashu in Durban from 1991 till 1998. The complainant and her mother are both well-known to Mbambo. When they returned from exile they had no place to stay and with the assistance of his parish Mbambo provided a home to the complainant and her mother.

The complainant and her mother were members of the congregation served by the pastor. The complainant was responsible for youth activities, in particular health matters in relation to HIV Aids. She was in that way attached to the District Council of Churches in Durban. The pastor himself was the chairperson of the ecumenical, educational and renewal ministry of a branch of the South African Council of Churches. The office from where the work was done was commonly known as Deaconian in Durban at 20 St Andrews Street.

In his church the pastor has, what is called, an altar call where people in the congregation can express their desires or wishes. On an occasion the complainant expressed her wish to become a pastor. The witness and the congregation were happy about it and proud of the young lady and therefore recommended her to the district conference and later to the annual conference to be accepted as a student and to have her tuition fees paid by the church. All this happened in 1994. The complainant did, however, not have a matric certificate and she went to the Phambile high school in Durban to write certain subjects to obtain her matric certificate.

At the end of that year there was an annual conference which the complainant did not attend because, according to her, she was writing matric examinations.

For some time Mbambo did not have any contact with the complainant and later in 1995 learnt that she had already joined the college. The witness therefore contacted the dean at the college and asked for a copy of the complainant's matric certificate.

During a service in KwaMashu during Easter 1995 a person fainted. Mbambo later learned that it was the complainant. He then raised the question of the matric certificate with her. She told Mbambo that it was at the college and that she would supply it later. She also complained about her financial problems and the witness arranged for further finances to be made available.

The witness only heard of the complainant again in September of 1995 when it was reported that she was at home and that she was sick. The annual conference was to follow shortly thereafter and the witness realised that at the annual conference a roll-call would be held and the complainant's name as a future pastor would be called out. On a Sunday he sent elders of the church to go to the complainant to find out what her problems were and why she was not attending college. The elders reported back that the witness must forget about the report. He forced them to tell him what the complainant told them and they then said that she had alleged that he had raped her. He immediately arranged for the complainant to be fetched by car and brought to the church. Having

arrived there he invited her to sit down which she refused to do. He explained the complainant's rights to her in that she could go to the police with the complaint and that there were also internal disciplinary procedures in the church. Her reaction was "if you do not know about it I am leaving this dirty church". She then left.

At the annual conference the complainant's name was called and she was not present. It was then reported by the secretary of the conference that the complainant had alleged that she left the college because she was raped at the theological seminary. Mbambo then also reported her allegation of rape against him. The complainant was given a year to put her house in order but she never reported back to the conference or made any complaints with the police.

The witness denied that he had suggested to the complainant to become romantically involved with him while his wife was away.

The witness was also asked about Sandile Sithole. He confirmed that Sithole was a member of the Anglican Church, that he was a short, tiny young man with feminine features, smaller than the complainant. He confirmed having heard about an attempted rape concerning Sithole and the complainant from Dudu Ncobo.

Mbambo testified about the allegations made against Nestor Ragedzi. This happened in 1993 before the complainant went to the theological seminary. It was during Easter. Mbambo had to stand in for the pastor who had to preach the closing ceremony

on the Sunday. He therefore prepared his sermon at the home of Reverend Mayakizo. He also slept in Mayakizo's house. The Sunday morning between 03:00 and 04:00 he heard a loud knock on the window of a room next door. He got up to investigate and found Nestor naked on the bed lying next to the complainant who was sleeping on her stomach with a white panty and a T-shirt on with either a Telkom or Escom insignia on it. As both Nestor and the complainant were asleep he woke them up and told them that certain ladies wanted to collect vegetables from that room and to open for them. Mbambo went back to bed. The next morning at breakfast the complainant's mother was present and so were the complainant and Nestor. The complainant introduced Nestor to her mother. Mbambo then remembered what he saw earlier that morning and reported that to Mayakizo. That evening at about 18:15 at his own home in KwaMashu, Mbambo was visited by the complainant and her mother. The complainant was carrying the T-

shirt and it was alleged that Nestor had raped her and that DNA samples were on the T-shirt. Mbambo advised the complainant and her mother to lay a charge with the police as he was very suspicious and skeptical about her story. He pointed out to the mother what he had found in the bedroom and also referred to the introduction at the breakfast table. The mother became cross and left with the complainant and nothing was heard again of this allegation.

Mbambo said that the room in which he found Nestor and the complainant was immediately adjacent to the room in which he was sleeping. It was the room normally occupied by Nestor. There was no door in that room but only a curtain. Had the complainant made any noise whatsoever he would have heard that.

Nothing much came out of the cross-examination. It was put to Mbambo that the complainant denied having accused him as well as Nestor and Sandile Sithole of rape. The witness stated that he was most surprised about those denials.

Sandile Nhlanhla Sithole testified about the attempted rape he was accused of by the complainant.

Sithole is a 38 year old unmarried male from Durban. He met the complainant in the early 1990's. When she was introduced to him he was aware of the fact that she was a candidate to go to a theological college and he regarded her as a role model because she was a female, somebody from within their own ranks, who wanted to become a minister of religion.

The complainant's offices were in St Andrews Street in Durban while Sithole was based in Queen Street in Durban.

During 1993 he can recall the complainant visiting him one afternoon. Later that afternoon he went back to the Deaconian centre and Dudu Ncobo then informed him that the complainant had accused him of attempted rape. Sithole said that he laughed because he thought it was a joke. Ncobo then told him that it was serious and a committee was set up to investigate. He confirmed that nothing came of that. In cross-examination it appeared that Sithole had met the complainant on a number of occasions since the alleged

rape, even as late as last year. There were no bad feelings between them but the witness did not ask the complainant about the allegations. He was advised to stay away from her.

Oupa Geoffrey Matlabe is a pastor in the African Methodist Church with a parish located in Katlehong. He was the boarding master at the ministry where the complainant studied in 1995, the year in which he met her. The witness' responsibilities were to look after the welfare of the students including their sleeping facilities, health and general welfare. The students lived in hostels. Some hostels were on campus but others were outside. The complainant lived outside the campus in a hostel together with about eight students. Matsoko who testified earlier was also known to the witness.

In 1995 the witness received a report from the complainant that Matsoko had raped her. The matter was investigated. The complainant was advised to lay a charge with the police. That was not done.

The witness said that there was a rule that male students could not go to the rooms of female students. Everybody knew that when they arrived at the college. Matsoko breached that rule. He also in cross-examination said that he was not aware of anybody else accompanying Matsoko to the complainant's room. She did not mention anybody and Matsoko said he was alone.

Matsoko was expelled on the day the allegation was made against him. That was done to set an example to other students.

An allegation of rape was also made against Mahlabe himself. That was the incident where the complainant said she was impregnated. The witness said that he became aware of this allegation on 9 March 2006 round about 18:45. One of his fellow pastors asked him if he knew that a complaint of rape had been laid against the accused. When Mahlabe said that he did not know, the pastor showed him a newspaper and said that he, Mahlabe, was the boarding master at the college during 1995. He then read about the alleged rape levelled against him. He said that he was shocked and he went to the college to seek information about the complainant. The witness testified that before Easter in 1995 the complainant became ill. With the assistance of the staff at the college it was decided that it would be safer for the complainant to stay at his house instead of at the boarding house outside the campus. The witness also contacted Mbambo so that the complainant's mother could be informed about her illness and be asked to collect her at the college. The complainant stayed for one night with Mahlabe and his family in his house and the complainant's mother then arrived. The mother and the complainant remained for one night whereafter Mahlabe took them to board a taxi to go home. He denied that he had raped her. He denied that she had fainted while in his presence. He was also referred to the complainant's mother's evidence that the fetus looked like him. When that evidence was put to the witness he smiled and he gave the following answer: "My expression is not that I am laughing. I am not actually laughing. I pity the poor complainant. I think she is not well. She is sick, and she needs urgent attention, medical attention otherwise many families will be destroyed by her." He then stated that DNA tests could have been done on the fetus and on himself. Nothing like that was done

and no complaint was laid against him. The witness was so upset that he even consulted medical doctors who confirmed that a five month old fetus could have no resemblance with the alleged father.

In cross-examination the witness again said that the complainant is not well. She is sick.

Three witnesses were called to state that though they had phoned the accused the evening of 2 November 2005 they did not ask to see him urgently and could not see him in Johannesburg at all. The first was Kumanas Majola who was in Durban at the time. She wanted some help from the accused. The second was Nosizwe Vuso. She was also in Durban that night. The third was Julaiga Mohammed an attorney for the accused in various matters. She has never spoken Zulu to the accused and she did not ask to see him urgently.

Mr Modiyanewu Terrence Modise is a pastor in the African Methodist Church situated in Standerton. He also studied at the seminary where the complainant was a student. Modise completed his studies in 1995, the same year he met the complainant at the college. She was then in her first year.

When he met the complainant he immediately fell in love with her. He is of the opinion that it was a mutual feeling and he said that they were thereafter inseparable.

They had an intimate relationship though it appeared that it was not a sexual relationship in the sense that he had had penetrative sex with her.

On an occasion when the other female students left for a week-end and the complainant was alone in the hostel the witness visited her. He said that they chatted, they hugged, they kissed and at a stage when he lowered his pants she suddenly jumped up and according to him became mad. Up to then, he said, it appeared as if they were acting like two lovers, they cuddled each other and the complainant was permissive.

When she became so angry she took everything she could lay her hands on like pillows, blankets and pillow cases and threw them outside, according to him, with the intention of burning it.

The witness said he felt very bad about this incident because he thought that he had done something wrong and that he had hurt the person whom he loved. The moment he could, he disappeared and he went back to the place where he stayed. The next morning he felt dreadful. He did not go for the morning prayer and only later saw the complainant. He apologised to her. She accepted the apology. They continued their relationship but the witness said he was very careful not to do anything to upset the complainant again.

Apart from a passing remark by the dean of the college that the witness was apparently involved with the complainant he was informed by Reverend Mbambo that the

complainant had alleged that he, the witness, had raped her. The witness denied ever having raped the complainant. He denied ever having had sexual intercourse with her at any stage whatsoever.

In cross-examination the witness said that he was not aware of the fact that he was not entitled to visit a female in her room. He testified that a certain elder S E Modise was the boarding master at the time of this incident and that Mahlabe had taken over from Modise.

Nothing more came out of the cross-examination.

Mr Lungisa Henry Manzi is at present the chief of the emergency services of the Durban metro municipality. He knows the complainant very well.

He met the complainant during 1998 when his flat mate, one Thulani Mpontshani brought her to their flat. On that occasion, which was a Sunday, they watched a soccer match and later that evening he accompanied the complainant and Thulani to the back exit of the block of flats. The witness thereafter returned to his room.

The next Saturday between 08:00 and 09:00 the complainant used the intercom at the block of flats to contact the witness. Thulani overheard that the complainant wanted to come to the flat and as he was with another female in his bedroom he asked the witness to chase the complainant away. The witness could not do that and she came to the flat

and stayed there with the witness all day long. Thulani and his girl friend remained in his bedroom. Later that evening the witness walked the complainant back to her flat where she stayed with her mother. She then told her mother that she was going to stay the night with the witness. The witness said that he was shocked, but she did accompany him. They went to his bedroom. Apparently Thulani was aware of her presence and again remained in his bedroom. Later the witness took a bath and while he was in the bath the complainant entered, undressed, and got into the bath with him. They later went to his bedroom and remain naked. They had a discussion about Thulani and how the complainant met him and it then appeared that the complainant apparently had a problem with her own boy friend and told Thulani that she was frustrated with her boy friend, that she needed sexual intercourse and that she needed it immediately. Thulani then took her to his flat which was at that stage in a separate building. She also told the witness about an incident when Thulani apparently looked for a condom which he could not find and then started praying.

The witness spent the night with the complainant in his bed, both of them naked, but he said that they did not have intercourse. The following morning he took her back to her mother.

The witness saw the complainant on different occasions thereafter in the street and then she disappeared for a fairly long time. In the second half of the year 2000, while he was with his wife, he met the complainant again, took her telephone number on her invitation that he come and see her. He dropped his wife off at the airport and went to the

University of Natal where the complainant was staying in a local hostel. She then told him about her HIV status. Later that afternoon the witness left.

The witness was a policeman with the rank of senior superintendent when he met the complainant. During cross-examination he was also asked to describe her which he did. He was aware of the complainant's surname.

As will appear from the evidence of Thulani later herein there are a few discrepancies between this witness' evidence and that of Thulani. According to the witness they all sat on the floor to watch the soccer on the Sunday while Thulani said that they were sitting on the sofa. The witness said that he only accompanied Thulani and the complainant up to the back gate. Thulani initially

said that the witness walked half way to the complainant's flat. According to the witness he and the complainant only left during the evening whereas Thulani said that he got a chance to make some food when the witness and the complainant left the flat some time during the day.

The witness denied that the complainant does not know him or Thulani. He said that if she was present in court she would have immediately recognised him.

Thulani Tetwake Mpontshani is the Thulani referred to earlier. He met the complainant during 1996. He saw her when she was wearing Swazi clothes and as he lived in Swaziland and attended school there, he greeted her in Isiswazi. They met on more than one occasion in Point Road where they visited the Wheels restaurant where

they inter alia discussed a love affair. He took her to his flat on an occasion where he could not find a condom. As he was not used to making love

to women without a condom he started praying. They had intercourse on that occasion. At a later stage the complainant spent an entire week-end with him in the flat where he was staying at that time. They had intercourse on more than one occasion during that week-end. At a stage during the week-end he realised that she was a little bit quiet and when he enquired about it he then heard that she had been raped on a previous occasion.

Over and above the contradictions with the evidence of Manzi the witness was also confused about the next visit by the complainant to the flat where he and Manzi was staying. He initially said it was the day after the Sunday and later changed it to a week later. Not much further transpired from the cross-examination.

Dr Louise Olivier is a registered clinical and counseling psychologist. It is not necessary to refer to her curriculum vitae. It is an impressive curriculum vitae.

Dr Olivier treats patients from different culture groups in South Africa and has patients from countries such as Botswana, Uganda and Tanzania. In her doctoral thesis she inter alia worked on the development of a psychometric test regarding the evaluation of sexual functions and adaptation of adults in South Africa. This test has found acceptance and is now used in South Africa. She has also done a research project on inter alia the trauma experienced by women including rape. In her report she referred to the mandate given to her. She also refers to the fact that a request was made to do a

psychological assessment of the complainant which was refused. She said that a psychologist can be asked in the field of forensic psychology to do a full evaluation or be asked to give a specialised input in regard to the testimony given. Dr Olivier could not do a psychological assessment. She therefore had to listen to the evidence given by the complainant and to read the record which inter alia includes Dr Merle Friedman's report.

Dr Olivier was critical of Dr Friedman's report. Dr Olivier made a clear distinction between a psychologist doing clinical work and a psychologist doing forensic work. As a forensic psychologist preparing a report for evidence in court a whole battery of psychometric tests are

undertaken. Each specific test, so Dr Olivier testified, can assist in coming to conclusions. The allegations of the patient are also investigated over a period of time during lengthy consultations. Confirmation is also obtained from other witnesses, family and friends. A medical history is of importance. In the instant matter the complainant was apparently, while in exile, treated in a mental hospital. It is common cause between the state and the defence that the complainant is still receiving some sort of counseling or treatment. Dr Olivier was also critical of Dr Friedman's allegation that the Wechsler Adult Intelligence Scale 3 test is of no value. Dr Olivier says that the Wechsler test is very important because cognitive functioning is influenced by emotional problems.

Dr Olivier was also critical about the two short consultations Dr Friedman had with the complainant and the apparent lack of enquiry into the complainant's sexual background. Dr Olivier says that it is of the utmost importance to find out everything

about a complainant in order to make an assessment. The conclusion Dr Olivier came to was that because Dr Friedman did not investigate the complainant's position in detail she could not say that the complainant as a fact froze during the intercourse. Dr Olivier conceded that about 10% of all women freeze during a rape but one can only say that it is not malingering once one knows the results of the battery of psychometric tests and had gone into the detail referred to above.

The finding of post traumatic stress disorder by Dr Friedman was also questioned. Dr Olivier said that it is so that a woman will suffer from post traumatic stress disorder after a rape but if one takes into account that there were various allegations of rape made by the complainant, which Dr Friedman did not investigate, it cannot be said that the intercourse between the accused and the complainant was the cause of the post traumatic stress disorder. Again Dr Olivier stressed that the lack of investigation by Dr Friedman makes her report regarding post traumatic stress disorder of no value whatsoever.

Dr Olivier was also referred to the so-called attacks suffered by the complainant. She said that that was highly relevant and should have been investigated in full. Reference to even a neurosurgeon or a neurologist would have been advisable.

In cross-examination Dr Olivier tried to explain the difference between a clinical psychologist and a forensic psychologist or, put differently, a psychologist performing clinical work and a psychologist performing forensic work. This will become of importance later when I discuss the reference to the *You* magazine and advice Dr Olivier

gave therein. Dr Olivier says that as a clinician the psychologist deals with the perception by the patient. The patient is then treated for the perception and to try and heal that person. In forensic work the perception as such is investigated in detail in order to find whether the perception represents the true factual situation. Therefore, she said, that when she gives advice in the *You* magazine she does it as a clinician and accepts the perception of the reader and deal therewith and refer the specific reader for expert assistance.

Dr Friedman is a trauma specialist. Dr Olivier did not say that that means that her evidence is of no value to the court. What Dr Olivier did say was that the work of a trauma specialist is not that of a forensic psychologist. The evaluation by Dr Friedman as a trauma expert is not acceptable as a full forensic evaluation. It is also not in accordance with the ethical code of conduct of the professional body of psychologists.

In cross-examination Dr Olivier was on more than one occasion invited to make a diagnosis. She refused on each and every occasion because she said she had not done a forensic investigation. She is not in possession of a full clinical history.

Dr Olivier in conclusion in her report refers to possible reasons from a psychological perspective why a claimant would make a false allegation of rape. She describes it as follows:

"It is the experience of the undersigned psychologist that a claimant would make a false allegation of rape because of the following psychological dynamics:

- That the claimant genuinely believes that she has been raped but that the belief is not reality based. This occurs in cases where the claimant has an encapsulated delusion (in this case the claimant is in contact with reality in other aspects of her life), hallucinates, or has organic pathology, which can be accompanied by hallucinatory images.
- That the claimant has serious personality or emotional pathology. Typical personality pathology would be the Borderline Personality Disorder, the Schizotypal Personality Disorder and the Antisocial Personality Disorder. In the latter case the person would accuse someone of rape for personal gain or vindictiveness.
- That the claimant has experienced previous trauma and that due to this, the claimant then perceives any sexual behaviour as threatening. In this case the claimant can have consensual sex but after the fact project this as rape because of subconscious guilt feelings, resentment, anger and emotional turmoil. In this case the claimant can believe that the reality she has created for herself is in fact reality.
- That the claimant can simply make an allegation of rape because of negative transference (such as 'punishing' the accused for a perceived wrong). In this case the claimant is convinced that she is telling the truth.
- That the claimant can simply make an allegation of rape because of a hidden agenda (such as getting revenge because of a perceived other wrong done to the claimant). The undersigned psychologist has been involved in cases where claimants make an allegation of rape just because
-

the accused jilted the claimant for another lover. In this case the claimant knows that she is lying but does so purposefully."

The defence closed its case after the evidence of Dr Olivier.

It is unfortunate that it was necessary to summarise the evidence as long as I did. Because of misconceptions that had arisen as a result of selective reporting it was necessary to highlight certain material facts. That I had now done and I can now proceed with the final analysis.

In this particular matter it is necessary to refer to the state's burden of proof and the way in which a court should approach the evidence where a court is faced with two conflicting, in some instances, mutually destructive versions.

In *S v Ntsele* 1998(2) SACR 178 (SCA) the supreme court of appeal deals with the onus of proof on the state, the adequacy of proof and the trial court's evaluation of evidence. At 182b-f EKSTEEN JA says the following:

"Die bewyslas wat in 'n strafsak op die staat rus is om die skuld van die aangeklaagde bo redelike twyfel te bewys – nie bo elke sweempie van twyfel nie. In *Miller v Minister of Pensions* [1947] 2 All ER 372 op 373H – stel Denning R (soos hy toe was) dit soos volg:

'It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt.'

Ons reg vereis insgelyks nie dat 'n hof slegs op absolute sekerheid sal handel nie, maar wel op geregverdigde en redelike oortuigings – niks meer en niks minder nie (*S v Reddy and Others* 1996 (2) SASV 1 (A) op 9d-e). Voorts, wanneer 'n hof met omstandighedsgetuienis werk, soos in die onderhawige geval, moet die hof nie elke brokkie getuienis afsonderlik betrag om te besluit hoeveel gewig daaraan geheg moet word nie. Dit is die kumulatiewe indruk wat al die brokkies tesame het wat oorweeg moet word om te besluit of die aangeklaagde se skuld bo redelike twyfel bewys is (*R v De Villiers* 1944 AD 493 op 508-9)."

The reference to *S v Reddy and Others* 1996(2) SACR 1 (A) reads as follows: "Lord Coleridge, in *R v Dickman* (Newcastle Summer Assizes, 1910 – referred to in *Wills on Circumstantial Evidence* 7th ed at 46 and 452-60), made the following observations concerning the proper approach to circumstantial evidence:

'It is perfectly true that this is a case of circumstantial evidence and circumstantial evidence alone. Now circumstantial evidence varies

infinitely in its strength in proportion to the character, the variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts around the accused man. That network may be a mere gossamer thread, as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture, that no efforts on the part of the accused can break through. It may come to nothing – on the other hand it may be absolutely convincing. The

law does not demand that you should act upon certainties alone. In our

lives, in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds. The law asks for no more and the law demands no

less."

In *S v Singh* 1975 1 SA 227 (N) the court discussed the approach of a court where there is a conflict of fact. The learned judge says the following at p228F-H:

"it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the state witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the state witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to

apply its mind not only to the merits and the demerits of the state and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt."

An extremely helpful summary also appears in the headnote of the judgment in

S v Radebe 1991(2) SACR 166 (T) at 167j-168h. The summary reads thus:

"A criminal court does not judge an accused's version in a vacuum as if only a charge-sheet has been presented. The state case, taking account of its strengths and weaknesses, must be put into the scale together with the defence case and its strengths and weaknesses. It is perfectly correct that the state case cannot be determined first and if found acceptable regarded as decisive. The state case, if it is the only evidentiary material before the court, must in all cases be examined first in order to determine whether there is sufficient evidentiary material in respect of all the elements of the offence and whether there is not perhaps in any event a reasonable possible alternative hypothesis appearing therefrom. Precisely the same approach is applicable if the defence puts forward a version. Taking into account the state case, once again it must be established whether the defence case does not establish a reasonable alternative hypothesis. That alternative hypothesis does not have to be the strongest of the various possibilities (that is, the most probable) as that would amount to ignoring the degree and content of the state's onus. The state's case must also not be weighed up as an independent entity against the defence case as that is not how facts are to be evaluated. Merely

because the state presents its case first does not mean that a criminal court has two separate cases which must be weighed up against one another on opposite sides of the scale. The presentation of the two cases in that sequence is the result of considerations of policy and effectivity. The criminal court ultimately has a conglomerate of evidentiary material before it

which is indicative of facts against or in favour of the innocence of the accused. Some exculpatory facts may appear from the state case whilst incriminating facts might appear from the defence case, for example admissions made during cross-examination. The correct approach is that the criminal court must not be blinded by where the various components come from but rather attempt to arrange the facts, properly evaluated, particularly with regard to the burden of proof, in a mosaic in order to determine whether the alleged proof indeed goes beyond reasonable doubt or whether it falls short and thus falls within the area of a reasonable alternative hypothesis. In so doing, the criminal court does not weigh one 'case' against another but strives for a conclusion (whether the guilt of the accused has been proved beyond a reasonable doubt) during which process it is obliged, depending on the circumstances, to determine at the end of the case: (1) where the defence has not presented any evidence, whether the state, taking into account the onus, has presented a *prima facie* case which supports conclusively the state's proffered conclusion; (2) where the defence has presented evidence, whether the totality of the evidentiary material, taking into account the onus, supports the state's proffered conclusion. Where there is a direct dispute in respect of the facts essential for a conclusion of guilt it must not be approached: (a) by finding that the state's version is acceptable and that therefore the defence version must be rejected; (b) by weighing up the state case against the defence case as independent masses of evidence; or (c) by ignoring the state case and looking at the defence case in isolation."

From the foregoing it must at this stage already be clear that there is no onus on an accused to convince a court of any of the propositions advanced by him. It is for the state to prove the propositions 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, ..."

All evidence requires a court to engage in inferential reasoning. Reference is hereinbefore made to circumstantial evidence. The question is how should a court approach circumstantial evidence.

In *S v Mtsweni* 1985 1 SA 590 at 593E-I it is emphasised that only proven facts can form the basis for legitimate inferences. Furthermore inferences can only

be drawn if the logical dictates of R v Blom 1939 AD 188 at 202 are fully complied with. In the Blom case WATERMEYER CJ states as follows:

"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."

On more than one occasion hereinbefore I have referred to the question whether any evidence in respect of the complainant's sexual history and experience can and will be regarded as being relevant and admissible. I have also referred to the statement by SCHREINER JA in R v Matthews (supra) that relevance is "based upon a blend of logic and experience lying outside the law". It has also been said that

facts

are "relevant if from their existence inferences may properly be drawn as to the existence of the fact in issue". See

R v Mpanza 1915 AD 348; S v Mavuso 1987 3 SA 499 (A). I have also referred to the fact that the question of relevancy is also dependent upon a consideration of all the facts put before court.

The question of similar-fact evidence was also raised by the state during argument. In The South African Law of Evidence, Zeffertt et al at p251, the learned authors say the following about similar fact evidence:

"The topic of similar-fact evidence, as it has been understood by our courts, involves a consideration of three of the matters that have already been discussed:

- (a) the requirement that evidence, if it is to be received, must be logically relevant and of sufficient probative force to warrant its reception despite any practical disadvantages that might be caused by admitting it;¹ and (b) the rules of the English law, applicable to character evidence,² that have been (c) applied to South Africa by statute. Similar-fact evidence, it will be seen, is only exceptionally admissible.³ It will be received, exceptionally, only if it is, first, sufficiently relevant to warrant its reception and, secondly, if it has a relevance other than one based solely upon character.⁴"

I will later herein return to the question of relevancy and similar-fact evidence in this particular case. Note can, however, already be taken at this stage of what is said in S v Wilmot 2002(2) SACR 145 at 157, paragraphs

[36] and [37] where the court also dealt with a question concerning section 227 of the Act and similar-fact evidence:

"[36] I am mindful of the dangers of a court having regard to what happened in subsequent cases in which a complainant was involved and the Pandora's box of

1 See ch 7.

2 See ch 8.

3 See at 260 et seq below.

4 See at 256, 260 et seq below.

collateral issues which could be opened by doing so. But there can be no absolute bar to doing so. It is obviously something which a court should only be prepared to take into account in circumstances where the alleged behaviour of the complainant in subsequent cases is indicative of a proclivity to level false allegations of a distinctive and similar kind and there is real anxiety in the court's mind as to whether the exclusion of those circumstances may not result in the perpetuation of a possible miscarriage of justice. Just as similar fact evidence is admissible against an accused only in narrowly circumscribed circumstances, so should 'similar fact' evidence of the proclivity of a complainant to give untrue evidence be admissible only in narrowly circumscribed circumstances.

[37] Here we have the disturbing feature that in two other cases involving allegations of rape by the complainant her credibility has been found wanting. Once because she herself made flatly self-contradictory statements on oath as to whether she was raped and once because her evidence conflicted in material respects with that of a friend who also testified for the state. The complainant's evidence in that case was found by the magistrate to be unreliable. There may well be innocent explanations for the latter. It is conceivable that the friend's evidence was the unreliable evidence and not the complainant's or that, faced with the conflict, the magistrate did not know whose version was correct. One does not know. In the former case, it may well be that her initial allegation of rape is indeed true and that her retraction of this allegation was the result of influence being brought to bear upon her but the fact remains that, at best, she succumbed to

the influence and committed perjury in retracting her allegation that she was raped."

In *S v Jackson* 1998(1) SACR 470 (SCA) the supreme court of appeal considered the so-called cautionary rule in matters such as rape and found it to be irrational and outdated. The following remarks by OLIVIER JA at p476e-477d are of great importance to the matter under consideration:

"In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the state to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.

In formulating this approach to the cautionary rule under discussion I respectfully endorse the guidance provided by the court of appeal in *R v Makanjuola, R v Easton* [1995] 3 All ER 730 (CA), a decision given after the legislative abrogation of the cautionary rule in England. Although the guidelines in that judgment were developed with a jury system in mind, the same approach, *mutatis mutandis*, is applicable to our law.

At 732f-733a Lord Taylor CJ stated:

'Given that the requirement of a corroboration direction is abrogated in the terms of s 32(1), we have been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge ought in summing up to a jury to urge caution in regard to a particular witness and the terms in which that should be done. The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving 'discretionary' warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court would

be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content."

With the foregoing in mind I have approached the facts and the legal position applicable thereto.

Whenever the complainant could she referred to the accused calling her "my daughter" and to the fact that she regarded him as her father. That was denied by the accused. He said that he did not even call his own daughters "my daughter". It is clear that the complainant tried to persuade the court that she had a very deep and intimate father/daughter relationship with the accused. That was also a vital aspect of her freezing version and an attempt of discrediting the accused.

The complainant was born on 17 September 1974. She met the accused as a child of 5 years old during or about 1979. Her father died on 1 May 1985 when she was 10 years of age. During the period 1979 to 1985 she had seen the accused on a few occasions. Not only was she a child at the time but both the accused and the complainant, with her parents, were in different places outside of South Africa. The complainant returned to South Africa with her mother during December 1990 when she was 16 years of age. She can recall that she spoke to the accused again in 1998 when she was 24 years old. It appears that for a long period, in fact approximately fourteen years, she had no contact with the accused. The complainant started working in Pretoria in 2001 when she was 27 years of age. In that period she saw the accused more often. She,

however, left for the United Kingdom during 2002 until October 2003. She was 29 years of age when she returned from the United Kingdom. During the period in the United Kingdom there was no contact between the complainant and the accused.

The complainant also tried to show that she was a good friend of one of the accused's own daughters. The only daughter it could have been is Duduzile Zuma. It is not disputed that Duduzile was also in exile but when the complainant saw her in South Africa she did not recognise Duduzile. Strangely enough when Duduzile saw the complainant for the second time at her father's home on 2 November 2005 she was irritated because she regarded her as a child of a comrade who again wanted money from her father. It is clear that Duduzile did not regard the complainant as a close family friend. The fact that the complainant called the accused malume and showed him respect does not prove that there was a father/daughter relationship between them. In court the complainant even referred to Kasrils as malume Ronnie. The term malume does not indicate that an older person is regarded as a father figure. Nomthandazo Msibi, a young lady of approximately the complainant's age and also a close friend of the complainant, denied that the accused had ever called the complainant "my daughter". She indicated that the complainant regarded the accused as her father but at the same time she said that she herself regarded him as her father. I will later refer to my impression of the various witnesses

but in this specific aspect I was not impressed by Ms Msibi's evidence.

I am not prepared to accept the complainant's evidence that there was a father/daughter relationship between her and the accused.

The versions of the complainant and the accused as to what happened before and after the alleged rape are identical in many respects.

I will first deal with some of the events before the rape took place.

It is common cause that the complainant was upset about a child who was bitten by a snake in Swaziland. As a result thereof she contacted various people including the accused. It is common cause that she did not go to Swaziland but instead went to the accused's home that evening. It is in dispute as to whether the accused invited her to go there or whether she invited herself. It is common cause that the complainant stayed for the night. It is in dispute whether the accused invited her to stay over or whether the complainant indicated that she would be staying over. Duduzile Zuma supports the accused's evidence that there was talk that the complainant would leave with Kadusha but later decided not to do so. Though Duduzile Zuma was not privy to the discussion between the accused and the complainant as to the complainant leaving for home, the probabilities in the light of Duduzile's evidence favour the accused's version. Coupled with that is the statement that Duduzile overheard when the complainant said that she normally carries a panty and a toothbrush in her back pack. Other evidence by Duduzile, referred to above, is indicative of the fact that the complainant, according to her, wanted to discuss something with the accused on the night in question.

It is common cause that when the accused and the complainant were alone when Duduzile took Kadusha home there was again talk about a boy friend and the accused's physical needs in spite of her HIV status. It is common cause that the accused had to do some work in his study. It is common cause that Duduzile returned back after having taken Kadusha home and it is common cause that at that stage the complainant was in the guest room and most probably having a shower. It must be accepted that Duduzile said goodnight to the accused before the complainant visited Duduzile in her room. It is common cause that the complainant wanted a book to read and that both the complainant and Duduzile went to the study where the accused was. It must be accepted as a fact that there was no need for Duduzile to say goodnight to her father a second time. There is but only one reasonable deduction from the facts and that is that the complainant wanted to see the accused at the time. The accused said that during the conversation in his study the complainant told him to wake her up even if she was asleep. Mr Kemp argued that the reason for the complainant's visit to the study was to ensure that the accused would see her later that night. I think the submission is correct.

It is clear that the accused did receive a telephone call when both the young ladies were in the study. On the probabilities it, however, is clear that in spite of the complainant's say-so nobody who phoned the accused that night wanted to come and see him.

According to the complainant the accused made reference to her coming to his bedroom before she left the study at that time. On the accused's version she did visit him in his bedroom later that night.

It is common cause that the accused visited the complainant in the guest-room at least once that night. According to the complainant the accused was merely there to say that he was attending to his visitors and would see her again later. On the accused's version there were no visitors to attend to and he invited the complainant on this occasion to his bedroom. When the complainant and the accused met again the alleged rape took place. According to the complainant it took place in the guest-room and according to the accused the consensual intercourse took place in his own

bedroom. It must be remembered that whatever happened between the complainant and the accused happened in his own home. There was no need for the accused to say that consensual sex took place in his bedroom instead of in the guest-room. Obviously it would tend to make the complainant's case stronger if sex took place in the guest-room

because if it took place in the main bedroom she must have gone there and it would be more difficult to prove rape. Similarly it would be better for the accused if his version is accepted that the complainant came to his bedroom instead of him having had sex with her in the guest-room. But, as I have already pointed out, nothing would have prevented the accused from saying that everything he said took place in the main bedroom in fact took place in the guest-room. I find it difficult to see what advantage the accused could gain by making his version more difficult by transferring what happened in the guest-room to the main bedroom.

The state placed a completely different interpretation on the accused's visit to the guest-room.

It was submitted by the state that the accused was implementing a plan all evening of 2 November 2005. He was making sexual overtures, referring to tucking in, massaging, etc. Eventually, according to the state, when the complainant did not submit to these sexual overtures the accused decided to rape her when she was asleep. I have difficulty in accepting that version. It would be foolish for any man with a police guard at hand and his own daughter not far away to surprise a sleeping woman and to start raping her not knowing whether she would shout the roof off. In fact the state submitted that when the complainant did not react the accused started talking to her to get some reaction from her. That would have been even more foolish for a rapist if he wanted to rape a sleeping woman now to wake her up to get her co-operation to increase his sexual pleasure and at the same time not knowing whether she would scream for help.

It is common cause that after intercourse had taken place the accused visited the complainant in the guest-room. According to the complainant this was the third visit to the guest-room and according to the accused the second visit. It is not necessary to refer again to the complainant's and the accused's different versions as to the alleged rape and what took place immediately thereafter.

The state argued that the accused was aware of what he had done wrong and he therefore visited the complainant on this occasion in the guest-room to do some damage

control. Mr Kemp on the other hand argued that unlike what was normally expected the accused did not stay in bed with the complainant after their intercourse cuddling her and making small talk but instead got up to have a shower. Mr Kemp argued that both complainant and accused had realised that they had had intercourse without a condom and all the accused was doing was trying to clean himself as soon as possible. Mr Kemp further argued that it is quite possible that the complainant took some exception to the accused's action and therefore left the main bedroom and went back to the guest-room. He argued that because the complainant unexpectedly left the main bedroom the accused went down to the guest-room.

The discussion that took place in the guest-room, and which is fairly common cause, is not in line with rape that had just taken place. Only a foolish, over-confident rapist would have dared entering the room of his victim not knowing whether she is going to shout and scream or not. Instead the discussion that took place is not indicative of a rape shortly before.

I will later deal in more detail with the complainant's version that she froze at the time. I will at that stage deal in more detail with the evidence of Dr Friedman and also the evidence of Dr Olivier. I will then also give my impressions of the complainant as a witness.

The evidence of the complainant's mother does not really take the matter much further. It is clear that she was upset about the allegations of rape. It is common cause

that the accused apologised to her. It was never said that he apologised because he raped the complainant. The accused said he apologised because the witness was upset about what had happened. It is clear that different people wanted to put a stop to the allegation of rape and any possible criminal trial. That in my mind is understandable. For a person in the position of the accused to make every attempt to stop the accusation from spreading further is logical. For a friend like Dr Mkize to do so is also understandable. I need not refer to the other people who also tried to do the same.

The complainant's mother is an elderly lady. Her evidence was not in all respects coherent. I am not saying that she was lying to the court. In certain respects her memory was bad and perhaps conveniently so. I refer in this instance to the evidence of Pastor Mbambo. I was, however, not much impressed by the complainant's mother's evidence.

The evidence of Nosipho Mgudlwa, also known as Pinkie, does support the complainant's version. She did find the complainant subdued and not her giggling self. The complainant did say that she was raped and that she cried. In the same vein the evidence of Nomthandazo Msibi, also known as Kimi, supports the evidence of the complainant, in particular her evidence that she was dismissive, abrupt and talkative. The fact that she was unsettled and restless and that she said that she did not want to see the accused again is supportive of the state's case. The witness could not, however, contribute much about what actually had happened on the night in question. The same holds true for Kimi's evidence.

I prefer to deal with Taioe's and Linda's evidence somewhat later.

As appears from the foregoing the accused denied the allegation of rape and said that consensual sex took place in his bedroom.

Before dealing with the evidence of Dr Friedman and Dr Olivier and the evidence that followed on the successful application by the defence in terms of section 227 of the Act the following should be emphasised.

Prior to the rape and in the preceding two months, the complainant had sent 54 sms messages to the accused. It appears that a change in the tone of the sms messages has also taken place in that they ended off with "love, hugs and kisses". It appears as if the complainant was seeking to make

regular contact with the accused. In the accused's house the complainant walked around in a kanga with no underwear which prompted Duduzile Zuma to say that she was inappropriately dressed. Sexually charged conversations took place between her and the accused. It is common cause that the accused and the complainant arranged that he would come and see her in her room sometime during the evening. The complainant did not object to this. She did not object when he came to her room. She also did not object when he said that he would come later again. The complainant who is an experienced person in life did not find these arrangements strange at the time or recognised any of the sexually charged remarks. After the alleged rape she was very quick to recognise those indicators.

As far as the rape itself is concerned there are a few very strange and odd features. The complainant is not in any way threatened or physically injured. Her clothes are not damaged in any manner. At no stage did the accused resort to physical violence or any threat. The accused knew that he was in danger of contracting HIV if he had to forcefully have sexual intercourse with the complainant because an abrasion or scratch inflicted on him during the sexual encounter may be responsible for HIV infection. The complainant was at least a reasonably fair match physically for the accused, being 31 years old herself and weighing 85kg compared with the accused who was at the time 63 years old and weighing 90kg.

A very odd feature is that the alleged rape took place within ten metres of a uniformed policeman with the accused's grown up daughter not far away.

As stated I will later deal with Dr Friedman's evidence but it appears to be very odd that from the time the complainant assisted in rolling onto her back and having her clothes removed, she did not utter a single "no" throughout her vagina being touched and at least ten minutes of intercourse. At no stage was there any call for help which was immediately available.

During the "rape" the accused uttered words of endearment to the complainant, not a single one whereof has the connotation of dominance or abuse.

After the "rape" the complainant was in a position to immediately phone the world and to tell them about it but she instead decided to report to her close friends in terms indicating that no rape had taken place. The complainant was also in a position to leave the house immediately but she preferred to stay there for the rest of the night and not even locking the door. The next morning she wandered around in the house for at least one and a half hour. She took food from the fridge, she showered and made phone calls from the house's landline before leaving for work.

If one looks at the allegations about rape and attempted rape in the complainant's past she was clearly not slow to report such incidents and to resist, save on the one occasion that she said she was unconscious.

As a teenager the complainant was treated in a mental hospital and she was suffering from hallucinations. It appears that she is at present still receiving psychological treatment. It is therefore very strange that the complainant refused to undergo a psychological evaluation from an expert psychologist engaged by the defence where it could have revealed sexual pathology giving rise to false rape allegations.

According to both Drs Friedman and Olivier victims of rape normally wash themselves as soon as possible and they suffer from depression. The complainant did not wash immediately and she does not suffer from depression.

The accused's question regarding him ejaculating in her is indicative of the fact that he was prepared to withdraw the moment the complainant wanted him to.

I have referred at some length to the application in terms of section 227 of the Act and the cross-examination and evidence that followed.

In argument Mr Kemp submitted that irrespective of an order in terms of section

227 of the Act the defence would have been entitled to at least cross-examine the complainant on certain aspects of her evidence. He further submitted that ex abundante the application was couched in wide terms for the complainant's protection. Mr Kemp is correct. I, however, do not find it necessary to discuss the detail of the argument as an order was granted.

Mr Kemp further submitted that now that the evidence is before court the credibility and effect thereof should be considered and not so much its relevance. He did not say that even irrelevant evidence should be considered. I am satisfied that he is correct. Where necessary I will still consider the question of relevancy.

In her memoirs (the intended book) reference is made by the complainant to two instances of rape when she was 5 years of age. That must have been in 1979. A clear reference to rape was made. During cross-examination the complainant said that in one instance it was not rape but only "an experience with a penis". In the other instance she was raped. Mr Kemp did not investigate that further and I think correctly so. Nothing

much turns on this save for the fact that the word "rape" was used when no rape took place.

The incidents with Godfrey and Charles must have taken place during 1987 and 1988. The complainant said that both Godfrey and Charles were convicted and sentenced for the rape. The evidence of Ntswaki Nigxashe makes it clear that Godfrey and Charles did not rape the complainant.

The evidence concerning Godfrey and Charles was led, not to reflect on the complainant's bad sexual history or sexual experiences, but merely to indicate that she was prone, at a young age already, to make allegations of rape when no rape took place. Sigxashe referred to the person known as Mashaya who later turned out to be Mbuso Ncube. Reference is made to Mashaya in the memoirs where it is alleged that he attempted to rape her.

Mashaya (Mbuso Ncube) testified. He denied any attempted rape. He said he was in love with the complainant. He also confirmed the problem between the complainant and Godfrey's girl friend.

Again we have an allegation of rape (an attempt in this instance) which is refuted.

In her evidence the complainant denied that she ever had penetrative sex with Mashaya. He denied that and said that they had had penetrative sex on more than one

occasion in his car and once in his house. In her denial of penetrative sex with Mashaya the complainant was vacillating from a denial to lack of memory to "perhaps". Most unsatisfactory evidence.

The evidence was not tendered for any other purpose than to indicate that the complainant is prone to make false allegations of rape. The evidence of Mashaya concerning intercourse that in fact took place was led to show that the complainant was lying when she tried, unpersuasively so, to prove that she had had no penetrative sex with him.

In the summary of the evidence I have dealt with different other allegations of rape too.

In 1994 the accused alleged that Nestor had raped her. That was disproved by the evidence of Mbambo. In 1994 the complainant accused Sandile Sithole of attempted rape. Sithole testified. He denied having attempted to rape the complainant. There is no reason why Sithole's denial should not be accepted.

In 1995 the complainant was a student at the RR Wright theological seminary in Vereeniging, also known as the Wilberforce Institute (1908). At the seminary a number of incidents occurred leading to certain accusations made by the complainant. The witness Matsoko at a stage proposed love to the complainant. She refused his advances

and he left. The next day he was accused of having raped the complainant. Matsoko was expelled from the seminary. Matsoko denied having raped the complainant.

Modise testified that in 1995 at the seminary he was madly in love with the complainant, that they had a relationship and that they were inseparable. When he wanted to make love to her, he said she went mad. Nothing really happened between them. Later he heard that according to the complainant he had raped her.

Still at the seminary in 1995 the complainant fell ill and Mahlabe, the boarding master, helped her only to be accused some time later that he had raped her and that he was the father of the child she aborted. Mahlabe was also aware of the allegation against Matsoko and was co-responsible that he was expelled from the seminary.

Later in 1995 after the complainant had left the seminary and could not produce a matric certificate, she accused Mbambo of rape and when she was confronted about the allegation by Mbambo in front of members of the church the complainant referred to the church as a dirty church and left.

The evidence of and regarding Sithole, Nestor, Matsoko, Modise, Mahlabe and Mbambo was not led to show that the complainant was of loose morals. The evidence was led to show that the complainant was inclined to falsely accuse men of having raped or attempted to rape her.

The complainant's answer to the allegations by or concerning Sithole, Nestor, Matsoko, Modise, Mahlabe and Mbambo was either a blank denial or that she did not know the specific individual.

It cannot be said that all these witnesses conspired against the complainant. There was not even an attempt to suggest that the witnesses were part of a conspiracy. In view of Duduzile Ncobo's evidence such an attempt would not have succeeded.

I have no hesitation in accepting the evidence of Mashaya, Sithole, Matsoko, Modise, Mahlabe and Mbambo. The evidence of Duduzile Ncobo was in particular convincing.

The evidence of Manzi and Mpontshani was also summarised earlier herein. I seriously considered whether the evidence of these two witnesses was relevant or not. I eventually concluded that the evidence was relevant.

As far as Manzi is concerned, it appears to be relevant in that the complainant explained to him how she met Mpontshani and what she told him at the time. I have referred to the fact that she, according to her, told Mpontshani in no uncertain terms that she wanted to have sexual intercourse and that she wanted it immediately. It appears that she is a woman who is not scared to tell men of her sexual needs. The complainant's attitude is further illustrated in the evidence of Manzi when he said that while he was having a bath the complainant came into the bathroom, undressed and got into the bath

with him. It was not strange to her to be naked with a man whom she had met only a week before.

When Manzi again met the complainant two years later, ie in the year 2000, she told him that she was HIV positive and referred to a rape which took place five years earlier. That can only refer to the alleged rape by Mahlabe. I have no reason not to accept the evidence of Manzi.

Mpontshani met the complainant in 1996. They had sex on various occasions. The witness confirmed Manzi's evidence in broad detail namely that Manzi met the complainant in 1998 and that the complainant again visited the place where he and Manzi stayed.

I am aware of some differences between the evidence of Manzi and Mpontshani. I have referred thereto earlier and I need not repeat it again. Although Mpontshani's memory failed him in some respects, his evidence has a clear ring of truth.

The evidence of Commissioner Taioe and Superintendent Linda is said to be inadmissible as it relates to information obtained from the accused unconstitutionally. I have hereinbefore dealt with the question of a follow up meeting, the fact that the accused was warned on 10 November 2005 when the warning statement was obtained from him and that it is alleged that that warning was still applicable on 15 November 2005. I have also referred to the fact that according to both policemen the accused's

attorney was at all times present and that there was therefore no reason to warn him again.

At the time Commissioner Taioe saw the accused on 10 and 15 November 2005 he had not only read the complainant's statement but he had consulted with her as well. He must have known what the complainant's version was. On 15 November 2005 he was aware of the fact that the accused had denied having raped the complainant and had stated in his warning statement that he and the complainant had conversed "and shared in each other's company privately" and further stated in paragraph 14 thereof "much later that evening at approximately 11:30 she retired to the room prepared for her where she spent the night".

In spite of that he wants me to believe that he nonchalantly asked the accused to point to him where the alleged crime scene is and that the accused then in an unguarded moment pointed out the guest-room. That is in any event not borne out by the photographer's description of what was pointed out. For the same reason I am not prepared to accept that the commissioner asked the further two questions, one in the guest-room and one in the main bedroom.

The commissioner had great difficulty in explaining why the questions had to be asked in the way he said he had asked them.

Surprisingly the commissioner regarded the answer as very important but did not refer thereto in his statement. This statement by the commissioner shows the lie in his evidence. At the time he could not have regarded the accused's alleged answer as of any importance whatsoever.

Superintendent Linda had to defend the commissioner bravely and referred to the cool manner in which the commissioner had asked the questions. In order to convince me that he was correct in his evidence Superintendent Linda had to rely on his youth and therefore his good memory.

I am not in the least impressed by this piece of evidence by the commissioner and the superintendent. On the probabilities the accused would not have answered as stated by them.

I therefore cannot accept the version of the two policemen in this respect.

The overall probabilities in the matter also militate against their versions.

Even if the admissibility of the two policemen's evidence is to be approached from a constitutional point of view I am satisfied that it is inadmissible. It would have been the easiest thing for the commissioner to have warned the accused again which he is expected to do whenever he puts questions to or interviews a suspect. If one looks at the contents of the accused's warning statement and what the commissioner must have

known of the matter at the so-called follow up meeting, his alleged questions were nothing less than a trap for the accused. There was therefore, in my judgment, a clear breach of the accused's constitutional rights.

Earlier herein I stated that I would again refer to the evidence of the two experts, Dr Friedman and Dr Olivier.

From the summary of their evidence the differences in their approach should be clear. I do not want to deal with their evidence in any detail again. In my judgment it is clear that Dr Friedman came to a conclusion without having made full enquiries from the complainant, that she did not obtain all detail from her and furthermore did not make use of available psychometric tests. I agree with the evidence given by Dr Olivier that I cannot rely on the evidence of Dr Friedman to conclude that the complainant did freeze at the stage when intercourse took place on 2 November 2005.

From the foregoing it should be clear that I find that consensual sex took place between the complainant and the accused in the main bedroom. It is therefore not necessary for me to deal with the question of the absence of mens rea which was again raised by Mr Kemp.

It may be asked why the complainant who is inclined to lesbianism would have had consensual sex with the accused. The answer lies in the complainant's history. The complainant regards herself as being bisexual but inclined to lesbianism. She was

prepared to have penetrative sex with men on various occasions but also as late as 1996, 1997 and 1998 according to the evidence of Mpontshani. According to the complainant herself she had sex with a male in July 2004.

The question can also be asked why would the complainant allege that she was raped by the accused when it was in fact consensual sex that took place. Why would a woman in her position go through all the trauma in terms of the trial and publicity when she was not really raped. It is in this respect that the reference to previous false rape allegations become of the utmost importance. This case is in my judgment a good illustration why pressure groups and individuals should not jump to conclusions and express criticism before having heard all the evidence. At the time when I allowed the complainant to be cross-examined on her sexual history and evidence to be led in that respect I was fully aware of what was contained in Hulley's affidavit. I realised that there was at least a possibility that at the end of the case it could be said that a false accusation of rape was made against the accused. Instead of waiting some people stated categorically that rape victims will as a result of this case be hesitant to report an incident of rape because of the treatment the complainant received, apparently also by the court. Much was also said about the protection the proposed new Sexual Offences Act will afford to rape complainants. I have referred to that Act and if it is necessary for the defence of an accused the same process will have to be followed in the future.

In many respects this is a unique case with unique features. Instead of scaring off unfortunate rape victims it should have been pointed out and emphasised that unfortunate

victims of rape will be treated differently because they are different from the complainant in this matter.

A further question that can be asked is why will the complainant deny that she knows any of the men who alleged that she had falsely accused them of rape or attempted rape. The answer must be obvious. That is that she cannot admit that she had done so in the past because then it will be found out that she has done it again. The evidence of Duduzile Ncobo and Mahlabe should not be forgotten. Both these witnesses in all earnesty said that the complainant is a sick person who needs help.

A vital question is why would the complainant shout "rape" when she was a willing participant in sexual intercourse? I have referred to the statement of Ncube and of Mahlabe. I have also earlier herein referred to what Dr Olivier advanced as possible reasons why a complainant would make a false allegation of rape. It is quite clear that the complainant has experienced previous trauma and it is quite possible that she perceives any sexual behaviour as threatening. It is quite possible that after intercourse had taken place there was the feeling of guilt, resentment, anger and emotional turmoil.

This trial was unfortunate in many respects. It had a damaging effect on both the complainant and the accused. In my view both of them are to be blamed for the fact that it affected them. The accused should not have had sexual intercourse with a person so many years younger than himself and furthermore being the child of an old comrade and a woman plus minus his age. The complainant said that in spite of her own attitude that

she would not have unprotected sex, it still remains the choice of a person to have unprotected sex. In my judgment that is exactly what she and the accused did that night of 2 November 2005. Having heard the evidence of Prof Martins it is inexcusable that the accused did so. It is totally unacceptable that a man should have unprotected sex with any person other than his regular partner and definitely not with a person who to his knowledge is HIV positive. I do not even want to comment on the effect of a shower after having had unprotected sex. Had Rudyard Kipling known of this case at the time he wrote his poem "If" he might have added the following: "And if you can control your body and your sexual urges, then you are a man my son."

From the foregoing it is clear that the probabilities show that the complainant's evidence cannot be accepted. She is a strong person well in control of herself knowing what she wants. She is definitely not that meek, mild and submissive person she was made out to be.

On the evidence as a whole it is clear that the accused's version should be believed and accepted. The accused's evidence was also clear and convincing in spite of media efforts to discredit him. At least one cannot say that the accused's evidence is not reasonably possibly true.

The state applied that the court order, exhibit "B", be further amended to protect the complainant's identity and that the kanga be handed back to her. I am prepared to do so. I therefore make the following

orders:

1. The order of court, exhibit “B”, is amended by adding the following at the end thereof: “The complainant’s name and photograph may not be published without her and the Director for Public Prosecutions for the Witwatersrand Local Division’s written permission.”
2. The kanga, exhibit “1”, may be handed back to the complainant.

In my judgment the state has not proved the accused's guilt beyond reasonable doubt. The accused is found not guilty and is discharged.

W J VAN DER MERWE

JUDGE OF THE HIGH COURT

FOR THE STATE: ADV C DE BEER, H J BROODRYK SC, W NGABELA INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS, JHB

FOR THE ACCUSED: ADV K J KEMP SC, J BRAUNS SC, T MBONGWA INSTRUCTED BY: BRIAN HULLEY & ASSOCIATES, DURBAN

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