

IN THE HIGH COURT OF SOUTH AFRICA  
WITWATERSRAND LOCAL DIVISION

**Case No.**

In the matter between:

**THE STATE**

versus

**JACOB GEDLEYIHLEKISA ZUMA**

Accused

---

**ACCUSED'S SUPPLEMENTARY HEADS OF ARGUMENT**

---

**THE HIV ISSUE**

1.

The Prosecution argument is fatally flawed both in respect of the proof of status of the Accused and the significance of his status.

**PROOF**

2.

The Accused testified clearly that he is HIV negative - he has been tested a number of times in the past, the last time in March 2006 (the window period being 2½ - 4 months - Prof. Marten).

3.

The Accused testified that he uses condoms unless procreation is intended. He has a number of children and his wives get tested when they give birth.

4.

The Prosecution has no factual basis for putting the proposition, and it ought not to have been put to the Accused that he is HIV positive. It relies on:

4.1. The Accused's reference to certain herbs etc. which were recommended to him. In context, the conversation as recounted to the Complainant does not in any manner suggest either use or possession of the herbs or other treatment and there is no evidence that she even understood it in that manner. He raised it as a possible treatment for her and given his position in the anti-HIV campaign. He would know about

such issues and people would know he is interested therein.

- 4.2. He would not have had intercourse with the HIV-positive Complainant unless he was HIV-positive. But the State's case is that she, who was HIV-positive, would not have unprotected sex because of some unknown risk of re-infection - so why in his case is a willingness to have such sex, a pointer to an HIV-positive status? What is sauce for the goose, is sauce for the gander - whether positive or negative, he should not have had unprotected sex with her.

5.

There is nothing which detracts from the Accused's evidence. Moreover, the argument loses complete sight of the onus and that an HIV-positive finding, involves a change in status.

- 5.1. When the Accused was born, 64 years ago he was HIV-negative - the first case of HIV had not even been reported yet. Save to impugn the status of his parents, which has not been done, and explain the medical miracle that HIV left him physically unaffected for 64 years, there can be no other

conclusion.

- 5.2. A finding of him being HIV-positive thus requires a finding of a change in status. There is also a presumption of continuity.
- 5.3. It would have been remarkably foolish of the Accused and the Defence to claim the HIV-negative status if they had any reason to suspect that this was not correct as well as being unethical to allow the Accused to state that the test results are with his lawyers in Court if they were not.
- 5.4. The Prosecution had every right to ask for the test results and do whatever investigations they wished to (compare the request for the Complainant's passport). They chose not to do so. Handing in the test results would have taken the matter no further for the Defence - the document itself takes it no further than the Accused's testimony and there was no reason for the Defence to gratuitously burden itself with an onus it did not bear.
- 5.5. This is particularly so because the Prosecution was at all times

entitled to take a blood sample from the Accused to establish his HIV status which clearly was an issue given the provisions of section 51 of Act 105 of 1997.

- 5.6. The Prosecution thus relies on a change of status - the presumption of continuity also applies - if they wish to assert and rely on a change of status, they were obliged to prove that.
- 5.7. The Prosecution had every opportunity to do so. In terms of section 37(2) of the Criminal Procedure Act 51 of 1977, they could simply request a blood sample and test it to establish his HIV status. They could even, outside this section, have asked him and he could have hardly refused (see the adverse inferences in paternity suits following a refusal). Indeed, they are in possession of a sample of his blood.
- 5.8. The Prosecution did not ask for the test results. Common sense dictates that the HIV-negative evidence would not have been led and the claims of test results made, if this was not so. To have put up the certificates would not afford positive proof - there was no reason for the Defence to assume an onus

it never had to prove.

5.9. Obviously the test was only done shortly before the trial in march 2006 - the 4 month window period was awaited from 2 November 2005.

5.10. There is no reason why the Defence should be out of pocket in order to call unnecessary witnesses. [And would if the HIV status of the Accused was a concern to the Defence, the whole of Dr. Nkobi's sampling not have been made unnecessary by an appropriate admission?].

5.11. The Complainant gave not the slightest suggestion that she had any reason to suspect the Accused was HIV-positive. She was an HIV activist with considerable knowledge - she would have been able to discern the slightest indication. Moreover, she and her "father" who discusses such things, would surely have shared their common plight.

5.12. What is completely inexplicable is why it is suggested that the Accused will tell a lie about his status which can readily be

exposed but fails to tell a simple lie involving a burst condom which makes the whole HIV debate superfluous and provides another reasons for a false rape charge (resentment about his improper use and free treatment for exposure to pregnancy, rape etc.).

- 5.13. There is of course no evidence that the Complainant was re-infected with HIV as a result of intercourse. It is clear that the Complainant had been available at all times as were any battery of experts to show this (few rape complainants discuss the finer details of their cases with the Police Commissioner of Intelligence - p. 130).

6.

The Prosecution argument is thus simply not understood. The Accused had sex with the Complainant without a condom. If this was rape, the risk of contraction was very much higher. How does this support rape?

7.

The twisting of the conversation with the healer to suggest the Accused was

HIV-positive, is somewhat mischievous. Moreover, to suggest in argument that he will lie about the test result which he said was in Court with his legal representative (and which the State simply could ask to see) and when they can call his bluff by asking him for a blood sample (how can he refuse?), smacks of sheer obtuseness.

8.

What is, in any event, totally astonishing, is the argument that the Complainant would not have sex with the Accused because she would risk her life because she is HIV-positive! The inherent contradiction and double standards are obvious. It is also not clear why it suffices for the Complainant to claim she is HIV-positive but why the Accused's evidence to that effect is not good enough.

9.

The HIV issue is a red herring. It operates only in favour of the Accused with regards to the probabilities in respect of rape/consensual intercourse. It was introduced and persisted in only to harm the Accused in the political/public arena.

**THE TELEPHONE CALL IN THE STUDY**

10.

The Prosecution's attempt to avoid the very serious blow towards any acceptance of the Complainant's version which the reliable evidence presents, is total conjecture and speculation which runs counter to every relevant fact in this case. The Prosecution's "explanation" must be seen against the failure of the Complainant to mention the call and its sequel on two relevant contextual issues in her statement and raising it for the first time in her evidence.

10.1. The State has sought the Accused's telephone call records. For the purposes they sought them, it was vital that they put up the calls to and from his telephones. These records were put up. All the calls made or received by the Accused from his phones were recorded and are before the Court. At no stage did the Defence even suggest otherwise.

10.2. It was specifically put to the Complainant that all the person who phoned him on his cellphone between 21h45 and 22h15 on 2 November 2005, deny making a call with the content testified to by the Complainant. This was a clear assertion at

the commencement of the case that the cellphone in question was the only cellphone on which he could have taken the call. This was never challenged though the State had every means to do so. On the contrary.

- 10.3. Duduzile testified that the Complainant had phoned Swaziland on her father's cellphone - the records reflect that. She also testified that the call in question came through on his cellphone. *Cadit questio*. She is clearly talking about one phone. Not a single witness talked about a phone or cellphones in the plural in relation to the Accused.
- 10.4. The Complainant, his "daughter", did not mention any other cellphone owned by the Accused.
- 10.5. It is perfectly clear from the State's cross-examination of the Accused that he was alleged to have only one cellphone at the time and his answers clearly confirmed it. In respect of Samkele, it was put to him that there was no record shortly after 2 November 2005 of any phone call by Samkele to him - the implication being that he is lying about receiving such a

call. His explanation was not that he could have received such a call on his other cellphone - it was that she may have used another phone with an unknown number (see: p. 1027-1028). So too the cross-examination and argument regarding the history of his phone call conversations with other witnesses. It is very clear only one cellphone, operated by the Accused, is postulated - if not, the cross-examination and argument is improper.

10.6. The suggestion that “L” indicates that he had another cellphone on 2 November 2005 is ridiculous (and he clearly had his cellphone with him on 2 November 2005 as the records indicate - two cellphones should have registered with one of the 3 witnesses). “L” does not reflect it as his phone - it reflects it as the deponent’s phone number/contact number as at 10 November 2005. It was, and still is, the easiest thing in the world for the State to establish whose phone number it is and to get the records as they did with all his other phones (and surely they did so if they had the slightest suspicion that he operated that telephone). If they neglected to do so, they are expressly invited to do so and testify to the results (just

phone it). It will take approximately 1 minute to check and 1 minute to testify to it (see also the 2 cellphone records of Dr. Mkhize).

11.

It must be borne in mind:

- 11.1. The telephone call with this content did not feature in the statement.
- 11.2. That the “visitor” meeting did not feature in the communication to her on the first visit in her statement.
- 11.3. That the first time this featured was when she was in the witness box.
- 11.4. That this content was necessary to give sense to the first meeting on her version.

**MENS REA**

12.

This will remain an issue only if the Accused's essential version is rejected and the Complainant's essential version is accepted as sufficiently proved. In that, with respect, unlikely event, the State should still fail on the issue of *mens rea*.

13.

The position is worse for the State than at the section 174 application in that:

13.1. The credibility of the Complainant was not a major issue. At this stage, given her defects as a witness, her version must be shorn of its dubious features at least.

13.2. Probable features of the Accused's evidence which accords with other reliable witnesses, must be taken into account together with their evidence.

14.

The additional aspects must now include:

14.1. Only credible portions of the Complainant's evidence is to be considered - where there is a question mark about a specific point, that part cannot weigh against the Accused. These include the following:

14.1.1. Her evidence of the third "No" cannot be accepted . The Complainant only protested to the proposed massage and all protests disappeared thereafter. Not only was there total acquiescence to a series of overt sexual acts in preparation for intercourse which provided ample opportunity for protest or resistance, both likely to prove effective, but there were also acts of active participation, e.g. rolling over. In short, the third "No" must, on account of its absence and indeed lack of viability in the statement, and Dr. Friedman's evidence, be discarded.

14.1.2. Her evidence of him restraining her hands cannot be accepted.

- 14.1.3. She being in a daze afterwards cannot be accepted.
- 14.1.4. There was no close “father/daughter” relationship.
- 14.2. Her evidence must be considered in the light of conflicting and supplementary evidence by other witnesses.
  - 14.2.1. She visited the study to speak to him and did not change the initial arrangement that he would come to her room (see: Accused’s evidence and that of Duduzile).
  - 14.2.2. Her behaviour afterwards is reflective of a belief that she was not raped - the SMS’s, her staying over, her not locking the door, the lack of fear for the Accused, her not washing etc. - if she had such a belief, how much more he.
  - 14.2.3. The Accused was HIV-negative, he was the one

at risk. The risk in case of rape was much higher and he knew this. He also knew that any nick or scratch to him in the case of resistance would increase his risk enormously.

14.2.4. The Complainant herself indicated that the reason why the Accused did not phone her was because he probably did not think he had done anything wrong (see: p. 206). This was not mentioned at the section 174 application.

14.2.5. The visit to the study was a gratuitous visit to ensure that the Accused would later visit her and also to show herself off, dressed (inappropriately) in a kanga. Duduzile's evidence cannot be otherwise interpreted. This accords for her total lack of surprise at and questioning of, the presence of the Accused in her room. The visit had clearly not been cancelled.

**THE PROSECUTION'S CRITICISM OF THE ACCUSED**

15.

A sentence by sentence answer to this would invoke the very technique the Defence contends is not the proper approach. The overall response and some examples of the defects in reasoning are thus all that are raised.

15.1. It is in submission not particularly instructive to do a sentence by sentence analysis of the testimony of a witness and criticise it in that manner. There is a ready danger therein to read such bits of testimony out of context. This is in submission why much of the criticism of the Accused's evidence is misplaced.

15.2. The criticism regarding the fact that he did not ask her about her journey (see: p. 1027). In context, it relates to a general discussion whether she is fine etc. to show he cares. Otherwise one falls into a strict literal interpretation of selected bits of evidence.

15.3. The Complainant being in the Accused's camp. She was also an adherent of Minister Kasrils and he was in the opposite camp.

15.4. The Accused did not say she only joined them at lunch. He clearly meant she joined into the preparations later.

15.5. The State makes much about the Accused not forcing the Complainant to disclose what she wanted to discuss with him and that she, if she had something to discuss, would have done so earlier (see: p. 261).

15.5.1. This brands Duduzile a liar - she clearly was not regarding the study visit.

15.5.2. This depends on what she wanted to discuss with him; if it was up close and personal, there is nothing odd about it.

15.5.3. Nor would he push it - from just after dinner, there was some sexually charged conversations between them.

The Accused was willing to wake her because she specifically

asked him.

15.6. The suggestion that the Accused lied about the matter being in the newspapers prior to 10 November 2005. Clearly everyone knows (including the Accused) that it was only **published** on 13 November 2005. The rest of the explanation simply explains that by 10 November 2005, journalists were already seeking information from him about this. There is no basis in the absence of a testing hereof to suggest that this is a lie.

15.7. The Prosecution's case isolates the Accused's version almost by answer word for word. This resulted in wholly out of context propositions. One example: the Accused was lying when he said he was not a family friend. There is not a shred of evidence that his family and the complainant's family ever visited one another. He volunteered that he accommodated them in Pretoria and helped them to visit her father's grave. Different perceptions as to what is a family friend/comrade cannot be usefully employed as criticism of this ilk. Evidence is not an Act of Parliament being interpreted.

16.

Submissions are made which have no foundation in evidence:

- 16.1. On what basis is it suggested that Promise was available to be called as a witness?
- 16.2. The submission that the Accused has serious financial troubles, is wholly without any factual foundation.
- 16.3. The accusation that the Accused does not care about the crime of rape is both hurtful and malicious; there is no factual basis laid in the evidence. It is simply designed to prejudice the Accused.

17.

The Prosecution has resorted to statements/inferences which are either *non sequiturs* or not inevitable consequences.

- 17.1. Why respect for someone would translate into a father/daughter relationship is not clear. It is also not clear

how a powerful position translates into power over another who does not operate in that hierarchy (see: p. 249).

17.2. This argument of a powerful position equates to power over another individual is simply fallacious. Why then did she not withdraw the charge when he wanted that? His explanation is sensible and true. Why else did she not go to his room. Why did she not wait for him to visit her?

18.

Moreover, one's approach must be consistent - one cannot have an argument/inference on one aspect which runs into a brick wall against another aspect (e.g. waiting for the Complainant to sleep in order to rape her - later waking her up to rape her).

19.

Another example is because the Accused, for a brief moment, omitted a part of his version before he realised it himself, his version is a fabrication. The Complainant did exactly the same when she was asked to repeat the rape incident until she was reminded by Counsel of this.

20.

Furthermore, submissions must be based on facts not intuition or knowledge outside the evidence. The argument presented displays these factors in varying degrees.

21.

The Accused's version deviates from what was put. In fact, all that happened is that the Accused's version in evidence and especially cross-examination was far more detailed and exhaustive than the version put (otherwise it would have taken 3 days just to put his version). Must the Complainant's claim of a tendency towards lesbianism be rejected because it was not part of her evidence-in-chief?

22.

What would the purpose be to put what the Accused thought in respect of her skirt, legs etc. to the Complainant? Was she going to say he did not think that? It was never disputed that she wore a skirt etc. One would have thought that if it was attempted to cast her as a Delilah, these things would have been put to her - it was not part of the Defence. The Prosecution

elicited these details. You cannot elicit details about what the Accused thought in cross-examination and then complain that things that the Defence did not place before the Court as their case, were not put. Moreover, if a conflicting version is put, everything in conflict is disputed - it was clearly put what the Accused's version was regarding the guestroom and their parting company; obviously telling her to go and sleep did not form part of that version.

23.

Some of the contentions advanced are wholly exaggerated.

24.

The submission that no sober man in his right mind would have (unprotected) sex with an HIV-positive woman is wholly exaggerated - use of a condom reduces the risk by 90%. Is that risk OK to take?

25.

To suggest that he advised her on each of the major events in her life is an overstatement. He suggested Australia was not suitable (and clearly she did not have funding) and, like Kasrils, assisted her in trying to get a bursary

(see: p. 243-244).

26.

The Prosecution's main refrain is that the Defence witnesses cannot explain why the Prosecution witnesses are lying. This is a complete *non sequitur* as an indication of truthfulness on the part of the Prosecution witnesses. If the Accused cannot say why the Complainant lied about her matric certificate, does that mean she is telling the truth about obtaining a matric in 1992? Moreover, the Prosecution never asked the Accused to speculate when he said he could - unless he investigates each witness, how can he prove this? When witnesses did speculate, this was held up for ridicule. His conjecture as to a political conspiracy is confirmed by the Complainant.

27.

Such reasons can, if necessary, be debated in argument.

28.

The Complainant was also mendacious in the following respects:

28.1. She testified presumably to cover for the possibility that

Kasrils may testify to her saying that a daughter of Zuma was a close friend of hers, that she had been close friends with a daughter of his. This has been denied convincingly by the Accused and Duduzile. The Complainant's version falls by itself given her inability to remember the name of this close friend of hers.

28.2. She sought to escape a difficulty in cross-examination by stating the memoirs were for family reading hence the dedication to her "grandson". She had no answer to it being pointed out that the dedication was to be omitted and the names changed (obviously to prevent defamation suits). Again she maintained she decided that the book would end in 1995 - however, it contains, in the few pages of written material, events which clearly form part of the tale it tells from beyond 1995 up to 2003.

28.3. The sequence of acts in the rape itself (on the State's version). The Complainant was unreliable regarding the type of lighting available in the room (if a sentence by sentence approach is adopted).

28.4. She described the lighting incorrectly.

### **THE LESBIAN CLAIM**

29.

That bisexuality rather than lesbianism describes the Complainant is equally clear from her lobola remarks. She clearly did not exclude marriage to a male (lobola sit uneasy with an all female marriage - who pays who what?) [see: p. 14].

### **MANZI AND THULANI NOT PUT**

30.

The evidence of Manzi and Thulani was not put to the Complainant when she testified. That is because the Defence was unaware of their existence and did not look for such witnesses - it did not look for witnesses simply because of the Complainant's general sexual history which was regarded as irrelevant until the Prosecution led the Complainant's no-condom/no-intercourse evidence. The arrangement was that the Prosecution would put the version of these witnesses to the Complainant and that they would put

her version to these witnesses. If not, the Defence would have recalled the Complainant to put this to her.

**THE STATE'S CASE**

31.

The Prosecution sought to bolster a highly improbable case by reliance on the following:

- 31.1. The Complainant freezing.
- 31.2. The Complainant being dazed.
- 31.3. The close “father/daughter” relationship.
- 31.4. The no-condom/no-intercourse stance.
- 31.5. The police persuading the Complainant to lie and otherwise behave oddly.
- 31.6. The Complainant “being lesbian”.

32.

Apart from other defects and counter-vailing evidence, the main problem is that each of these features rely wholly on the credibility of a discredited witness.

33.

In respect of any criticism of the statement by Hulley to the radio, it was a live interview and there is no evidence that the Accused knew or authorised the specific content. It cannot be held against him. Nor can the failure to call Hulley regarding the room pointings out lead to an adverse inference. It may well have considered it not necessary given the performance of the police as witnesses.

34.

The admissions Constable Taioe testified to do, on a proper analysis, not take the matter much further. If the Accused had been asked by the Commissioner as to the alleged crime scene etc., that could only refer to the Complainant's version - she is all who suggested the commission of a crime. The police evidence does not exclude knowledge of her allegations by the Accused. Hence the Commissioner's cryptic cuteness may well have

destroyed any value of such evidence.

**K.J. KEMP SC**

**and**

**J. BRAUNS SC**

**and**

**T.S.I. MBONGWA**

**Chambers,  
Durban  
1 May 2006**