DNA: the missing justice link

Forensic investigation can convict the guilty but also acquit the innocent

CAROLYN RAPHALEY

WHEN Oscar Thwala was sentenced to life imprisonment 10 years ago on three counts of rape, two counts of kidnapping, illegal possession of ammunition and firearms, he’d never heard of DNA or of its use as a forensic tool in criminal investigations.

So, when his lawyer told the then-23-year-old street vendor that the results of DNA tests taken after his arrest were “unimportant”, Thwala accepted his advice unquestioningly.

Like many sentenced offenders, Thwala continued to protest his innocence long after his trial had been concluded. His protestations fell on deaf ears until 2006 when a doctor—behind bars for murdering his wife—at Bavianspoort prison heard his story and explained just how crucial DNA could be in excluding a suspect.

Thwala immediately began searching for his results, starting with repeated requests to Soshanguve clinic where his DNA had been sampled. After writing to everyone he could think of requesting help—including the Minister of Safety and Security—he found the report buried deep inside a police docket four years later.

He discovered that his preliminary DNA test results conducted by SAPS’s Pretoria Forensic Science Laboratory were available at the time of his trial and the final report concluded three months after his conviction and sentencing.

But more importantly, he also discovered that the results excluded him on the basis of swab and semen analysis positively implicating his co-accused Walter Raulinga, a repeat offender with previous convictions.

“I didn’t know what to feel. The results confirmed what I always said—I never raped that lady,” Thwala said.

Whether Thwala is guilty or not, only time and the courts will tell. However, the DNA bill—the Criminal Law (Forensic Procedures) Amendment Bill—passed by the National Assembly in August should not only increase the possibility of arrest and the probability of prosecution, improve conviction rates and act as a crime deterrent, it should also assist in exonerating the innocent.

“Though it’s important to put dangerous criminals behind bars, it’s just as important to free the many innocent people languishing in South Africa’s jails,” notes Professor Sean Davison, Innocence Project SA founder and head of the University of the Western Cape’s forensic DNA Lab.

In spite of 311 cases of post-conviction DNA-based exoneration in the US between 1988 to date—including 18 people who spent time on death row—there isn’t a single such case in South Africa’s legal history. This probably isn’t surprising since DNA profiling and collection currently operates in a legal vacuum—the Criminal Procedures Act of 1977 governing its use was promulgated long before the use of DNA profiling as a criminal intelligence tool was invented.

However, University of Fort Hare law professor and DNA in the Court Room author Lirieka Meltjes-Van der Walt cautions that the bill doesn’t contain the necessary nuts and bolts for exonerations purposes: “There’s no clear mechanism enabling a sentenced offender like Thwala to access original samples. Nor does it
make provision for exoneration on the grounds of new evidence, or enable the factually innocent to apply for a hearing once all avenues of appeal have been exhausted.”

Council for Responsible Genetics’ New York president Jeremy Gruber concurs: “The bill offers no new rights and protections for the wrongfully convicted. Though there’s general reference to post-conviction DNA access, the legislation doesn’t create any specific framework or series of rights to ensure the wrongfully convicted can use DNA to prove their innocence. No part of the bill is devoted to ensuring post-conviction access to one’s own DNA for exoneration purposes. This is a serious omission.”

Not least because high prosecutorial caseloads, careless handling of forensic evidence, inefficient investigations, poor police work and clogged court rolls have resulted in a systemic breakdown in the criminal justice system. Pressure on the courts to secure convictions can encourage prioritisation of convictions over ensuring innocent people are acquitted.

Given South Africa’s rocketing crime rates, there appears to be more interest in the bill’s potential to convict the guilty than exonerate the innocent. The construction of a National Forensic Database where criminal profiles of all arrestees and all sentenced offenders will be stored, coupled with the creation of a framework for the collection of DNA samples, should go some way to addressing popular fears.

Conviction rates should be dramatically impacted by the establishment of a DNA database,” Davison explains. “DNA profiles obtained from testing will be entered into the database and if a match is found the real perpetrator of the crime will be identified – particularly since most criminals tend to be repeat offenders.

However, a DNA database is not a universal panacea for combating crime. “The UK data base has more than 4.8 million profiles but only had a 58.7 percent average match rate between database profiles and crime sample profiles during 2008-9,” says Meintjes-Van der Walt.

“The conviction rate based on matches between profiles and crimes is a mere 0.37 percent. High linkage rates are not supported by high conviction rates.”

Gruber is also concerned that “the human rights issues raised by the broad collection powers of the bill will have negative implications in South Africa for years to come. The bill affords the police wide powers to decide who should have their DNA collected, and who shouldn’t.”

“The civil liberties of the entire population are at risk when the DNA of all arrestees – people who haven’t yet been convicted of any crime – and the DNA of people who have committed minor, petty crimes for which DNA evidence is irrelevant, is collected. For example, US African Americans constitute 13 percent of the population but make up 40 percent of the Federal DNA database, though statistics show they don’t commit crimes at higher rates than other groups.”

DNA can be both used and abused. Though one of the most technologically advanced pieces of legislation ever passed in South Africa, the bill demonstrates that technology has progressed more rapidly than the law and requires its own regulation to prevent abuse.

For example, under the leadership of Lothar Neethling, an apartheid-era scientist who founded the SAPS forensics unit, research was conducted into toxins causing death without detection and chemical and biological weapons developed.

Today, the two State forensic science laboratories processing DNA are still managed by SAPS. With regular reports of police brutality, corruption, lack of accountability and torture, it’s not surprising that human rights activists are concerned about the management powers the bill accords the police, not to mention police competency.

Medical Research Advocacy Network co-ordinator Poonitha Naidoo is adamant that DNA forensic labs should be managed by health professionals with the oversight of an independent ombudsman and that DNA buccal swab collection is conducted by health professionals, not police officers as envisaged by the bill.

“The practice is logistically practical, non-invasive and in line with international best practice but not all countries have as corrupt a police force as South Africa,” says Naidoo. “Anyone can take a buccal swab but anyone dealing with human tissue must be trained to manage it and registered with the Health Professions Council of SA.”

“It’s not impossible that an innocent person’s DNA could be planted at a crime scene. If the police lose dockets, they can also lose DNA samples.”

Founder of The DNA Project, former commercial lawyer Vanessa Lynch has lobbied for the use of DNA as a crime-fighting tool and the establishment of a DNA database. She believes the successful implementation of the legislation will depend on the oversight and guidance of the National Forensic Oversight Ethics Board which the legislation proposes.

Says Meintjes-Van der Walt: “Before the database can be functional, the labs must be accredited, police trained and regulations put in place. At present, only two private South African labs have received South African National Accreditation System (Sanas) accreditation. Neither of Saps forensic DNA labs are accredited either in terms of international standards, or locally.”

As for Thwala his 2006 application for leave to appeal was dismissed. Since Legal Aid subsequently turned down his requests for assistance, last June Thwala set about filing his own Supreme Court of Appeal application with the assistance of “prison lawyers” – law students behind bars. “I’ve heard nothing since,” he says.

Though Thwala has been warned that DNA constitutes only part of the evidence required to secure a conviction, with science on his side he remains determined to appeal his case and prove his innocence.

“I’ve read everything the law students studied and many cases about DNA. I’ve read encyclopaedias and biographies and been encouraged by stories of other peoples struggles. My mother has never lost hope in me and has always encouraged me. I feel like I’ve failed her so I need another chance to make her happy. That’s what keeps me going,” he says.

- Carolyn Raphaely is a member of the Wits Justice Project which is located in the University of the Witwatersrand’s journalism department.