REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
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DATE SIGNATURE

CASE NO A109/2016

22/3/2017

In the matter between:

MUNYAI, AZWINDINI BOYBOY **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Headnote
Appeal against conviction for rape and life sentence

Conviction based on evidence of former girl-friend who testified that after their relationship ended, which produced two children at the time, the appellant abducted her, and held her overnight where he assaulted and raped her, her mother and brother rescuing her from the appellant's room the next morning.

During trial the victim admitted meeting the appellant whilst he was on bail and having sexual relations – this factor not commented on in judgment of magistrate.

After sentence, and at a time when the appeal was being prosecuted an affidavit signed by the victim was presented in which she recanted in whole the account of the abduction and rape claiming it was a fabrication in consequence of pressure from her family, ostensibly because the relationship between her and the appellant which began whilst she was a schoolchild being characterised by continual violence; moreover, she said that she was pregnant with their third child conceived whilst he was on bail.

Application made to refer the matter back to the trial court to admit the evidence of recantation.
The application had to be granted and the conviction and sentence were set aside to facilitate that process.

However, extensive directions were given as to the process to be followed, aimed chiefly at investigating the circumstances of the victim and ensuring as far as possible that her recantation was genuine and that her interests were appropriately protected. The order included provision for legal representation for the victim, and the resumption of the trial be case managed to ensure an expeditious outcome.

The appellant was to remain custody subject to the right to apply fir bail to the trial court.

Sutherland J

INTRODUCTION:

[1] The appellant was convicted of rape and sentenced to life imprisonment on 27 January 2016. He appeals against both conviction and sentence.

[2] On 18 October 2016, an application was brought on behalf of the appellant to lead further evidence as contemplated in section 309B (5) and (6) of the Criminal Procedure Act 51 of 1977 (CPA).[1] The application is not opposed.

[3] The essence of the State case was that the appellant and the complainant, Z O, were well acquainted. Having been in a romantic relationship for about 7 years since she was 15. She had borne him two children. Z claimed that he was consistently abusive towards her and she had terminated the relationship at some earlier unspecified time in 2015. She testified that on 30/31 May 2015, the appellant abducted her in the street at about 18h30. He took her to his home, ostensibly a single room, which though separate from that of his mother and sister, was in close proximity to their quarters. This place is a short distance from Z's parents' home, where she too lived, with her children. He held her in his room overnight. He assaulted with a bottle and caused her head to bleed. He raped her twice. On the following morning, Z's mother,

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[1] The sub-sections provide:

(5) (a) An application for leave to appeal may be accompanied by an application to adduce further evidence (hereafter referred to as an application for further evidence) relating to the conviction, sentence or order in respect of which the appeal is sought to be noted.
(b) An application for further evidence must be supported by an affidavit stating that-
(i) further evidence which would presumably be accepted as true, is available;
(ii) if accepted the evidence could reasonably lead to a different decision or order; and
(iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.
(c) The court granting an application for further evidence must-
(i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and
(ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.

(6) Any evidence received under subsection (5) shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question.

accompanied by her adult son, went to the appellant's home. They went there because the appellant's mother had alerted them to an assault being carried out on Z by the appellant. On arrival, they heard Z crying. The son broke down the door of the room in which they found Z and the appellant. By such means they rescued her. Upon such version, the appellant was convicted, his version that sex was consensual being rejected.

[4] The burden of the application to lead further evidence is that Z has recanted her claim of rape. An affidavit, purporting to be sworn to by her, deposed before Student Constable Manyju at 19h30 on 14 April 2016 at the Alexandra police station, and date stamped by the clerk of appeals on 19 April 2016, is on the record.

[5] The affidavit is not obviously one that was prepared by a lawyer, albeit the usual lawyerly jargon is employed. It is an abject disavowal of her earlier evidence about a rape. The relevant text is as follows:

> "I, Z O,…. do hereby state under oath that:
>
> 1. I am an audit (sic) female presently resident at …. Alexandra Township. I consider the afforested (sic) to be my permanent residential address.
> 2. I am authorized to depose to this affidavit on the basis that I was the complaint (sic) and/or a witness that testified in a rape case against my long-term boyfriend Mr. Azwindini Munyayi.
> 3. The fact stated herein below fall within my own personal knowledge, save where the contrary state otherwise, and are both true and correct.
> 4. As afforested (sic) I testified against Mr. Azwindini Munyayi in a rape case opened at the Alexander (sic) police station, bearing case number RC389/15 and duly tried at

the Wynberg Regional Court before the Honourable Mr. Venter.[this reference to Venter is incorrect]

5. I hereby wish to correct a gross injustice personally inflicted against Mr. Azwindini Munyayi by misrepresenting the facts and subsequently stating that he raped and sexually molested me the 30th and 31st of May 2015.
6. Nothing could be further from the truth that the accused was guilty of the heinous crime of rape. Mr. Azwindini Munyayi did not rape and molest me in anyway.
7. I voluntarily and without any coercion retract my testimony before the court of law and shamefully submit that my testimony was devoid of any truth.
8. I humbly state that a heated tiff led to me losing my mental faculties and lying under oath to get even with Mr. Azwindini Munyayi after he hurt my feelings.
9. I further submit that I was only influenced by both my mother and my brother to open a case of rape against Mr Azwindini Munyayi.
10. Sadly my play to get even with Mr. Azwindini Munyayi backfired as he was sentences to life imprisonment for a crime he did not commit.
11. Realising my heinous mistake and the face that have two minor with the accused and I am pregnant with our third child, which was conceived during his bail period.
12. In light of the aforestated, I humbly leave it to the honourable court to formally pardon and release Mr Azwindini Munyayi from prison, notwithstanding the consequences I may face. I am deeply hurt and sorry that something this bad had happened. I wanted to get him arrested for assault.
13. I was confused and not thinking straight when I opened this case. I was told by my mother and brother to lay a rape case against Mr. Azwindini Munyayi. I thought they cared for me, but I was wrong, because I thought family will never abandon and hurt me but I was taken away due to confusion. We are not in good speaking terms with my mom because she cares about my brothers and doesn't want my brothers to fight my battles and get arrested.
14. I trust the honourable court will accept my apology in misleading it and resulting in the conviction and sentencing of Mr. Azwindini munyayi who never slept with me by force. My family didn't want me to drop the case because they hated Mr. Azwindini Munyayi."

[6] The contents are instructive as much for what they do not say, as for what is alleged. Notably, what is absent is an account of what happened on the day in question. The document is entirely cast in generalities. The high point of the explanation for initially lying is that the appellant hurt her feelings. She does not advance an alternative version. She does not identify what she initially said was false and what, if anything, was true. For example, was she assaulted, even though not raped. Did her mother and brother arrive to rescue her? Was she crying at the time?

[7] Two additional important points are touched on in the affidavit.

7.1. First, her poor relationship with her own family and her sense of rejection by her mother. This provokes a thought about whether her motivation to recant is the absence of support for herself and her children, a matter that requires investigation.

7.2. Second, the claim that she was, on 14 April 2016, pregnant with the appellant's third child is significant. A birth certificate of a child born to Z on 19 April 2016 is among the documents in the record of appeal. She states the child was conceived whilst the appellant was on bail which had been granted on 6 July. By inference, conception must have occurred in July or August 2016. Accordingly, she deposed to this affidavit, 7 days before that birth, and some three months after the appellant was sentenced. At the time when her evidence was given, on 12 August 2016, she would on the probabilities have not known she was pregnant. Notably, during the trial,

she testified to having had sex with the appellant in July 2016, despite his bail conditions stipulating no contact between them.

[8] The application is supported by a single affidavit by the appellant. That affidavit states that he learnt of the recantation affidavit from his Legal Aid Board Representative, Ms Britz. What she told him was that, upon receipt of the record, the recantation affidavit was included. The inference is that she knew no more than that.

[9] What is manifestly missing from the record is an explanation for the following:

9.1. How did the affidavit get into the record, independently of an application to admit it?

9.2. Who drafted the affidavit?

9.3. How did it happen that Z decided to recant?

9.4. What role did the appellant, or for example, his family or friends play in the recantation?

9.5. What is the input of Z's family in the recantation, especially since they are accused of inspiring the perjury?

9.6. What rational basis exists for accepting that the recantation is voluntary?

[10] A number of further important factors need attention too:

10.1. Is it appropriate that such an affidavit be presented to Z to sign without her having the benefit of independent legal advice about its implications?

10.2. Ought Z not to be assessed to determine whether, emotionally or psychologically, she genuinely wishes to recant?

10.3. Why did Z go, accompanied or alone, to the police station at night to swear out the affidavit, and why, of all the officers present, was a *student* constable required to take the affidavit. (I may add, that I am by no means certain that a student constable is a commissioner of oaths, and the 'affidavit' may be no such thing in law)

[11] In my view, in the absence of a full and convincing case being out forward in these respects, the application is woefully inadequate. Accordingly, the application is fundamentally flawed.

[12] The test for acceding to such an application is that set out in *State v De Jager 1965 (2) SA 613 (AD) at 613A-D.*

> "This Court can in a proper case hear evidence on appeal; see R v Carr 1949(2) SA 693 (AD); but the usual course, if a sufficient case has been made out, is to set aside the conviction and sentence and send the case back for the hearing of the further evidence,

as was done, for example, in R v Mhlongo and Another, 1935 AD 133. However, it is well settled that it is only in an exceptional case that the Court will adopt either of the foregoing courses. It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty. Accordingly, this Court has, over a series of decisions, worked out certain basic requirements. They have not always been formulated in the same words, but their tenor throughout has been to emphasise the Court's reluctance to re-open a trial. They may be summarised as follows:

(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a prima facie likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial.

See R v de Beer, 1949 (3) SA 740 (AD) at p. 748; R v Weimers and Others, 1960 (3) SA 508 (AD) at pp. 514 - 5; R v Madikane, 1960 (4) SA 776 (AD) at p. 780; R v Nkala, 1964 (1) SA 493 (AD); and S v Gert Stynder, (1 October, 1964).”

[13] Plainly, criterion 1 and 3 are met. But criterion 2 is not properly addressed in the application owing to the absence of a proper treatment of the matters described above.

[14] Nevertheless, despite the warts on the application itself, it is incumbent on a court to scrutinise all the circumstances that are evidenced to determine whether the interests of justice would be thwarted if the application were to be denied. That stance, and the vigilance that goes with it are rooted in the values of the constitution, no less than in the traditional approach to such applications. A pragmatic approach was adopted in *State v Nkala 1964(1) SA 496 (AD)* where despite an inadequate explanation by that appellant for not calling evidence in his defence, the court reached the conclusion that in the light of the grave consequences for a person convicted of

murder, certain patent inadequacies in the body of evidence warranted, in the interests of justice, the allowing of further evidence. More recently, in *MK Nkomo v The State [2014] ZASCA 186 (26 November 2014),* Mba JA at [20] concluded that every case must be decided on its own merits. In that matter, like this case, there were disquieting circumstances, which warranted the exercise of a judicial discretion in favour of allowing further evidence.

[15] Independently of the demerits of the application to lead further evidence, it is plain that the evidence substantiating the rape is problematic. Winie O, Z's mother, corroborates some sort of emotional storm between the appellant and Z on 31 May, and a probable assault. Z, her mother and her brother went to the police straight from the appellant's home by taxi. Z laid a charge of assault. She did not lay a rape charge.

[16] Z, so she says, only mentioned a rape when taken, thereafter, to a clinic for a medical examination relevant to the assault, the appellant having struck her with a bottle. The clinic staff summoned the police upon that report by her. She said she also told her mother and brother of the rape, but her evidence does not indicate when that occurred; ie before or after the clinic visit. Her mother's evidence was that she was told of a rape, but it is unclear when it was said; whether that report was after the visit to the police station is as likely as sooner, and if taken as later, it would be consistent with Z's own evidence; ie after the initial police report, and therefore, later than one would have expected.

[17] In the cross-examination of Z, it was put to her that despite her claiming to have a bleeding head, the medical report stated no abrasions, a fact confirmed by Doctor Klisiewicz, who examined her. She did not resolve the discrepancy. More important still, she conceded that in late July 2016 she had again had sex with the appellant, but had not told the prosecution. Her explanation for not reporting a rape to the police initially on 31 May was that she was afraid of the appellant. This theme was not pursued and is cryptic in the absence of exploration. I may add, the failure of the defence to extrapolate on this point in cross examination is disappointing.

[18] Moreover, when the appellant testified, he said that whilst he was in custody he concluded that he loves her no more. He did not refer, in chief, to the sex she had admitted to having with him in July. In cross examination, he told a tale about her approaching him in a tavern after his release on bail, when, it is to be inferred from his evidence, the sex occurred. The burden of that evidence seemed to bear more on exonerating himself from the breach of his bail conditions.

[19] The appellant's evidence, in short, was that Z is prone to drink, and was under the influence on the night in question when he found her at the gate of his home. She joined him voluntarily. They argued about their children which appellant alleges she neglects to go drinking. No assault occurred. He went out drinking himself whilst she remained at home, and when he returned, consensual sex occurred. He denied that he ever abused her over several years.

[20] A Social worker, Nosesa Khumete testified that Z was an example of a battered woman owing to a long-term abuse in an intimate relationship with the appellant.

[21] In my view, although there is substantial evidence that points to an abusive relationship between the appellant and Z, and assaults on the night and day in question, there is very little to offer assurances that a rape indeed occurred, other than Z's belated say-so. The probability that the rape was an exaggeration, aimed at punishing him for yet another assault, cannot be ruled out.

[22] Regrettably, the trial was conducted with such robustness that the many finer details and nuances which are important in this type of case were not addressed. Foremost is the pedestrian attitude of the police and prosecution to proving rape by reference to discernible vaginal injuries, often a fruitless exercise and indeed, a useless exercise when the key facts about a rape are constituted not by raw violence but by overpowering intimidation inducing submission. There is no shortage of cases on appeal bemoaning these systemic shortcomings in rape cases but it is apparent that no heed is paid by those who investigate or prosecute.[2]

[23] However, the stand-out issue is the common cause fact that the appellant and Z continued a sexual relationship, of sorts, after the arrest when the appellant had been bailed. That is a profound consideration in casting doubt on the veracity of the allegation of rape itself, but again, must not be taken out of context and her claims dismissed. Id cannot by itself mean that because some degree of rapprochement occurred in July, it

[2] For example: Sebofi v The State 2015 (2) SACR 179 (GJ)

is untrue that she was not raped in May. What these circumstances do make absolutely plain is that there is no room for superficiality in prosecuting rape cases. The post-arrest sexual encounter is also a factor utterly ignored by the court *a quo*, perhaps because the significance of the social workers' evidence about Z's psychological status was misunderstood or exaggerated. The mere fact that she is a brow-beaten woman is not dispositive of the forensic exercise a court must perform to determine what facts are proven. A real danger exists that a miscarriage of justice may have occurred.

[24] Accordingly, it is appropriate to set aside the conviction and sentence and allow the trial to re-opened for further evidence.

[25] However, it is also apparent that Z needs independent representation, as her recantation cannot safely be taken at face value.

[26] Moreover, the matter should be remitted to the court a quo, together with directions on how to deal further with the case.

[27] The appellant should remain in custody pending that resumed trial. At the time of this judgment, he has been imprisoned for approximately 14 months. The resumption should take place as soon as reasonably possible, an aspiration which shall take a little longer in order to facilitate representation for Z. However, if the matter cannot be finally resolved before 31 December 2017, the appellant shall be brought before a Magistrate for bail to be considered.

THE ORDER

1. The convictions and sentences are set aside and the trial shall be resumed in accordance with the directives in paragraph 3 of this order.

2. The appellant shall remain in custody pending the conclusion of the trial, subject to his right to apply for bail to the trial court.

3. The matter is remitted to the court *a quo* to deal with in accordance with these directives:

    3.1. The complaint, Z O, is to be provided with independent legal counsel, and to that end, Legal Aid South Africa is directed to take the necessary steps to appoint such a representative, who shall be a legal practitioner of at least 10 years' experience.

    3.2. The South African Police shall investigate the allegations set out in the affidavit, and address all the concerns mentioned in this judgment, and furnish a full report to the chief prosecutor responsible for the district in which the trial is to be resumed; the National Prosecuting authority shall take the necessary steps to ensure this occurs.

3.3. Evidence to explain the procurement of the recantation affidavit shall be adduced, regardless of the report furnished in paragraph 3.2 .

3.4. All witnesses who have hitherto testified may be recalled.

3.5. All and any evidence having any bearing on the truth or falsity of the allegations of rape may be called.

3.6. A report shall be furnished to Sutherland J by Legal Aid South Africa and by the National Prosecuting Authority on 30 June 2017 on progress made, in fulfilment of this order.

3.7. If necessary Sutherland J shall convene, *mero motu*, or on application from any interested party, a hearing in order to give further directions if there is needless delay in bringing the matter to ripeness so that it may be expeditiously enrolled before the court *a quo.*

3.8. The Trial Magistrate, Mr Schnetler, shall be advised by the National Prosecuting Authority of this judgment within 10 days of its delivery, and may, if he deems it appropriate, assume a case management role, forthwith; in the event that he does so, he shall state so formally on the record and Sutherland J shall be informed by Legal Aid South Africa forthwith, in which event, paragraph 3.7 shall be inoperative.

_____
Sutherland J
Judge of the High Court,
Gauteng Local Division, Johannesburg

I agree.

_____
Shangisa AJ
Acting Judge of the High Court,
Gauteng Local Division, Johannesburg

Hearing: 16 March 2017

Delivered: 22 March 2017

For the Appellant:
Adv Y J Britz,
Instructed by Legal Aid South Africa,
Johannesburg Justice Centre.

For The State:
Adv P Marasela

REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

CASE NO A109/2016

In the matter between:

MUNYAI, AZWINDINI BOYBOY **APPELLANT**

and

THE STATE **RESPONDENT**

Variation of order

Sutherland J:

The terms of the order made on 22 March 2017, is varied for the purposes of clarification as follows:

THE ORDER

1. The convictions and sentences are set aside and the trial shall be resumed in accordance with the directives in paragraph 3 of this order.

2. The appellant shall remain in custody pending the conclusion of the trial, subject to his right to apply for bail to the trial court.

3. The matter is remitted to the court *a quo* to deal with in accordance with these directives:

    3.1. The complaint, Z O, is to be provided with independent legal counsel, and to that end, Legal Aid South Africa is directed to take the necessary steps to appoint such a representative, who shall be a legal practitioner of at least 10 years' experience.

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event that he does so, he shall state so formally on the record and Sutherland J shall be informed by Legal Aid South Africa forthwith, in which event, paragraph 3.7 shall be inoperative.

_____
Sutherland J
Judge of the High Court,
Gauteng Local Division, Johannesburg

I agree.

_____
Shangisa AJ
Acting Judge of the High Court,
Gauteng Local Division, Johannesburg

24 March 2017.