THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 20642/2014

In the matter between:

NS **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *NS v The State* (20642/2014) [2015] ZASCA 139 (30 September 2015)

Coram: Ponnan, Theron, Swain and Mbha JJA and Baartman AJA

Heard: 16 September 2015

Delivered: 30 September 2015

Summary: Grant of application for special leave to appeal in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013 – manifest failure of justice – appeal upheld – conviction of rape and sentence of ten years' imprisonment set aside.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Potterill J with Webster J concurring sitting as court of appeal).

1 The applicant is granted special leave to appeal in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013.

2 The appeal is upheld. The order of the court a quo is set aside and substituted with the following order:

'The appeal is upheld. The conviction of the appellant of rape by the Regional Court, Ermelo and the sentence imposed pursuant thereto is set aside and the following order is substituted in its stead:
Accused one is found not guilty and discharged.'

JUDGMENT

Swain JA (Ponnan, Theron and Mbha JJA and Baartman AJA concurring):

[1] This matter involves an application for special leave to appeal and, if granted, the determination of the appeal itself. The application for special leave to appeal to this court in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013 (the Act), has its origin in the conviction of the applicant before the Ermelo Regional Court (Mpumalanga) on one count of the rape of a girl under the age of 16 years for which the applicant was sentenced to 15 years' imprisonment.

[2] An application for leave to appeal to the Gauteng Division of the High Court Pretoria, was refused by the magistrate. A subsequent petition to the high court was successful, and leave was granted to him to appeal the conviction and sentence.

[3] The applicant's[1] appeal before the court a quo was partially successful. The conviction was confirmed but the sentence imposed was altered to 10 years' imprisonment.

[4] On 19 September 2014 the court a quo erroneously granted the applicant leave to appeal to this court against both conviction and sentence, when it no longer possessed jurisdiction to do so as the special leave of this court was required at that stage.[2]

[5] The applicant thereafter applied to this court for special leave to appeal against his conviction and sentence in terms of s 16(1)*(b)* of the Act. In addition the applicant sought the following declaratory relief:

a An order declaring s 16(1)*(b)* of the Act inconsistent with the Constitution and therefore invalid insofar as it requires the applicant to meet the 'special circumstances' threshold required by the section.

b An order declaring Supreme Court of Appeal Rule 6(5) inconsistent with the Constitution and therefore invalid insofar as it prevents the applicant from placing the record of proceedings before this court together with the present application.

[6] On 25 November 2014 this court granted an order referring the application for special leave to appeal for oral argument and directed the parties to be prepared

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[1] The identities of the complainant, the applicant and the second and third accused are not disclosed as they were all minors at the time of the alleged rape. For this reason the identity of the state witnesses, Mr [JS] and Constable [M] are not disclosed.

[2] *Van Wyk v S*, *Galela v S* (20273/2014, 20448/2014) [2014] ZASCA 152, [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA) (29 September 2014).

if called upon to address the court on the merits of the appeal. The applicant was also directed to file the record and serve a copy of the application upon the Minister of Justice and Constitutional Development (the Minister). The Minister was granted leave to intervene and if so advised defend the constitutionality of these provisions. As a result, the Minister has intervened and filed submissions dealing with the constitutional challenges raised by the applicant.

[7] The record of the proceedings has been filed. For the reasons which follow, it is clear from the evidence that special circumstances exist which merit a further appeal to this court. The prospects of success are so strong that the refusal of leave to appeal would result in a manifest denial of justice, if the applicant's conviction were allowed to stand. As a consequence it no longer becomes necessary to consider the constitutional challenges raised by the applicant.

[8] The central issue at the trial was whether the sexual intercourse which the applicant admitted having had with the complainant was consensual. In this regard the evidence of the complainant was neither reliable, nor credible. The magistrate found that the complainant's evidence was not satisfactory in all respects, that she had lied about certain aspects of her version, that her evidence was not very clear, contained contradictions and she altered her version of events. Despite these reservations the magistrate found that her version that she was raped, was corroborated by the findings and opinion of a forensic nurse contained in a J88 report which was handed in by consent, as well as the evidence of an independent witness, Mr [JS], who arrived on the scene. The high court's approach to the matter was similar, finding that the complainant's evidence was not clear and satisfactory in every material respect, but that it was corroborated by the two sources of evidence relied upon by the magistrate.

[9] Before examining the so-called corroborative evidence, it is necessary to examine the complainant's evidence. The most glaring contradiction in her evidence is her implication of a third assailant in the attack, in addition to a second (the second accused in the trial court). She alleged that both of these individuals had assisted the applicant, who was the first accused, to rape her. At the commencement of the trial

the prosecutor stated that the State withdrew the charges against the third accused Mr [JCM].

[10] Constable [M], the arresting officer, gave evidence that he had arrested Mr [JCM] because the complainant had pointed him out as the person who had assisted the second accused to grab her, put her on the ground and hold her whilst the applicant was undressing. The complainant in her evidence stated that she did not see any persons other than the applicant and the second accused. When asked by the prosecutor whether she had seen [JCM] on that day she replied 'No, I did not see him'.

[11] This change in the complainant's evidence was not simply an alteration in the role played by the erstwhile third accused in the alleged attack, but a removal of him from the scene entirely. Having described to constable [M] the precise role he had played, to then deny that she had seen him, is only explicable on the basis of a blatant lie. She either lied when implicating him, or later when exonerating him. In either event her credibility was seriously undermined by this deliberate falsehood.

[12] The magistrate however in his judgment, rather than classifying this change of evidence by the complainant as a lie, which seriously affected her credibility, advanced a number of hypothetical explanations for her conduct. At first the magistrate speculated that she was intimidated, or that the erstwhile third accused's 'people' had approached her. The magistrate then speculated that the complainant did not recognise him, or perhaps did not see him clearly. The magistrate then added the further possibility that the complainant thought there were two persons involved and not three. Finding that three persons were present, because the applicant and the second accused said this was the case, the magistrate then offered a further explanation for the complainant's *volte face*, namely that, the complainant gave her evidence through an intermediary, and was not in court to see how many accused were present. Accordingly, so he stated, because only two individuals were charged, the complainant in her childish innocence decided that she must only talk about the two individuals and keep quiet about the third assailant. The magistrate then added a further explanation, namely that the complainant was traumatised and is a child.

Such hypothetical reasoning serves only to detract from the true enquiry, namely the real weight that can and should be attached to the complainant's evidence in the light of all these blemishes.

[13] The court a quo cursorily dealt with this issue on the basis that it did not appear from the record 'why this [JCM] was not a co-accused'. The prosecutor however when opposing the application for the discharge of the accused at the close of the State case explained why this was so. She explained that she could not comment why the complainant initially told the police there were three assailants, but later in her statement and when giving evidence maintained there were only two.

[14] I turn to the corroborative evidence relied upon by the magistrate and the court a quo. The J88 medical report compiled by the forensic nurse contains the following conclusion: 'History obtained is consistent with findings. Fossa navicularis tears at 4, 5, 6, 7 o'clock. Cervix red and swollen up at the opening.' It was recorded that the complainant had sexual intercourse ten days prior to the incident. Although the defence admitted the truth of the contents of the J88 form this did not include an admission of the complainant's version of events in the form, nor that the clinical findings were consistent with the complainant's version of events. The magistrate on the basis of these findings concluded that although the complainant was only 15 years of age, but was sexually active, he did not expect there to be tears in her vagina, if the sexual intercourse was consensual. There was however no evidence upon which the magistrate's professed expectation was based. All that the findings of the forensic nurse corroborated was that sexual intercourse had taken place which is consistent with the applicant's version.

[15] It was vital in this case to call the forensic nurse to give evidence, to explain her conclusion and exclude any reasonable possibility that the physical evidence was equally consistent with consensual sexual intercourse. This court has in the past expressed its dissatisfaction with the growing trend on the part of the prosecution,

particularly in cases of sexual assault, not to call the medical expert who examined the complainant and compiled the medical report.[3] The routine approach by prosecutors seems to be to obtain an admission from the accused as to the findings in the report ostensibly to satisfy this vital part of the prosecution's case. The shortcomings in this lackadaisical approach are starkly illustrated by this case. The evidence of the forensic nurse to explain her findings and deal with the issue of whether the sexual intercourse was consensual, could decisively have affected the outcome. In the circumstances for the magistrate to rely upon the bald and cryptic conclusion in the J88 form, to corroborate the unsatisfactory evidence of the complainant was unjustified. The court a quo dealt with this issue simply on the basis that it could not find the conclusion of the forensic nurse that the physical evidence was consistent with the history of rape, to be illogical. The enquiry however, was not whether it was illogical, but whether it was reliable.

[16] I turn to the evidence of the witness, Mr [JS]. The magistrate placed great reliance upon the fact that when he asked this witness whether he gained the impression that the complainant had been raped, he replied in the affirmative. The views of this witness were of course entirely irrelevant. When his evidence is examined, the only observation he made which is objectively inconsistent with the applicant's version that the sexual intercourse was consensual, was that he said he saw a male who was holding the hands of the complainant above her head, whilst another male was lying on top of her. Because he said he never saw a third person on the scene, this individual could only have been the second accused. However, the complainant said that after the second accused had taken off her clothes and closed her eyes, he did not do anything further to her. She added that he stood to one side but not far away. She also agreed that the second accused did not help the applicant to push her to the ground and rape her. The magistrate, in order to explain this glaring contradiction, again embarked upon unsubstantiated hypothetical reasoning to reduce its significance. This was that the complainant probably did not

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[3] *Madiba v S* (497/2013) [2014] ZASCA 13 (20 March 2014); 2015 (1) SACR 485 (SCA).

mention this because she was not asked by the prosecutor, who did not lead her on this aspect. This is not so; her evidence directly contradicts the evidence of Mr [JS].

[17] The magistrate again embarked upon hypothetical reasoning to explain the evidence of Mr [JS] that he did not see a third person in the vicinity. Having found that there was a third person present, the magistrate then reasoned that this person must have participated in the attack, but then decided that it was going too far, did not participate further and moved away. What the magistrate should have focused on was the inability of Mr [JS] to clearly observe the scene. Mr [JS] observed the scene at night whilst he was travelling in his vehicle. He said that because his car lights were on bright he saw the shadows of people moving and did not properly see what was happening. He accordingly put his lights on dim and then again on bright and realised there was something wrong along the road. He saw a female person lying on the ground with a male person on top of her. Another male was grabbing the hands of the female. He realised he had to increase speed to see what was happening and drove faster. At this stage the males ran away. That he did not see the erstwhile third accused at all, reveals how limited his observation of the scene was.

[18] The magistrate also concluded that the applicant ran from the scene because he was raping the complainant. The applicant, however, said he had moved away from the scene because he saw the vehicle flicking its lights and he wondered why the driver was doing this. He realised the driver could ask them what they were doing there. Even if the applicant ran from the scene and did not simply move away as he maintained, his wish not to be accosted for having sexual intercourse in public, is reasonable in the circumstances. The court a quo, however, concluded that the applicant's explanation was 'unsatisfactory, illogical and not reasonably possibly true'. I disagree. The guilt of the applicant was accordingly not the only reasonable inference to be drawn from his leaving the scene. It is therefore clear that the evidence relied upon by the magistrate and the court a quo to corroborate the evidence of the complainant was in itself unreliable.

[19] No major criticism can be levelled at the evidence of the applicant, except that his version that he had been in a relationship with the complainant was not disclosed until he was cross-examined. However, when the merits and demerits of the evidence of the State witnesses and applicant are examined, as well as the probabilities of the case,[4] it is clear that the State failed to discharge the onus of proving beyond a reasonable doubt that the applicant raped the complainant. It follows that the appeal against his conviction of the rape must succeed.

[20] The following order is granted:

1 The applicant is granted special leave to appeal in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013.

2 The appeal is upheld. The order of the court a quo is set aside and substituted with the following order:

'The appeal is upheld. The conviction of the appellant of rape by the Regional Court, Ermelo and the sentence imposed pursuant thereto is set aside and the following order is substituted in its stead:
Accused one is found not guilty and discharged.'

K G B Swain
Judge of Appeal

[4] *S v Singh* 1975 (1) SA 227 (N) at 228G-H.

Appearances:

For the Appellant:	F van As
	Instructed by:
	Pretoria Justice Centre
	Bloemfontein Justice Centre
For the Respondent:	P Vorster
	Instructed by:
	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein
Intervening party:	M S Mangolele
	Instructed by:
	The Minister of Justice and Constitutional Development