Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Case No: A 471/12

In the matter between:

ANGELO SIAS **Appellant**

and

THE STATE **Respondent**

Court: Judge Allie *et* Judge Cloete

Heard: Friday, 2 May 2014

Delivered: Friday, 2 May 2014

JUDGMENT

CLOETE J:

[1] The appellant, who had pleaded not guilty, was convicted as charged on one count of rape, and on 28 April 2010 was sentenced to 8 years imprisonment.

[2] On 8 March 2011 the appellant was granted leave by the court *a quo* to appeal against both his conviction and sentence. The main ground upon which leave was granted was that in an affidavit seemingly deposed to by the complainant on 24 February 2011 she admitted that she had laid a false charge of rape against the appellant in order to punish him for leaving her for another woman. The aforementioned affidavit was placed before the court *a quo* when application was made on behalf of the appellant for leave to appeal. This much is clear from the magistrate's judgment when granting leave to appeal when she stated that:

> *'Alhoewel daar in u aansoek om verlof tot appél sekere gronde is wat nie feitelik heeltemal korrek is nie, is dit van belang van onder punt 10 daar aangedui word dat die klaagster in hierdie saak tydens die verhoor van die saak in haar aflê van haar beëdigde verklaring of haar getuienis onder eed volgens die dokument wat ingehandig is nie die waarheid gepraat het nie en dit is 'n aangeleentheid wat wel nie deur die hof gelaat kan word nie.'*

[3] S 309B(5) and (6) of the Criminal Procedure Act 51 of 1977 (*'the CPA'*) sets out the procedure to be followed where an application for leave to appeal to a lower court is accompanied by an application to adduce further evidence. S 309B(5)(b) stipulates that an application of this nature 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.

S 309(5)(c) provides that the court granting such 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. S 309B(6) stipulates that any evidence received under subsection (5) shall, for the purposes of a subsequent appeal, be deemed to be evidence taken or admitted at the trial in question.

[4] S 316 of the CPA contains a similar procedure but applies only to situations where an accused is convicted of an offence by a High Court (see s 316(1)(a), (5) and (6)).

[5] In the present matter the appellant's legal representative did not make application to the court *a quo* for leave to adduce further evidence when the appellant sought leave to appeal from that court. He simply handed in the affidavit in which the complainant seemingly recanted her testimony. There was accordingly no application to adduce further evidence which the court *a quo* was required to consider, and no such application has been made at any subsequent date. Again, the appellant's legal representative has merely attached the complainant's affidavit to his heads of argument filed in this appeal.

[6] S 22 of the erstwhile Supreme Court Act 59 of 1959 provided that a court having appeal jurisdiction had the power:

> *'(a) On the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary….'*

[7] S 19 of the Superior Courts Act 10 of 2013 (*'the SCA'*, which came into effect on 23 August 2013) contains similar provisions (see s 19(b) and (c)). However s 1 of the SCA now specifically excludes from its operation an appeal in any matter regulated in terms of the CPA (i.e. an appeal such as that which is before us) or in terms of any other criminal procedural law. Furthermore, and having regard to s 52 of the SCA, it is unclear whether the appellant's appeal falls within the meaning of *'proceedings pending'* in any court at the date of commencement of the SCA. S 52(1) stipulates that such proceedings must be continued and concluded as if the SCA had not been passed (subject to s 27 thereof, which is not relevant for present purposes). S 52(2) stipulates that proceedings must, for purposes of the section, be deemed to be pending if *'at the commencement of this Act, a summons had been issued but judgment had not been passed'* [my emphasis]. This implies that *'pending proceedings'* refers to civil proceedings only, particularly when regard is had to the specific exclusion of criminal appeals in s 1 of the SCA. In addition, ch 31 of the CPA

applies only to appeals from a decision of the High Court and thus s 322(1)(c) thereof, which falls within ch 31, and confers upon a court of appeal the power to *'…make such order as justice may require'* does not apply in the present case.

[8] It seems therefore that as a court hearing an appeal in a criminal case we no longer have the power to receive further evidence or to remit the matter to the court *a quo* with instructions for the hearing thereof. However this does not mean that we cannot afford the appellant the opportunity to apply to the court *a quo* to adduce such further evidence before it, should the interests of justice so require.

[9] There is a line of authorities, all of which pre-date the Constitution, to the effect that the mere fact that a witness has recanted the evidence which he gave at the trial is insufficient to allow further evidence to be adduced; there must be proof *aliunde* that the evidence now sought to be adduced will be credible: see Erasmus: Superior Court Practice at A1-57 and the authorities cited at fn 5.

[10] In *S v N* 1988 (3) SA 450 AD at 464D-H the court stated the following:

> *'* *The situation created by a recanting witness was dealt with by this Court in* R v Van Heerden and Another *(*supra*) where Centlivres CJ made the following statement (at 372H-373A):*
>
> *"To accept at their face value affidavits made by material witnesses who allege therein that they knowingly gave false evidence at the trial would leave the door wide open to corruption and fraud. It is not in the interests of the proper administration of justice that further evidence should be allowed on appeal or that there should be a*

> *re-trial for the purpose of hearing that further evidence, when the only further evidence is that contained in affidavits made after trial and conviction by persons who have recanted the evidence they gave at the trial. To allow such further evidence would encourage unscrupulous persons to exert by means of threats, bribery or otherwise undue pressure on witnesses to recant their evidence. In a matter such as this the Court must be extremely careful not to do anything which may lead to serious abuses in the administration of justice."*
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> *And in* S v W *1963 SA 516 (A) Ogilvie Thompson JA said (at 524E):*
>
> *"…The mere circumstance that a witness called at a trial has subsequently made a statement inconsistent with his evidence will seldom in itself be sufficient ground for reopening a concluded trial…" '*

[11] The question that nonetheless arises is whether, by ignoring the existence of the complainant's affidavit in this appeal, the appellant may be deprived of his right to a fair trial enshrined in s 35(3) of the Constitution. Put differently, simply because the appellant's legal representative failed to follow the required procedure as set out in s 309B of the Act, should this have the effect that the door must forever be closed to the appellant? In posing this question, I do not suggest that the affidavit of the complainant which was tendered by the appellant when he applied for leave to appeal in the court *a quo* should be accepted at face value. Nor do I suggest that it should be entertained or considered without any formal application to adduce further evidence. My concern is rather that a consideration by this court of the merits of the appeal, without affording the appellant an adequate opportunity to make application to the court *a quo* for the hearing of further evidence, could well deprive him of his right to a fair trial (which, in terms of s 35(3)(o) of the Constitution, includes the right of appeal to, or review by, a higher court). Furthermore, s 12(1) of the Bill of Rights affords every person the right to freedom, which includes the

right not to be deprived of freedom without just cause. Although I accept the principle of finality in litigation, it is nonetheless my view that, if this court were to effectively deprive the appellant of the opportunity to which I have referred, a failure of justice could result due to the particular circumstances of this matter.

[12] S 173 of the Constitution provides *inter alia* that the High Courts have the inherent power to protect and regulate their own process. Furthermore, there is nothing in s 309B of the CPA which renders it mandatory for an application to adduce further evidence to be made simultaneously with an application for leave to appeal; and at no other time. The section specifically refers to the word *'may'*, i.e. that an application for leave to appeal may be accompanied by an application to adduce further evidence. This indicates that, in principle at least, such an application may be made at any stage, and will be considered by the trial court concerned on its merits.

[13] We have also granted condonation for the appellant's failure to prosecute his appeal timeously.

[14] **In the result I propose the following order:**

1. **The appellant's appeal against his conviction and sentence is postponed *sine die*;**
2. **The appellant is granted leave to apply to the court *a quo* to adduce**

further evidence relating to the affidavit seemingly deposed to by the complainant on 24 February 2011;

3. **Should the appellant fail to launch the application referred to in paragraph 2 above within 60 calendar days from date hereof, or such extended period as the court *a quo* may allow, the appeal may again be re-enrolled for hearing.**

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J I CLOETE

ALLIE J

I agree and it is so ordered.

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R ALLIE