THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 347/2015

In the matter between:

MZWANELE LUBANDO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Lubando v The State* (347/2015) [2016] ZASCA 4 (1 March 2016)

Coram: Maya AP, Swain and Dambuza JJA

Heard: 24 February 2016

Delivered: 1 March 2016

Summary: Application for leave to appeal to High Court – conviction of rape – reasonable prospects of success – failure to call doctor to explain gynaecological findings – absence of corroboration of minor complainant's evidence – Criminal Law Amendment Act 105 of 1997 – minimum sentence – failure to prove age of complainant.

ORDER

On appeal from: Eastern Cape Local Division, Mthatha (Dawood and Mjali JJ, sitting as the court of appeal).

1 The appeal is upheld.
2 The order of the court a quo is set aside and replaced with the following:
'The applicant is granted leave to appeal to the Eastern Cape Local Division, Mthatha against his conviction of rape and the sentence imposed of 20 years' imprisonment by the Mthatha Regional Magistrates' Court.'

JUDGMENT

Swain JA (Maya AP and Dambuza JA concurring):

[1] The appellant, Mr Mzwanele Lubando, who was 28 years old at the time of his trial, was convicted of the rape of a nine year old girl by the Regional Magistrates' Court at Mthatha on 4 October 2013 and sentenced to 20 years' imprisonment. The appellant's application for leave to appeal to the Eastern Cape Local Division at Mthatha was refused by the trial court on 19 November 2014. A subsequent petition in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the Act), to the Eastern Cape Local Division (Dawood and Mjali JJ) for leave to appeal suffered the same fate on 15 December 2014.

[2] A further petition to this court for special leave to appeal in terms of s 16(1)*(b)* of the Superior Court Act 10 of 2013, against the dismissal of the appellant's petition for leave to appeal by the court a quo, was however granted.

[3] Accordingly, the sole issue for determination is whether leave to appeal should be granted to the appellant, to appeal to the court a quo against his conviction and the sentence imposed by the trial court. The resolution of this enquiry requires a determination of whether the appellant possesses reasonable prospects of success in prosecuting an appeal.[1]

[4] The conviction of the appellant was based in large measure upon the trial court's finding that the testimony of the complainant that the appellant had raped her, was corroborated by the findings of the doctor contained in the J88 form. This form which set out the findings and conclusion of Doctor N Noyawan who examined the complainant on 2 June 2011, was handed in by the State without objection by the defence in terms of s 212(4) of the Act. Accompanied as it was by the requisite affidavit by Dr Noyawan its contents were prima facie proved.

[5] Dr Noyawan recorded under 'clinical findings' –

'No hymen, . . . 20x20 mm. Redness around vaginal entrance, oozing yellow offensive pus, no abrasion / bruise.'

The recordal of the dimensions '20x20mm' is explained by his findings under the section headed 'Gynaecological examination'. These are the dimensions of the complainant's vaginal opening. It was also noted that there were no fresh tears and that the complainant's vagina only admitted the examining doctor's little finger. The remainder of the gynaecological examination was noted as 'normal', save for the discharge and the presence of bruising.

[6] Regard being had to the evidence by the complainant that she never had sexual intercourse before this incident, the conclusion by Dr Noyawan that 'penetration has occurred' required that he be called to give evidence to explain his conclusion in the light of his findings that there were no fresh tears, or scarring and

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[1] *Greenwood v S* [2015] ZASCA 56 para 3.

the vagina of the complainant only admitted the passage of his little finger, albeit that the hymen was absent. 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 of young children not to call the medical expert who examined the complainant and compiled the medical report.[2] The routine approach by prosecutors seems to be to obtain an admission from the accused of the findings in the report, or simply to rely upon the affidavit by the examining doctor resulting in prima facie proof of the contents of the report.

[7] In the present case where the complainant is a very young child and the only witness implicating the appellant, her evidence must not only be treated with caution, but a degree of corroboration is required to reduce the danger of relying solely upon her evidence to convict the appellant. To rely upon the cryptic findings and bald conclusion by the doctor to provide the requisite corroboration was unjustified. If the doctor had been called his or her evidence could have had a decisive effect upon the outcome of the trial. As it is this court is left with the doctor's conclusion that penetration occurred, which in certain respects appears to be inconsistent with the objective findings revealed during the gynaecological examination referred to above.

[8] The need for reliable medical corroboration of the complainant's allegation is heightened by the evidence of the complainant's mother. She stated that she was in a relationship with the appellant who had shared her bed on the day in question, together with the complainant and another young child, who slept on the bed in the opposite direction. In the morning she had gone outside to prepare a fire to boil water to enable the complainant to bath before going to school. It was during her absence that the complainant alleged she had been raped by the appellant. The mother said that on her return there was nothing about the complainant's behaviour that indicated she had been raped. She was happy, did not complain of any pain

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[2] *Madiba v S* [2014] ZASCA 13; 2015 (1) SACR 485 (SCA) para 8; *NS v The State* [2015] ZASCA 139 para 15.

when she was bathed and left for school walking, as her mother put it, like a normal person. She also expressed the view that if somebody was not sexually active and was raped, there would be bleeding. There was however no evidence of bleeding when she bathed the complainant. It was only after school on the following day that she noticed a discharge from the complainant's private parts. When she asked her what had happened, the complainant replied that 'she did not know'.

[9] On the following day she took the complainant to the clinic where they were informed 'that this child had been raped'. She was not present when the complainant was examined by the doctor. The entry in the J88 form is instructive in this regard which reads as follows:

doctors

'Brought in by mom that ^ suspects rape. Child: admits having sexual acts with mom's boyfriend.'

The doctor's evidence of how this issue was raised and discussed with the complainant was of vital importance. The caution expressed by the authors Zeffertt and Paizes is particularly relevant:

'In sexual cases, for example, a child who is prompted by leading questions when he or she first makes a complaint is quite likely to believe that things which were suggested to him or her really happened.'[3]

[10] A further aspect of the J88 form which required explanation by Dr Noyawan is that it is recorded that the examination took place on 2 June 2011. The complainant's mother however said she took the complainant to be examined two days after the incident, being 27 May 2011. An explanation of this disparity could have been of vital significance in assessing the apparent absence of serious injuries to the complainant.

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[3] D T Zeffertt and A P Paizes *The South African Law of Evidence* 2 ed (2009) at 972.

[11] The complainant's mother said that on the way home from the hospital, the complainant would not tell her the truth but she did not suspect anybody because the complainant had walked to school normally. It was only when she threatened to call the police that the complainant implicated the appellant.

[12] The trial court also found that the appellant's alibi was false, because the complainant's mother had quite clearly stated that he had spent the night with her on 25 May 2011 and the witnesses he called to prove his alibi did not support him. However, even if the appellant was untruthful with regard to his alibi this must not be considered in isolation but in the context of all of the evidence.[4]

[13] It is not however the function of this court to determine the guilt or otherwise of the appellant, but simply to decide whether the appellant has reasonable prospects of success in an appeal to the court a quo. For the reasons set out above reasonable prospects are present.

[14] I turn to the sentence imposed of 20 years' imprisonment. In terms of Part 1 of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 the minimum sentence prescribed in terms of s 51(1) in the case of the rape of a person under the age of 16 years, in the absence of substantial and compelling circumstances, is life imprisonment. Although the trial court did not expressly find these circumstances to be present, it appears the trial court impliedly did so and sentenced the appellant to 20 years' imprisonment.

[15] The State however never proved the age of the complainant, relying solely upon the hearsay evidence of the complainant that she was nine years old at the time of the incident, and 11 years old at the time she gave evidence. It is trite that the age of the complainant could be proved by the evidence of her mother, or someone

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[4] *S v Van der Meyden* 1999 (2) SA 79 (W) at 82D-E, cited with approval by this court in eg *S v Heslop* [2006] ZASCA 127; 2007 (4) SA 38 (SCA) para 11.

else present at her birth or by the production of her birth certificate.[5] The age of the complainant had to be proved beyond a reasonable doubt, because it was a vital element in the determination by the trial court of whether a prescribed minimum sentence had to be imposed.[6] The appellant accordingly possesses reasonable prospects of success in relation to the sentence imposed in an appeal to the court a quo.

[16] It is ordered that:

1 The appeal is upheld.

2 The order of the court a quo is set aside and replaced with the following:

'The applicant is granted leave to appeal to the Eastern Cape Local Division, Mthatha against his conviction of rape and the sentence imposed of 20 years' imprisonment by the Mthatha Regional Magistrates' Court.'

K G B Swain
Judge of Appeal

[5] Zeffertt and Paizes supra at 438.

[6] Zeffertt and Paizes ibid at 438 note 339 and authorities there cited.

Appearances:

For the Appellant:	Z Z Matebese
	Instructed by:
	Sabelo Lubando & Associates, Mthatha
	Webbers, Bloemfontein
For the Respondent:	M F Mzila
	Instructed by:
	National Director of Public Prosecutions, Mthatha
	National Director of Public Prosecutions, Bloemfontein