THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 157/15

In the matter between:

THOBANI NOTSHOKOVU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Notshokovu v S* (157/15) [2016] ZASCA 112 (7 September 2016)

Coram: Shongwe, Seriti, Petse and Mathopo JJA and Potterill AJA

Heard: **22 August 2016**

Delivered: **7 September 2016**

Summary: Reconsideration of an order refusing special leave by two judges of the SCA: test has stringent requirements as the threshold is now higher: whether the courts below, including the decision of the two SCA judges, ought to have granted leave or not: appellant failed to show special circumstances: special leave refused.

ORDER

The decision of this court dated 9 February 2015 dismissing the applicant's application for special leave to appeal is referred to the court for reconsideration and, if necessary, variation in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 (Mpati P)

The application for special leave to appeal is refused.

JUDGMENT

Shongwe JA (Seriti, Petse, Mathopo JJA and Potterill AJA concurring)

[1] This appeal is a result of an order made by the President of this court on 30 July 2015, in terms of the provisions of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 (the Act). The appellant was convicted by the Regional Court (East London) on one count of rape and sentenced to 6 years' imprisonment. An application for leave to appeal against conviction and sentence was refused – so was a subsequent petition to the high court. A special leave application to this court, before two judges, suffered the same fate.

[2] The appellant brought an application in terms of s 17(2)*(f)* of the Act, which was granted. What is, therefore, before us for adjudication is the reconsideration and, if necessary, variation of the decision of the two judges who dismissed the application for special leave. In my view, this is not an appeal on the merits against the conviction and sentence but a reconsideration of the decision refusing special leave to appeal. This court has to decide whether or not the courts below, including the two judges of this Court, ought to have found that reasonable prospects of success existed to grant leave or special leave

respectively. (See *S v Khoasasa* [2002] ZASCA 113; 2003 (1) SACR 123 (SCA); *S v Matshona* [2008] ZASCA 58; 2013 (2) SACR 126 (SCA)). An appellant, on the other hand, faces a higher and stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959. (See *Van Wyk v S, Galela v S* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) para [14].)

[3] The trial court refused leave to appeal because it was satisfied of the complainant's credibility and more so that it was corroborated by the other state witnesses. On the other hand it found the appellant's version not to be reasonably possibly true and contradictory. Essentially the refusal of leave was factually based. It concluded that, although the complainant was under the influence of alcohol, she was not drunk. It found that there were no reasonable prospects of success on the merits.

[4] In order to understand the motivation of the trial court in refusing leave – it is essential to consider the factual background of what actually happened on that fateful day. On 27 January 2007 the complainant and her boyfriend Muntu Kwela (Kwela) and other people attended a farewell party. The appellant was also present. The complainant was introduced to the appellant by Kwela. She had two sparkling wine drinks for the evening. She also danced with a friend for a few minutes and later around 3am she felt tired and decided to go and sleep. Her boyfriend walked with her to the bedroom and she asked him to lock the door but her boyfriend suggested that he should not lock it because she might want to visit the ladies bathroom later. During her sleep, she heard someone coming into the bedroom, whom she thought was her boyfriend. As a result she did not wake up to see who it was. She felt the person coming on top of her and also realised that the person was penetrating her. She testified that she was on her monthly period that day and she had inserted a tampon to regulate the

bleeding. She realised that it was not her boyfriend as the person was lighter than the boyfriend, she woke up screamed and cried and noticed that it was the appellant who penetrated her. Kwela came into the bedroom and other party goers also came. The appellant ran away. She later reported the matter to the police and subsequently also underwent medical examination in the hospital.

[5] The appellant admitted having had sexual intercourse with the complainant but said it was consensual. His version is that he danced with the complainant, which she denies, and they touched each other and he put his hands around her waist whilst she put hers on his shoulder. He interpreted her actions and conduct as being relaxed around him and mutually attracted to each other. Later he decided to go and sleep. He went to the room which was identified to him by one Andile, a friend and a person who resided in the particular house. He found the complainant asleep and he moved in next to her and they started kissing each other. He realised that she was naked. He mounted her and had sexual intercourse with her. While busy with the intercourse, the door opened and closed immediately and he could not see who opened the door. Shortly thereafter the door opened again and the lights went on and when he looked he noticed that it was Kwela. The appellant said that she exclaimed and said ‘yoh maybe that was Muntu’. He immediately stood up, and put on his clothes, apologised to Kwela and then Kwela started assaulting him and he ran away.

[6] Kwela, also testified, although his version is that when he opened the bedroom door where the complainant was sleeping, he immediately put the lights on and saw the appellant on top of the complainant and was badly shocked. He remained standing at the door. He asked the appellant what was going on, upon which he answered that he thought it was his (appellant’s) girlfriend.

[7] His evidence contradicts that of Thembele Maseka (Maseka), also a state witness, in that Maseka said when they got to the complainant's bedroom door Kwela opened the door, peeped and closed it and followed him (Maseka) to his bedroom – but he (Maseka) asked why Kwela was following him, Kwela turned back to where the complainant was sleeping, opened the door and put the lights on. Maseka also followed Kwela when he turned back. It would appear that Maseka's version is consistent with that of the appellant when he said that someone opened and closed the door before opening it again and switching on the lights.

[8] Be that as it may – it is common cause that there are discrepancies and contradictions in both the State and the defence cases, the question remains whether or not the said discrepancies and contradictions are relevant and material to the issue or issues to be decided by this court. The totality of the evidence ought to be considered holistically. In *S v Mkohle* 1990 (1) SACR 95 (A) at 98E-F Nestadt JA remarked that:

'Contradictions *per se* do not lead to the rejection of a witness' evidence. As Nicholas J, as he then was, observed in *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-C, they may simply be indicative of an error. And at (576G-H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance and their bearing on other parts of the witness' evidence.'

[9] In *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564G-H: Corbett JA observed that:

'The general principle is that an applicant for special leave to appeal must show, in addition to the ordinary requirement of reasonable prospects of success, that there are special circumstances which merit a further appeal to the Appellate Division. This Court will be the arbiter as to whether such special circumstances exist.'

[10] I turn to deal with the appellant's contentions. The appellant attacked the admissibility of the medical report (J88) contending that it did not comply with the provisions of s 212(4) of the Criminal Procedure Act 51 of 1977 (the CPA). He complained about the procedural acceptance thereof in that the medical report was not properly completed and the qualifications of the doctor were not properly stated. The State conceded the inaccuracies and that it was wrongly admitted. However the State submitted that in view of the nature of the defence advanced by the appellant, the medical report does not take the appellant's case any further and I agree with the State's submissions. The medical report simply becomes a neutral fact. The appellant did not dispute sexual intercourse with the complainant but averred that it was consensual, which the complainant denies. Even if one excludes the medical report, the trial court relied on her evidence which was corroborated by other State witnesses.

[11] The appellant also contended that schedule 2 of s 68(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, amended the Magistrates' Court Act 32 of 1944 and provides that a judicial officer must be assisted by two assessors in terms of s 93ter(2) of the Magistrates' Court Act, in cases of rape. It probably became clear to counsel for the appellant that his interpretation of s 93ter(2) was incorrect. The essence of the State's contention was that the date of commencement of the amendment of the Act is still to be proclaimed. The present position is that s 93ter(2) of the Magistrates' Act gives the presiding officer a discretion to use assessors, except where the charge is murder. This court in *Gayiya v S* [2016] ZASCA 65; 2016 (2) SACR 165 (SCA) referred to *Chala & others v Director of Public Prosecutions, Kwazulu-Natal & another* 2015 (2) SACR 283 (KZP) and confirmed the position that, the presiding officer is obliged to use assessors in

cases where an accused is charged with murder only, unless the accused person elects otherwise.

[12] I now turn to discuss the contention that the trial court applied an incorrect test in that the court required the appellant to prove that his version of the facts was probable. It is quite clear from the tenor of the judgment as a whole, that in arriving at her conclusion, the magistrate had had regard to the credibility of all the witnesses. On the contrary the record reveals that the magistrate made a proper assessment and analysis of all the evidence, by amongst other things, weighing the strength and the weaknesses of the State's case vis-ä-vis that of the appellant, including the probabilities and improbabilities. It is axiomatic that an examination of the probabilities cannot be done in a vacuum. Such an exercise requires an analysis and evaluation of the evidence as a whole. (See *S v M* 2006 (1) SACR 135 (SCA) para 189.)

[13] On the facts of this case, the State proved beyond reasonable doubt that she did not give consent to the intercourse that took place. The evidence is clear that she could not have said that her boyfriend should lock her inside the bedroom, if she had a secret visitor in mind in the person of the appellant. Clearly she did not consent when she realised that it was the appellant on top of her, she screamed and cried prompting the appellant to put his hand on her mouth. She could not have consented to have sexual intercourse when she knew very well that she had a tampon inside her as she was menstruating. She even refused to have sexual intercourse with her boyfriend earlier in the day for the same reason that she was having her period. She immediately reported to her boyfriend and others that she had been raped and reported the matter to the police and was examined by a doctor on the same day. If the version of the appellant, that the consent should be inferred from the time when he got onto

the bed next to her, then its improbability becomes glaring because she screamed and cried upon realising that it was the appellant on top of her.

[14] It is easy for one to trivialise the shock and trauma that a rape victim experiences and to conclude that she faked a rape. This court should be guided by the facts as played out by the evidence during the trial. On a conspectus of all the evidence including the appellant's version the complainant could not have consented to have sexual intercourse with the appellant. Her boyfriend was in the house he could have come into the bedroom at any time during the night.

[15] Based on the above considerations, I am of the firm view that the appellant failed to demonstrate any special circumstances which merit a further appeal to this Court – therefore special leave to appeal was justifiably refused. There are no reasons to vary the order of the courts below, including the decision of the two judges of the SCA. It is not of great public importance, nor is this a case where without leave a grave injustice would result.

[16] The application for special leave to appeal is refused.

_____

J B Z Shongwe
Judge of Appeal

Appearances

For the Appellant:	L Janse Van Rensburg Instructed by: BBM Attorneys, Cape Town; Symington & De Kock, Bloemfontein.
For the Respondent:	H Obermeyer Instructed by: Director of Public Prosecutions, Grahamstown; Director of Public Prosecutions, Bloemfontein.