THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE

Case No: 20133/14

In the matter between:

KHOLILE JACKSON TOFA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Tofa v The State* (20133/14) [2015] ZASCA 26 (20 March 2015)

Coram: Mpati P, Majiedt JA, and Schoeman AJA

Heard: **16 MARCH 2015**

Delivered: **20 MARCH 2015**

Summary: Rape conviction – whether guilt proved beyond reasonable doubt on evidence of a single witness – application to adduce further evidence – principles restated.

ORDER

On appeal from: High Court, Free State Division, Bloemfontein (Lekale J and Zietsman AJ, sitting as court of appeal):

(1) The application to adduce further evidence is dismissed.

(2) The appeal against conviction is dismissed.

JUDGMENT

Majiedt JA (Mpati P and Schoeman AJA concurring):

[1] This is an appeal against an order of the High Court, Free State Division, Bloemfontein (Lekale J and Zietsman AJ, sitting as a court of appeal), dismissing an appeal to it against the conviction of the appellant, Mr Kholile Jackson Tofa, on a count of rape in the Bloemfontein Regional Court. There is also an application before us to lead further evidence. The high court granted leave to appeal to this court and, although the application to adduce further evidence was not before it, expressed the view that this court should consider that application together with the appeal. It is convenient to consider that application first.

[2] The appellant placed an affidavit from the complainant before the high court. That affidavit purportedly showed that the complainant admitted that she had not been raped. In an opposing affidavit the complainant, Ms Nomsa Christonia Baadjie, disputed the authenticity of her alleged affidavit and pointed out that her surname had been misspelt as 'Bhatyi' in it, whereas her surname was 'Baadjie'. The policeman who is alleged to have commissioned the disputed affidavit, Constable Sabata Motjetje, also deposed to an affidavit. In it he denied any knowledge of the statement or that he knew the complainant prior to meeting her when a State advocate set up a meeting with the two of them to clarify the disputed affidavit.

[3] A brief recital of how the matter proceeded in the high court is necessary. The appellant, who was legally represented at all times, was convicted of rape on 4 March 2011 and sentenced to 10 years' imprisonment on 5 April 2011. On the last-mentioned date the regional magistrate refused his application for leave to appeal against conviction and sentence. On 21 November 2011 the high court (Musi J and Kubushi AJ) granted leave to appeal to the high court on petition. The appellant was granted bail pending his appeal, which was heard on 3 June 2013 but without an accompanying application to lead further evidence. The appeal was dismissed by Lekale J and Zietsman AJ. On 25 July 2013 the matter came before Moloi J as duty Judge, who granted leave for it to be set down before the Full Court to consider the relief sought, namely a 'rescission' of the judgment on appeal by Lekale J and Zietsman AJ. The Full Court (Kruger J, Van Zyl J and Molemela J) dismissed this extraordinary application and postponed it to 1 November 2013 for hearing by Lekale J and Zietsman AJ as part of the application for leave to appeal. We do not have the reasons (if any had been given) for the orders issued by Moloi J and by the Full Court before us. But it does appear as if the Full Court dismissed the application before it primarily on the basis that the appellant sought to introduce a civil law remedy in criminal proceedings. The appellant's bail was extended to 1 November 2013, on which date the hearing was postponed to 29 November 2013 and bail was further extended. Lekale J and Zietsman AJ granted leave to appeal against conviction to this court but regarded themselves as *functus officio* as far as

the application for leave to adduce further evidence was concerned. They thought it proper that this court should deal with that aspect on appeal.

[4] The test for the hearing of further evidence on appeal is well established. The requirements are:
(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: *S v de Jager* 1965 (2) SA 612 (A) at 613C-D; *S v Ndweni & others* 1999 (4) SA 877 (SCA) at 880D.

[5] The power to receive further evidence on appeal is sparingly exercised; further evidence will only be allowed in exceptional circumstances so that there can be finality in cases – *De Jager* at 613A. The present application does not meet the first two requirements above. In his affidavit the appellant says that, while in prison, he was visited by his relatives who conveyed to him that the complainant wanted to recant her testimony. What is glaringly absent is an identification of these relatives so that the State could follow this up. Also lacking is the date on which this information became available to the appellant. This has a material bearing on the first requirement. The evidence was available when the appeal was heard in the high court and yet there was no application for it to be led. We have not been given any explanation for this omission. This dearth of detail negated the State's ability to follow up these allegations. As it turned out, the State did follow up where it could, namely in respect of the alleged recanting affidavit of the complainant, which is what I discuss next.

[6] The affidavits of the complainant and Constable Motjetje cast great doubt on the authenticity of the alleged recanting affidavit. And the misspelling of the complainant's family name exacerbates the matter. There is a strong suspicion that this new evidence is a fraudulent fabrication, but it is not necessary to make a finding in this regard. It suffices to hold that the

application does not meet the first two requirements set out in para 4 (a) and (b) above and it falls to be dismissed.

[7] With regard to conviction, the thrust of the appellant's attack was that the complainant's testimony lacked credibility, that no reliance can be placed on her as a single witness absent any acceptable corroborating evidence and, lastly, that the appellant's version was reasonably possibly true. The trial court erred in accepting the complainant's evidence and rejecting his, so the appellant contended. The salient facts were briefly as follows (most of the facts were common cause):
The appellant and the complainant lived in the same street and were known to each other. The complainant bought liquor from the appellant (who ran a shebeen) on several occasions. On the date and at the place stated in the charge sheet the parties had sexual intercourse at the appellant's house. The appellant alleged that this was consensual, whereas the complainant's version was that it was not. Immediately thereafter, the complainant went to her mother's house and reported that the appellant had raped her (her mother confirmed this report). Thereafter she laid a complaint with the police and she was medically examined. The J88 medical report recorded no visible physical injuries, except for a superficial abrasion on the fossa navicularis which was indicative of probable penetration. The appellant's version was that he and the complainant had been in a clandestine love relationship for over two years without there ever having been any sexual intimacy involved (the appellant was a married man at that time). On the evening in question, on the appellant's version, she came to his house to buy beer and sexual intercourse occurred at her instigation and insistence. On his version the complainant made advances and although he initially showed no interest, he later succumbed to her wiles, due to the fact that his wife was not at home. The complainant had a completely different version. According to her, the appellant had pulled her into a bedroom, threw her on a bed, then proceeded to undress her and thereafter raped her.

[8] It is trite that an appellate court has limited powers to interfere with the factual findings of a trial court, which are presumed to be correct unless they

are clearly wrong *ex facie* the record; see – *S v Francis* 1991 (1) SACR 198 (SCA) at 204e-d. While it is true that the complainant's evidence was not without blemishes, it was not nearly of such poor quality that it warranted outright rejection. The primary issue was that of consent. It matters therefore not that she was not fully consistent about the time she had arrived at the appellant's place, whether she had an empty beer bottle with her or not and on the minute detail of how sexual intercourse had occurred. Of more materiality were the events afterwards. She walked a long way to report the rape to her mother. And she was in a tearful state when she arrived at her mother's house.

[9] The appellant's version, on the other hand, was correctly found to be false beyond reasonable doubt. He would have the trial court believe that, while in a secret love relationship for two years with the complainant, they had not been sexually intimate until the evening in question. When that watershed moment did eventually arrive, the complainant quite remarkably cried rape. And his explanation that the complainant had been paid R2 000 by a Ms Sophie Malisa to lay a false charge against him beggars belief. Ms Malisa held a grudge against him, said the appellant, due to a previous incident when Ms Malisa's daughter, Mandwa, had died at the appellant's hands. The appellant was charged with her murder but was acquitted on the basis of self-defence. The fatal flaw in this explanation is the fact that the complainant made the rape allegation that same night, having gone directly from the appellant's dwelling to that of her mother. On the undisputed facts there had been no opportunity for the complainant to have met with Ms Malisa before making the rape report, to hatch this conspiracy against him.

[10] In the circumstances, the regional magistrate's findings are unassailable. The appeal must fail.

The following order is issued:

1. The application to adduce further evidence is dismissed.
2. The appeal against conviction is dismissed.

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S A Majiedt

Judge of Appeal

Appearances

For the Appellant: P W Nel

Instructed by:

Bloemfontein Justice Centre

For Respondent: W J Harrington

Instructed by:

The Director of Public Prosecution, Bloemfontein