THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 074/2014

In the matter between:

JOSEPH MFULA MULULA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation:	*Mulula v The State* (074/14) [2014] ZASC 103 (29 August 2014).
Coram:	Brand, Bosielo, Zondi JJA, Fourie *et* Mathopo AJJA
Heard:	**18 August 2014**
Delivered:	**29 August 2014**

Summary: Criminal appeal – conviction on two charges of rape – application for leave to introduce further evidence of facts established subsequent to conviction and sentence – requirements to be satisfied – further question whether new evidence should be allowed in the form of affidavits on appeal or whether the matter should be remitted to the trial court.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Moshidi J sitting as court of first instance):

It is ordered that:

1 The application for the hearing of further evidence on appeal is granted.

2 The appeal is upheld.

3 The appellant's convictions by the regional magistrates' court on two charges of rape are set aside.

4 The sentence of 15 years' imprisonment imposed by the high court is set aside.

JUDGMENT

Brand JA (Bosielo, Zondi JJA, Fourie *et* Mathopo AJJA concurring):

[1] This is an appeal against conviction and sentence coupled with an application to lead further evidence. The appellant was charged in the Secunda Regional Court with two counts of rape. In support of these charges the State alleged that the appellant had intercourse with the complainant, who was under the age of ten at the time – to whom I shall refer as PZ – on two occasions. The first incident allegedly occurred in January and the second in February 2004. The appellant, who was represented by a legal aid attorney at the trial, pleaded not guilty. In spite of this plea, he was, however, convicted by the trial court as charged and then referred to the North Gauteng High Court for sentencing pursuant to the provisions of s 52(1)*(b)* of the Criminal Law Amendment Act 105 of 1997. In the event, the matter came before Moshidi J, who confirmed the convictions and sentenced the appellant to 15 years' imprisonment on both counts, taken together for purposes of the sentence. The appeal against that order is with the leave of this court.

[2] The background facts are as follows. PZ was the stepdaughter of the appellant's brother. They lived together in the same house with other adults and children. Included amongst the adults were three men. PZ slept in her own room. She testified that in January 2004 a man came into her room while she was asleep, got into bed with her, undressed her and then proceeded to have intercourse with her without her consent. She tried to scream but he put his hand over her mouth and threatened to kill her if she should tell anybody. In February 2004 more or less the same thing happened, but on this occasion she heard someone at her door. She tried to keep the door closed but her assailant forced it open. Thereupon she ran to her bed where her assailant followed her and once more forced her to have sexual intercourse with him. Again he threatened to kill her if she should tell anybody what happened. Because of these threats, PZ said, she did not report the incidents to anyone. According to PZ's mother, it came to her notice some time after these incidents that PZ experienced some discomfort and irritation in her private parts. She took PZ to a medical practitioner, Dr de Villiers, who identified the condition as emanating from a sexually transmitted disease, herpes 2. When the mother was informed about the cause of the condition, she questioned PZ about what had happened whereupon she came out with the version that she retold in court.

[3] It was not suggested that PZ's account of what had happened to her was entirely fabricated. What was challenged was her identification of the appellant as her assailant. In chief she was quite confident about this aspect of her evidence. She knew the appellant well, so she said, and although the incidents happened at night, the appellant switched on the electric light on both occasions before he got into her bed. Hence she had no problem in recognising him. Yet, under cross-examination she showed some misgivings about this issue which is reflected in the following passage in the judgment of the regional magistrate:

'[S]he was not very certain as to whether the light was on or off, whether the door is completely closed … so on those issues later in her cross-examination she became a bit confused but with regards to the incident itself she maintain[ed] the accused on these both occasions had raped her. And at no stage she was actually told to fabricate such versions.'

[4] What PZ in fact said in cross-examination with reference to the January incident was:

'He went into my bedroom and I was sleeping and then he came nearer to my bed. I do not remember if the light was on or not and then I tried to shout or scream and then he put his hand over my mouth.'

And on another occasion she conceded that:

'I thought it was [the appellant].'

I find this uncertainty crucial. If the light was indeed not on she could easily have 'thought' – as she said – that her assailant was the appellant. In this event the self-evident possibility is that she could have been mistaken, albeit honestly, about who her assailant was. In addition, there is what I regard as the inherent probability, that with so many people in the house, the assailant would not have switched on the light and left it on while he performed his evil deed. Unlike the regional magistrate, I derive no comfort from the subjective certainty on the part of PZ that it was the appellant who raped her. Subjective conviction rarely affords any safeguard against an honest mistake. Nor am I reassured by the absence of any suggestion that PZ's version is a fabricated one. Again this consideration would have been an answer to the contention that PZ was deliberately untruthful. But in the same way it provides no valid answer to the proposition that she was making an honest mistake.

[5] In rejecting the appellant's denial that he was the assailant, the regional magistrate relied mainly – if not exclusively – on the appellant's clearly unconvincing thesis as to why PZ and her mother would have singled him out as the false target of their blame. But although the inherent logic of the trial court's reasoning in this regard cannot be faulted, our courts have in the past often cautioned against this approach since it wrongly supposes an obligation on the part of accused persons to explain the motives of false accusations by their accusers. An adverse credibility finding against an accused person based solely on a failure to offer an acceptable motive for false incrimination, can therefore not be sustained (see eg *S v Lotter* 2008 (2) SACR 595 (C) para 38; *Maseti v S* 2014 (2) SACR 23 (SCA). But perhaps most important is the recognition that the State's difficulty in the instant case is not so

much based on the possibility of a deliberate false accusation by PZ, but on the possibility of a mistaken identification of her assailant. In the event the inquiry into a potential motive for a deliberate false accusation does not even arise.

[6] In this light I have real discomfort about the soundness of the appellant's convictions. On the other hand, there is the time-honoured reluctance on the part of this court to interfere with the factual findings of trial courts. As it happens, however, I find it unnecessary to pursue this line of enquiry any further, since the outcome of the matter would, in my view, be sealed by the new evidence that the appellant seeks to present, either on appeal or upon remittal to the high court. The context of this evidence requires the introduction of some further background facts. A starting point for this introduction is the evidence by Dr de Villiers that PZ was infected by a sexually transmitted disease, herpes 2, which means that she must have had sexual intercourse with someone suffering from that disease. There is no other way in which she could have contracted it.

[7] In cross-examination of Dr de Villiers, it was put to her that the appellant did not suffer from this disease. Her response was, however, that herpes 2 could be dormant in the body of the infected person with the result that the appellant could be suffering from the disease without him being aware of the fact. The further point she made was that once herpes 2 is in a person's blood, it remains there for life and would thus be detectable by a blood test even in a dormant state. Perhaps, with the benefit of hindsight, it is rather surprising that the State did not pursue this avenue. The reason for the surprise is, of course, that a simple test of the appellant's blood would conclusively determine one way or the other whether the appellant could be responsible for PZ's infection, which would, in turn, be highly relevant in removing any uncertainty that could exist about whether or not she was correct in the identification of the appellant as her assailant.

[8] This brings me to the evidence that the appellant seeks to introduce on appeal. Broadly stated it amounts to this: after the conviction of the appellant in the

trial court, he was no longer represented by the same legal aid attorney. Subsequent to sentencing in the high court, his new legal representative then sent him for a blood test with the specific purpose of determining the presence of herpes 2. A sample of his blood was taken by a phlebotomist employed by Lancet Laboratories, Ms P M Hope, and allegedly tested by another employee of Lancet, Ms E Havenga. Among the evidence which the appellant seeks to introduce is firstly reflected in an affidavit by Ms Hope. According to this affidavit she took a blood sample from the appellant on 6 November 2008 in accordance with the normal procedure prescribed by her employer and submitted it, again in accordance with the prescribed procedure, for testing to the laboratories with the request that it be tested for herpes 2.

[9] The second document is a pathology report by Lancet Laboratories with a reference number and particulars of the patient corresponding to the requisition form completed by Ms Hope. Thirdly, there is a report by Dr Karin Richter, a specialist pathologist in which she interprets the pathologist's report so as to indicate a result which is herpes 2 negative. In the light of this result she expressed the expert opinion that the appellant was not infected with herpes 2 at 'anytime before the date of the [pathology] laboratory report stated above (6/11/2008) and could not have transmitted herpes simplex virus type 2 to any sexual partner up to 6/11/2008'. Finally, there is an affidavit by an employee of the appellant's legal representative, to the effect that Ms E Havenga, who tested the blood sample, left the employ of Lancet Laboratories and could not be traced. According to his affidavit, the same holds true for the person(s) responsible for taking the sample from Ms Hope to Ms Havenga.

[10] This court's authority to deal with an application to introduce further evidence derives from s 22 of the Supreme Court Act 59 of 1959. Although s 19 of the Superior Courts Act 10 of 2013, which is now in operation, provides for the same powers in virtually identical terms, the latter section does not find application because this appeal was already pending when the new Act commenced on 23

August 2013. Both legislative provisions referred to, provide for this court to deal with an application to introduce new evidence at the appeal stage in one of two ways: it can hear the evidence on appeal or it can set aside the conviction and sentence and refer the case back to the trial court for the hearing of the further evidence. However, it is well-settled that it is only in exceptional circumstances that the courts will adopt either of these two courses. Apart from the general interest in the finality of litigation, there is always the possibility, having regard to the frailty of human nature, that evidence may be shaped or even fabricated to meet the trial court's difficulties. Accordingly this court has over a series of decisions worked out certain basic requirements. These are summarised thus in *S v De Jager* 1965 (2) SA 612 (A) at 613:

'*(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.'

[11] In addition, the general rule is that an appeal court will decide whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given, not in accordance with new facts or circumstances subsequently coming into existence. Nonetheless, this court has previously indicated that the rule is not written in stone. Evidence of facts subsequently arising will be allowed in circumstances that can be described as exceptional and peculiar (see eg *S v EB* 2010 (2) SACR 524 (SCA) para 5). Whether or not this test is met, I venture to suggest, will be dictated by what the interests of justice demand in a particular case. Of course, in a sense, the evidence that the appellant did not suffer from herpes 2 at the time when PZ was raped, was available before his conviction, albeit unknown. Nonetheless I will accept for the sake of argument that the appellant must pass the more stringent interests of justice test.

[12] In the present context the import of the first *De Jager* requirement, is of course, not so much why the evidence regarding the results of the blood test had not been introduced at the trial, but why the test had not been done earlier. With regard

to the latter the State's objection is that the appellant offers no real explanation for this failure. Although the objection is not without merit, it seems to me that the same criticism can be levelled at the State: why did the State not request a test for herpes 2 at the time? After all, as has often been said, a prosecutor's role is different from that of counsel or an attorney representing a client. Prosecutors stand in a special relationship to the court. Their primary duty is not to procure a conviction at all costs, but to assist the court in ascertaining the truth. This is particularly so where in this instance the prosecution went to the trouble of procuring a DNA test. The fact that the results of the DNA test then proved to be inconclusive is neither here nor there. The point is that it would have been much easier to procure a blood test, which by all accounts turned out to be highly relevant, than a DNA test. I am not saying all this to cast any aspersions on the State, but simply to make it plain why I do not regard this as an instance where the appellant and his legal representative should take sole responsibility for the fact that the blood test had not been done earlier.

[13] As to the second leg of the *De Jager* test, I am satisfied that the evidence regarding the blood test is at least prima facie true. This is not a case where it could be suggested that the new evidence had been manufactured or shaped to erode the basis of the convictions or sentence (see eg *S v H* 1998 (1) SACR 260 (SCA). The State's objection under this heading rests on the grounds, (a) that the evidence tendered does not prove the chain of custody of the blood sample, nor the correctness of the test, and (b) that the medical legal report by Dr Richter was not made in terms of s 212 of the Criminal Procedure Act 51 of 1977. But as I see it, these objections do not detract from the fact that the evidence is at least prima facie true. In consequence, the objections are more relevant to the enquiry further down the track, namely, if the evidence is to be allowed at all, whether this court should accept the evidence in the form of the affidavits tendered or whether it should set the convictions aside and refer the matter back to the trial court for the hearing of oral evidence.

[14] The third requirement of *De Jager*, that the evidence should be materially relevant to the outcome has, in my view, clearly been satisfied. The State's contention in this regard is that even if the evidence is accepted it would not justify the conclusion that it was not the appellant who raped PZ. Its argument in support of this contention was twofold. First, that the possibility cannot be excluded that the appellant was infected with herpes 2 when he raped PZ, but had been cured before the sample of his blood was taken on 6 November 2008. Secondly, that PZ could have been infected with herpes 2 by someone else before or after she was raped by the appellant. As to the first proposition, the possibility raised is in fact conclusively ruled out by the medical evidence. According to Dr Richter's statement, which is supported by the evidence of Dr de Villiers led by the State at the trial, recovery from herpes 2 is simply not possible. It is a lifelong affliction. Even when dormant it is still present in the blood of the infected person and will be detected by means of a blood test. As to the second argument the answer is that it is, in my view, far more likely that the nine year old PZ was infected by the rapist than that she had sexual intercourse with a second person on another occasion. According to the trial court's reasoning, the fact that PZ suffered from a sexually transmitted disease, corroborated her version that she was raped. But if this reasoning is sound, as it obviously is, logic dictates that she must have been infected by the rapist, which means, in turn, that the rapist must have suffered from herpes 2. Indeed, to my way of thinking, it can be said that if the new evidence is to be admitted the convictions and sentences are bound to be set aside.

[15] Hence I am satisfied that in the interests of justice, the appellant must be allowed to present the evidence that he seeks to introduce. This gives rise to the next question: should this evidence be admitted on appeal in the form of the affidavits already before this court or should the matter be remitted to the trial court for that purpose? There are no fixed rules for determining whether we should adopt the one approach rather than the other. The disadvantage of remittal is obviously that of additional delay in finalisation which is undesirable, especially in a criminal appeal. On the other hand, unless the evidence that the appellant seeks to introduce

is undisputed or incontrovertible, remittal seems to be the only viable option. In testing the evidence proposed by the appellant against this yardstick, the starting point is that the evidence reflected in the affidavit of Ms Hope is not disputed. It must therefore be accepted that she took a blood sample from the accused – whom she identified by his identity document; in the process the blood was collected in a sealed container; the container was marked with a unique reference number and with the name and further particulars of the appellant; the container was then sent to the laboratories for analysis; and that resulted in the pathology report before us.

[16] This pathology report reflects the same unique reference number and further particulars pertaining to the appellant which Ms Hope entered on the sealed container. The report clearly reflects that at the time of the test the appellant was not suffering from herpes 2. The State's first contention is, however, that the appellant had failed to prove the chain of custody of the blood sample. Although the argument is correct as far as it goes, it raises the rhetorical question – what are the chances of the contents of the sealed container being substituted between Ms Hope and whoever did the analysis? The answer, I believe, must be 'slight indeed'. The State's second objection is that the pathology report is not confirmed by the person who did the test. That is so. But the original report was handed to us at the hearing and there is no suggestion that it contains any misstatement of the test results. The only remaining possibility is thus that something could have gone wrong with the test. Absent any evidence to support this hypothesis, I think it must be accepted that the inherent probabilities favour the accuracy rather than the inaccuracy of the test results.

[17] The final objection raised by the State concerns the report by Dr Richter. This report, so the objection went, was not made in terms of s 212 of the Criminal Procedure Act and is not a proper affidavit at all. I consider the objection well-founded. Having said that, however, it seems to me that Dr Richter's report does not take the matter any further. It relates to two aspects only. First, to an interpretation of the pathologist's report that the appellant did not suffer from herpes 2. But that

interpretation appears clearly from a proper reading of the report itself. Secondly, it confirms that, because herpes 2 is for life, the appellant could not have suffered from herpes 2 at any time before the sample was taken. Although that evidence is patently of cardinal importance, it already appears from the testimony of Dr de Villiers who was called as a State witness at the trial.

[18] In these circumstances, and particularly in the light of the fact that the trial proceedings were concluded about eight years ago, I find that we should allow the evidence in the form of the affidavits before us rather than to remit the matter to the trial court. From what I have said earlier, the consequence is, in my view, that the convictions and sentence are to be set aside.

[19] It is ordered that:

1 The application for the hearing of further evidence on appeal is granted.

2 The appeal is upheld.

3 The appellant's convictions by the regional magistrates' court on two charges of rape are set aside.

4 The sentence of 15 years' imprisonment imposed by the high court is set aside.

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F D J BRAND

JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	C Joubert Instructed by: Pretoria Justice Centre, Pretoria c/o Bloemfontein Justice Centre, Bloemfontein
For the Respondent:	F W van der Merwe Instructed by: Director of Public Prosecutions, Pretoria c/o Director of Public Prosecutions, Bloemfontein