THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 1049/2013

Not Reportable

In the matter between:

ZWELAKHE ABEDNIGO LUTHULI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Luthuli v The State* (1049/2013) [2014] ZASCA 164 (01 October 2014)

Coram: Mpati P, Bosielo and Willis JJA

Heard: 12 September 2014

Delivered 01 October 2014

Summary: Procedure – appeal against conviction and sentence on the merits – application for leave to lead further evidence – main witness and potential witnesses to give further evidence deceased – requirements for leading further evidence satisfied – applicant's conviction and sentence set aside in interests of justice.

ORDER

On appeal from: KwaZulu High Court, Pietermaritzburg (McLaren and Jappie JJ sitting as court of appeal):

In all the circumstances, the conviction and sentence are set aside.

JUDGMENT

MPATI P (Bosielo and Willis JJA concurring):

[1] The appellant was convicted of rape in the regional court, Verulam, on 2 February 2000 and sentenced to 10 years' imprisonment. It was alleged in the charge sheet that upon or during November 1997 until March 1998, at or near Verulam, he 'did intentionally and unlawfully have intercourse with Portia Phahla (13 years) on several occasions . . . without her consent and did thereby commit the crime of rape'. The appellant's appeal against his conviction and sentence was dismissed by the KwaZulu-Natal High Court, Pietermaritzburg (Jappie J, with McLaren J concurring), on 14 September 2000. A little more than four years thereafter, on 20 December 2004, the high court granted the appellant leave to appeal to this court against his conviction and sentence. The circumstances under which leave was granted by the high court will become clear later in this judgment.

[2] It is not in dispute that the complainant was born in November 1983. She may therefore have been, or was about to attain the age of, 14 years rather than 13 years old as she testified, when the alleged rape took place for the first time during November 1997. The appellant was arrested for the alleged rape on 7

April 1998. He pleaded not guilty to the charge and gave no plea explanation. The trial commenced on 25 October 1999.

[3] The relevant evidence on which the appellant was convicted, testified to mainly by the complainant and her mother, Ms Bonganani Luthuli, may be summarised as follows: The complainant and her siblings lived with their mother at Canelands, Verulam. The appellant, who was related to the complainant's mother, also lived in Canelands, where he shared a house with, among others, Mr Mjabuliseni Luthuli, the brother of the complainant's mother. During November 1997 the complainant was sent by her mother, who was a vendor of items of clothing, to collect money owed to her by the appellant, who used to purchase clothing from her on credit. The complainant testified that upon arrival at the appellant's house at about midday she informed the appellant that she had been sent by her mother to collect money. The appellant advised her that he did not have money and that she would have to return at some other time. When she told him she was leaving he asked her to wait, without giving any explanation as to why she should wait. It appears, according to the complainant's testimony, that at that stage she was inside the appellant's bedroom.

[4] The complainant testified further that the appellant then closed the door of his room. When she enquired as to why he was doing so the appellant said there was no reason and proceeded to direct her to undress herself. She refused but he undressed her himself and thereafter pushed her towards his bed. He then 'inserted his penis in my vagina' so she testified. The following exchanges between the complainant and the prosecutor then appear from the record:

'Portia, when the accused did this to you, did you feel anything? - - - I felt pain.

And after he inserted his penis into your vagina, what happened? - - - He was moving.

While the accused was on top of you and he was doing this, Portia, what were you doing? - - - I was trying to push him aside, but I was failing.

And what happened after that? - - - So he then left me and I went home.'

The complainant testified further that before she went home the appellant told her that she should not tell her mother about what had happened. She indeed did not report the incident to her mother, because, she said, she was 'not so close' to her. She thought her mother would not believe her since 'the accused is her brother'.

[5] After the incident the appellant visited her home as he used to do. When the complainant was asked whether it ever happened to her again she said it happened five or six times from November 1997 until March 1998 at the house where the appellant lived. On each of those occasions she had been sent to his house by her mother to sell clothes. He did not, however, have sexual intercourse with her every time she went to his house. Her mother later suspected that she had a boyfriend, because, she said, she was no longer behaving like a child. Her aunt spoke to her at her mother's request and she told the aunt 'about what [had] happened'. She was thereafter taken to the police station by her mother where the alleged rape was reported. A police officer, sergeant Phewa, took her to a doctor, who examined her. This occurred during April 1998.

[6] The complainant's mother confirmed that when she noticed some change in the complainant's behaviour and the complainant denied that she had a boyfriend, she (the mother) enlisted the assistance of her sister to inspect the complainant to ascertain whether she was still a virgin. On discovering that the complainant was no longer a virgin and upon enquiry the complainant revealed to her aunt that the accused was the person who had taken her virginity. The next day she took the complainant to the police to make a report.

[7] Dr Jacques Terry Robert, a medical practitioner, testified that he examined the complainant on 8 April 1998. His findings were that 'the hymenal orifice appeared widened to slightly more than 15mm in transverse diameter', which 'could have been in keeping with previous penile penetration although one could not say with any certainty'. Dr Robert concluded that he did not believe that there was evidence to suggest 'that full penile penetration ever occurred'. Mr Mjabuliseni Luthuli and another witness, Mr Thembinkosi Luthuli, also gave evidence, but it is not necessary to refer to it for present purposes.

[8] The appellant denied that he ever had sexual intercourse with the complainant. He testified that he never had occasion to be alone with the complainant in his room because she was never alone when she visited him to collect money for her mother. She had always been accompanied by her two siblings. He testified that he once confronted the complainant when he met her, in the late afternoon, at an area known as Hilltop. When he asked her where she had been she said she 'was coming from men'. He said he thought the complainant had been in trouble with her mother on that day, which could be the reason why she falsely implicated him as the person who had allegedly raped her. Despite his denial the appellant was convicted and sentenced, as has been mentioned above.

[9] During December 2002 there was a significant turn of events. While the appellant was serving his sentence the complainant made a sworn statement to a police officer, Dumisani Raymond Gwala, in which she confessed that she had falsely implicated the appellant as the person who had allegedly raped her. It was recorded in the statement that at the time of the virginity test conducted on

her by her aunt she had a boyfriend named Mduduzi, with whom she had previously had consensual sex. Another police officer, Detective Captain Mzwakhile Chonco (Chonco), was subsequently tasked with an investigation into the veracity of the contents of the complainant's sworn statement. She confirmed to him, more than once, that she had made the sworn statement without being influenced by anyone. Chonco recorded his actions relating to the investigation in a sworn statement which he signed on 5 August 2004. Apparently, he also liaised with the relevant office of the Director of Public Prosecutions.

[10] In paragraph 12 of his sworn statement Chonco says:

'On Friday 5 March 2004 11:30 I arrived at office no 306 the Office of Advocate Sima Jockhad. I introduced the alleged victim Similo Portia Phahla to her. She interviewed her. The victim Similo Portia Phahla maintained that she lied in court. She was then warned of the consequences that she can now be charged for perjury she understood and still maintained her stand that no matter what happens to her, the uncle must be released from prison because she lied in court. Advocate Sima informed that an application to re-appeal shall now be submitted and the accused will be assisted by the Legal Aid Board . . . on new evidence that the victim lied under oath. I handed all the original documents to Advocate Sima Jockhad. . . .'

An application was subsequently launched on behalf of the appellant in the High Court, Durban, for leave to appeal to this court against his conviction and sentence. A further order was sought for leave for the appellant to lead further evidence. Attached to the papers was an affidavit deposed to by the complainant on 16 November 2004 in which she once again confirmed that she had falsely implicated the appellant in the alleged rape.

[11] The gist of what is contained in the complainant's affidavit appears in the following paragraphs thereof:

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Early in 1997 my mother accused me of not behaving myself and being rude to her. She asked me whether I had a boyfriend. I was at that stage involved in the relationship [with] Mduduzi. I was too afraid to tell her of this relationship and I denied that I had a boyfriend. My mother did not believe me and arranged for her cousin to examine me to determine whether or not I was a virgin.

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I had no choice but to submit to the examination. When my aunt examined me internally she realised that I was not a virgin and asked me who my sexual partner had been. Initially I did not respond. My mother then questioned me. I was too scared to tell her that the person was Mduduzi as I feared that I would be beaten and thrown out of the house. I was also concerned about what she would do to Mduduzi who lived in our house. Although I said I was completely ignorant about sex at the criminal trial, that was not accurate. I was not forced to have sex with Mduduzi and I thought it was a pleasurable experience and it was at all times consensual.

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Because I refused to tell my mother who my sexual partner was she took me to another aunt Dingeni Luthuli and her friend Happy Ndofana. These women asked my mother to leave the room as they thought I would be too frightened to reveal the information they wanted in the presence of my mother. I was then questioned by these women. I initially remained silent. They asked me if it was and suggested to me by questioning that it had been my uncle Zwelakhe. They said he had attempted to rape their daughters. Zwelakhe was a reference to the [appellant], Zwelakhe Abednigo Luthuli. I eventually decided that because they had mentioned Zwelakhe and it seemed they wanted me to say it was him I should do so and I hoped if I did nothing further would happen. I certainly did not appreciate that the [appellant] would be arrested and put into prison.'

The complainant concluded by saying she was 'willing to testify if recalled to give evidence in the matter' and that her evidence 'will accord with what is set out in this affidavit'. McLaren J granted both orders sought on 20 December 2004. He also fixed bail for the appellant in the amount of R50,00.

[12] In his heads of argument the appellant prayed for the setting aside of his conviction and sentence on the merits on various grounds, which it is not

necessary at this stage to enumerate. In the alternative, the appellant sought an order, on the strength of the 'new evidence', setting aside his conviction and sentence and the remittal of the matter to the trial court for the hearing of the complainant's new evidence. In her heads of argument counsel for the respondent supported the appellant's prayer for the setting aside of his conviction and sentence and the remittal of the matter to the trial court for the hearing of further evidence.

[13] A few days before the hearing of the appeal there was yet another turn of events. The respondent filed supplementary heads of argument in which we were advised that the complainant had passed away on 17 October 2010. Two other potential witnesses, Detective Captain Chonco and the complainant's alleged boyfriend, Mduduzi Nxumalo, had also passed away. Certified copies of death certificates in respect of the death of Chonco and the complainant were attached to the respondent's supplementary heads of argument.

[14] Before us counsel for the respondent supported the submission of counsel for the appellant that, in the light of the unfortunate and untimely demise of the complainant and the two potential witnesses mentioned above, the appellant's conviction and sentence should be set aside in the interests of justice. In *S v Ndweni and others* 1999 (2) SACR 225 (SCA) this court observed (at 227*e-g*) that-

'[i]t is not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified (*S v De Jager* 1965 (2) SA 612 (A) at 613A-B). An applicant seeking to re-open a case and lead further evidence will generally be required to satisfy the following requirements:

"*(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 (supra)* at 613C-D.)'

On a consideration of the contents of the affidavits referred to above, I am persuaded, without having to elaborate much, that the requirements for this court to remit the matter for the hearing of further evidence have been met.

[15] The appellant could certainly not have been in a position to lead the evidence now sought to be led. There are indications in the record from which it can be deduced that there is a likelihood of the truth of the evidence sought to be led. A few references to the evidence will suffice. The complainant testified that after the appellant had allegedly had sexual intercourse with her on the first occasion 'he said that I must not tell my mother'. When asked, almost immediately thereafter, why she did not tell her mother about the incident she said she was 'not so much close to my mother and the other thing, I thought that my mother would not believe my report since the accused is her brother'. When asked in cross-examination whether the appellant had used any means of threatening her she replied:

'He was not using anything to threaten me except that he used to say that I must not tell my mother about what happened because if I will do so, I will be in danger.'

She had made no mention in her evidence-in-chief of any threats made by the appellant. She also testified that if she had a boyfriend her mother would have been upset with her.

[16] Doctor Robert recorded the following findings in his medical examination report in respect of the complainant, which was handed into court as an exhibit:

'Full of scars and old bruises over the back and both upper and lower limb (apparently sjambok wounds by the mother).'

He confirmed his findings during his testimony before the trial court. In my view, there is a ring of truth in the contents of the complainant's affidavit, particularly where she states that she was too scared to tell her mother that the person who had had sexual intercourse with her was her boyfriend, Mduduzi, because she feared that she would be beaten and thrown out of the house. It appears that her mother certainly did not spare the rod. There is no doubt that the evidence sought to be led would, if accepted as the truth, be materially relevant to the outcome of the trial.

[17] I am satisfied that a case has been made out for the order sought, namely an order setting aside the conviction and sentence and remitting the matter to the trial court for the hearing of further evidence. The difficulty for the appellant, of course, is that the evidence he seeks to lead is no longer available, because the main witness and two potential witnesses who would have given it are no more. In my view, it would be a travesty of justice were the appellant to be denied the first part of the order he seeks merely because it has become impossible for him to lead the evidence he so wished to place before the trial court. I accordingly agree with the submission of both counsel that the conviction and sentence should be set aside in the interests of justice. In any event, I have grave doubts about the correctness of the conviction.

[18] Apart from the contradictions that are apparent from the testimony of the complainant referred to in paragraph 15 above, which appear to me to be material, the complainant was asked, during her evidence-in-chief, whether anybody accompanied her on each of the occasions she went to the appellant's house. Her response was in the affirmative. Now, it will be remembered that the appellant asserted in his testimony that he could never have been alone with the complainant in his house because she had always been accompanied by her

siblings when she went to collect money from him for her mother. Realising this difficulty the prosecutor asked a follow-up, but leading question:

> 'And on the occasions that the accused had had forceful sexual intercourse with you, was there anybody else that had accompanied you to his house?'

As would have been expected, the answer was 'no'. There are other discrepancies in the complainant's version, such as differences in her two statements that she made relating to the alleged rape, but it is unnecessary to go any further since the appellant's conviction and sentence are to be set aside in any event.

[19] In all the circumstances, the conviction and sentence are set aside.

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L MPATI
PRESIDENT

APPEARANCES

For Appellant:	B Laing Instructed by: Laing & Associates, Durban Justice Centre, Bloemfontein
For Respondent:	K. Essack Instructed by: The Director of Public Prosecutions, Pietermaritzburg The Director of Public Prosecutions, Bloemfontein