THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 979/2013
Not Reportable

In the matter between:

M K NKOMO **Appellant**

and

THE STATE **Respondent**

Neutral citation: *MK Nkomo v The State* (979/2013) [2014] ZASCA 186 (26 November 2014)

Coram: CACHALIA, MBHA JJA and GORVEN AJA

Heard: 05 November 2014

Delivered: 26 November 2014

Summary: Criminal Procedure – Appeal – Application for the remittal of a case to a trial court for the hearing of further evidence - witness recanting earlier evidence given at the trial - power of the court to make an order for remittal to be exercised sparingly and only when there are exceptional circumstances which warrant the granting of such an order – exceptional circumstances shown.

ORDER

On appeal from: Free State High Court, Bloemfontein (Kruger et Molemela JJ) sitting as court of appeal:

In the result the following order is made:

The appeal is upheld. The order of the high court is set aside and the following substituted in its place:

1 The conviction and sentence of the appellant are set aside;

2 The matter is remitted to the trial court (Regional Magistrate Phillip Johannes Visser) on the following basis:

(i) the letter of the complainant dated 15 May 2011 is admitted into evidence;

(ii) the State's case is re-opened for the hearing of further evidence;

(iii) the defence is permitted to re-open its case, should it so decide;

(iv) should the need arise to call other witnesses in relation to any relevant issues, the trial court is not precluded from calling and hearing such evidence.

JUDGMENT

MBHA JA (CACHALIA JA AND GORVEN AJA CONCURRING)

[1] The appellant was convicted for the rape of a young girl in the regional magistrate's court, Bethlehem, on 30 August 2010 and sentenced to 15 years' imprisonment.[1] On the same day the regional court granted the appellant

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[1] The charge sheet reads:
'. . . the accused is guilty of the crime of rape (read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997). In That upon or about 25/11/2007 and at or near Lindley . . ., the accused did unlawfully and intentionally have sexual intercourse with a female person, to wit Esta Pontsho Thwala a 13 year old girl, without her consent.'

leave to appeal to the Free State High Court, Bloemfontein against his conviction only. Before the appeal was heard, the appellant lodged an application in terms of s 22 of the Supreme Court Act 59 of 1959 for the matter to be remitted to the regional court for the hearing of further evidence of a letter in which the complainant recanted her testimony.

[2] On 5 September 2011 the high court (per Kruger et Molemela JJ), dismissed both the appeal and the application to allow further evidence. This appeal, with leave of the high court, is against the whole of the judgment dismissing both the appeal against conviction and the remittal application. I shall for the sake of convenience refer to the remittal application simply as 'the application'.

[3] In order to properly deal with the application, it is necessary to refer to certain parts of the evidence that was led at the trial, as well as the appellant's argument on the merits of the appeal.

[4] The evidence upon which the appellant was convicted consisted, in the main, of the testimony of the complainant, her sister Nthabiseng to whom the initial report of the alleged rape was made, the complainant's father and stepmother, and the J88 medico-legal report prepared and completed by Dr Leboko who examined the complainant. Dr Leboko passed away before the commencement of the trial.

[5] This evidence can be summarised as follows: during 2007, the complainant who was born on 14 February 1994, was a grade 7 pupil at a public school in Lindley. The appellant was one of her teachers at that school and was also a close friend of her parents. On Friday 23 November 2007 she attended a farewell function for all grade 7 pupils at Kroonpark in Kroonstad. The appellant and other teachers also attended the function. At the end of the festivities, the complainant together with other pupils and teachers all travelled back to school in buses that had been hired for the day.

[6] After the complainant had disembarked from the bus and whilst walking home, the appellant offered to give her a lift to her home in his car. After she entered the car, the appellant told her that he must first fill up petrol in town. Instead he drove to a local stadium where, after he undressed her and himself, had sexual intercourse with her inside his car without her consent. During the ordeal she never screamed as she believed that no one would hear her. As a result of the incident, she sustained injuries to her private parts and there was blood and a brown substance on her clothes. The appellant warned her not to tell anyone about what had happened. He then drove her home. Whilst they were driving, the complainant's father called her twice on her cellular phone to enquire as to her whereabouts. She replied that she was with the appellant who was driving her home.

[7] Upon arriving at her home, they both alighted from the car and the appellant entered her home to greet and speak with her parents. The complainant gave her stepmother some of the things she had brought from the school function and then went to sleep. She never told anyone about the rape for fear that her stepmother, with whom she had a poor relationship, would disbelieve and possibly assault her.

[8] The following day she visited her grandmother, who was staying with her elder sister Nthabiseng at another section in the same township. She confided to Nthabiseng that the appellant had raped her. Nthabiseng repeated what she had been told not to disclose to their stepmother. When the complainant returned home on 19 December 2007 she was confronted by her stepmother who assaulted her for not disclosing what had happened.

[9] The complainant's stepmother testified that she physically examined the complainant's private parts and observed a 'healing' bruise inside her vagina.

[10] A charge of rape was laid with the police on 31 December 2007, some five weeks after the incident. Later the same day the complainant was taken to a public hospital in Reitz where she was medically examined by Dr Leboko

who recorded his findings in the J88 medico legal report that the hymen was absent; there were bruises on the left side of the vaginal opening; the complainant informed him that she had not had sexual intercourse previously, and that she was sexually assaulted 'by a teacher she knows on 23/11/2007'.

[11] On 2 January 2008 the parents of the complainant and relatives of the appellant concluded a written agreement to the effect that the rape charge against the appellant would not be proceeded with and in return the appellant's family would pay an amount of R8000 to the complainant's parents. It is common cause that the charge of rape was never withdrawn and the R8000 never paid.

[12] In argument before us the appellant relied on various grounds to attack his conviction. I do not deem it necessary to traverse all the grounds save in so far as they may be relevant to the application. Before doing so, it is necessary to consider the manner in which the appellant came into possession of the complainant's letter in which she recants her earlier testimony and upon which the application to re-open the case rests.

[13] In his affidavit filed in support of the application, the appellant avers that during May 2011, Captain Mofokeng (Mofokeng) of the SAPS in Lindley telephoned him. He informed the appellant that the complainant who was with him, had an envelope containing a letter which she wanted him to give to the appellant. The appellant enquired what the contents of the letter were. Mofokeng read the letter and advised the appellant that as it contained serious allegations, he was going to refer this to the investigating officer. However, Mofokeng phoned back later saying he was not prepared to be involved any further.

[14] The appellant was, however, reluctant to have any contact with the complainant. He asked Mofokeng to advise her to leave the letter at a telephone booth next to the post office. The appellant says that he later drove to that booth where he saw the complainant as she left the letter. After she had left, he retrieved it and began reading it. It was in the complainant's

handwriting which he recognised. He then approached Mofokeng who advised him to summon Mr Rooikop Khambule (Khambule), the court interpreter. He also informed him that a case of perjury was being considered against the complainant. The appellant then referred the letter to his attorney.

[15] None of those facts is disputed by the State. This leaves the appellant's version about how he came into possession of the complainant's letter uncontroverted. Furthermore, there is nothing to suggest that the appellant's version in this respect is fabricated.

[16] Regarding the contents of the complainant's letter, it is dated 15 May 2011 and is addressed to the appellant personally. In it she says the following: the appellant did not rape her; her stepmother conspired with Khambule and forced her to lay a false charge of rape with a view to extracting money from the appellant; after the appellant had paid the money, Khambule would destroy the papers or make them disappear, and both Khambule and her stepmother told her to have sexual intercourse with her boyfriend so that when she was medically examined, it would be seen that she had been sexually penetrated. She also says that she was told to put on an act and cry whilst testifying in court to give credence to her false testimony against the appellant. The letter goes on to offer an unconditional apology to the appellant and his family for having destroyed his life by laying the false charge against him.

[17] Section 22 of the Supreme Court Act 59 of 1959 provides that:

'The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power –

(a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary.'[2]

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[2] This section has been replaced by s 19(*c*) of the Superior Courts Act 10 of 2013.

[18] The principles governing applications for remittal of matters for the hearing of further evidence are trite. This court has affirmed on various occasions that applications of this kind must be considered against the backdrop of the fundamental and well established principle that in the interests of finality, once issues of fact have been judicially investigated and pronounced upon, the power to remit a matter to a trial court to hear new or further evidence, should be exercised sparingly and only when there are special or exceptional circumstances.[3] The reason for this is the possibility of fabrication of testimony after conviction and the possibility that witnesses may be induced to retract or recant evidence already given by them. These are factors which must weigh heavily against the granting of the order of remittal. The mere recanting of evidence given earlier under oath 'will not ordinarily warrant the granting of an order reopening a concluded trial'.[4]

[19] In *R v Van Heerden & another*[5] Centlivres CJ stated:

'It is not in the interests of the proper administration of justice that further evidence should be allowed on appeal or that there should be a re-trial for the purpose of hearing that further evidence, when the only further evidence is that contained in affidavits made after trial and conviction by persons who have recanted the evidence they gave at the trial. To allow such further evidence would encourage unscrupulous persons to exert by means of threats, bribery or otherwise undue pressure on witnesses to recant their evidence. In a matter such as this the court must be extremely careful not to do anything which may lead to serious abuses in the administration of justice'.

Centlivres CJ also quoted with approval the judgment of Denning LJ in Ladd v Marshall [1954] 3 All ER 745 at 748 to the effect that:

'. . . A confessed liar cannot usually be accepted as credible. To justify the reception of the fresh evidence, some good reason must be shown why a lie was told in the first instance, and good ground given for thinking the witness will tell the truth on the second occasion.'[6]

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[3] *S v H* 1998 (1) SACR 260 (SCA) at 262h; *S v Ndweni* 1999 (2) SACR 225 (SCA) at 227a-g; *S v Wilmot* 2002 (2) SACR 145 (SCA) para 31.

[4] Ogilvie Thompson JA in *S v Zondi* 1968 (2) SA 653 (A) at 655 F-G.

[5] *R v Van Heerden* 1956 (1) SA 366 (A) at 372H-373A.

[6] At 372 D-F

There must, accordingly, be prima facie credible evidence which shows or suggests that the evidence originally given was false.

[20] The basic requirements which the applicant must satisfy to convince a court to accede to a request for a remittal, can be summarised as follows:

(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence sought to be led 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.[7]

Although non-fulfilment of any of these requirements would ordinarily be fatal to the application, every case must be decided upon its own merits and the court in the exercise of the overall discretion vested in it, and obviously only in very special circumstances, may nevertheless grant the application. Thus in *S v Nkala* where the accused's explanation was found not to be reasonably sufficient, the court nonetheless accepted, not without some hesitation though, that in the special circumstances of that case remitting the matter was proper.[8]

[21] I am of the view that the appellant, on whom the onus rests, has satisfied all these requirements. Regarding (a) and (c), the appellant was convicted by the regional magistrate on 30 August 2010. His notice of appeal was filed on 9 September 2010 and he received the complainant's aforesaid letter containing the new evidence around May 2011 whilst he was awaiting the hearing of his appeal. It follows that the appellant could not have had any knowledge about the complainant's letter and its contents prior to or during his trial in the regional court. Furthermore, assuming it is ultimately shown that the contents of the complainant's letter are true, this would clearly be materially relevant to the outcome of the trial.

[22] With regard to the likelihood of the truth of the contents, the specific averments made by the complainant in her letter must be considered against

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[7] *S v Nkala* 1964 (1) SA 493 (A) at 496A-B; S v De Jager 1965 (2) SA 612 (A) at 613C-D.

[8] *S v Nkala* (supra) at 497H; *S v Wilmot* (supra) para 31

the backdrop of the relevant evidence that was led at the trial. The complainant avers in her letter that she was reluctant to lay a false charge against the appellant but that she was forced to do so by her stepmother and Khambule. She says she even attempted, albeit unsuccessfully, to seek her father's assistance. From the evidence led at the trial it is clear that the complainant had an unhappy relationship with her stepmother. Significantly, the stepmother corroborated the complainant that she was reluctant to lay a charge of rape against the appellant. Furthermore, she testified that a few days before the charge was ultimately laid against the appellant on 31 December 2007, the complainant attempted to commit suicide by drinking a disinfectant. These incidents, although significant, were unfortunately never probed further by the defence during the trial, and assume even more importance in the light of the contents of the letter.

[23] The complainant's mention in her letter of the involvement of Khambule, is also significant and particularly disturbing. It will be recalled that Khambule also testified at the trial. From his evidence it is clear that it is he who initiated the discussion with the appellant about settling the matter in a so called 'cultural way'. He even suggested that the appellant should consider paying the sum of R10 000 to the complainant's family.

[24] Khambule is a court interpreter with considerable experience. He may well have known that what he was doing might be tantamount to obstructing the course of justice. The fact that he appears to have actively participated in attempting to prevent a criminal prosecution also lends credence to the contents of the complainant's averments in her letter that she was forced by her stepmother and Khambule to implicate the appellant falsely. I am of the view that Khambule must be recalled at the trial so that all these aspects can be properly investigated and ventilated.

[25] In light of the debate before us, counsel for the State was constrained to concede that the matter ought to be remitted to the trial court.

[26] The complainant's letter is written in simple English and contains numerous grammatical mistakes. In the letter the complainant extols the appellant as a good teacher who always gave his students good advice. She accepts that the appellant may in fact hate her for the rest of her life for having lied about him. From the simplicity of the letter and the manner in which it was written, it seems that the complainant never intended the letter to be used in any court process. She was simply trying to clear her guilty conscience. In the circumstances I am satisfied that there is a reasonable possibility of the contents of this letter being true.

[27] In summary, having regard to the contents of the complainant's letter, the manner in which it was written, how it came into the possession of the appellant and the prima facie likelihood of the truth of its contents, I am of the view that there are exceptional circumstances which justify the re-opening of the case and the leading of this evidence.

[28] In the result the following order is made:

The appeal is upheld. The order of the high court is set aside and the following substituted in its place:

1 The conviction and sentence of the appellant are set aside;

2 The matter is remitted to the trial court (Regional Magistrate Phillip Johannes Visser) on the following basis:

(i) the letter of the complainant dated 15 May 2011 is admitted into evidence;

(ii) the State's case is re-opened for the hearing of further evidence;

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(iv) should the need arise to call other witnesses in relation to any relevant issues, the trial court is not precluded from calling and hearing such evidence.

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B H MBHA

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	GJM Wright Instructed by: Azar & Havenga Inc., Bloemfontein
For Respondent:	SMW Mthethwa Instructed by: Director of Public Prosecutions, Bloemfontein