THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable

Case no: 1016/2023

In the matter between:

VINCENT JAPHTA **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Japhta v The State* (1016/2023) [2025] ZASCA 80 (5 June 2025)

Coram: ZONDI DP and SMITH and UNTERHALTER JJA and MOLOPA-SETHOSA and MOLITSOANE AJJA

Heard: 1 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 5 June 2025.

Summary: Criminal Law and Procedure - Special leave to appeal referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 — cautionary rule — evidence of a single witness — whether the trial court properly applied the cautionary rule — whether the trial court considered inadmissible evidence.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Slingers and Saldanha JJ sitting as court of appeal):

1. The referral of the order of this Court refusing special leave to appeal in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 was properly made.
2. The order of this Court refusing special leave is set aside.
3. The applicant is granted special leave to appeal against his conviction and sentence.
4. The order of the full bench is set aside and replaced with the following order:
   '(a) The appeal succeeds and the conviction and sentence imposed by the trial court are set aside.
   (b) The accused is found not guilty and is acquitted.'

JUDGMENT

Molopa-Sethosa AJA (Zondi DP and Smith and Unterhalter JJA and Molitsoane AJA concurring):

Introduction

[1] The applicant, Vincent Japhta, was charged with rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, in the Regional Court for the Regional Division of the Western Cape, Mitchells Plain (the trial court). The state alleged that he raped Jermaine Raylene Mulder (the complainant) during the early hours of 19 May 2019, at her residence.

[2] At the conclusion of the trial the applicant was convicted of attempted rape and on 10 December 2021, he was sentenced to eight years' imprisonment. On 26 January 2022, the trial court dismissed the applicant's application for leave to appeal against his conviction and sentence.

[3] On 4 February 2022, the applicant filed a petition in terms of s 309C(2)*(a)*(ii) of the Criminal Procedure Act 51 of 1977 (the CPA) for leave to appeal against his conviction and sentence. On 5 October 2022, the high court granted him leave to appeal.

[4] The appeal was heard on 26 May 2023, and was dismissed by the full bench of the Western Cape Division of the High Court (the full bench) on 14 June 2023. The full bench found that the trial court did not commit any demonstrable or material misdirections. It could thus not find any grounds on which to interfere with the trial court's findings.

[5] The applicant thereafter petitioned this Court for special leave to appeal. The petition was considered by Hughes and Kathree-Setiloane JJA and was dismissed on 30 August 2023. Aggrieved by the dismissal of his petition, the applicant applied to the President of this Court (the President) for reconsideration of that decision in terms of s 17(2)*(f)* of the Superior Courts Act, 10 of 2013 (the Act). On 10 November 2023, the President granted the application for reconsideration and ordered, inter alia, that:

(a) the decision of this Court dismissing the applicant's application for special leave to appeal against the decision of the full bench on appeal to it, is referred to the Court for reconsideration and, if necessary, variation;

(b) the application is referred for oral argument in terms of s 17(2)*(d)* of the Act; and

(c) the parties must be prepared, if called upon to do so, to address the Court on the merits.

Reconsideration in terms of s 17(2)*(f)* of refusal to grant special leave to appeal

[6] Section 17(2)*(f)* of the Act provides that where leave to appeal has been refused by two judges of this Court, the President of the Court, if she is of the view that a grave injustice may ensue or the administration of justice may be brought into disrepute, may refer the decision for reconsideration and, if necessary, variation.[1] This Court must determine whether the refusal to grant special leave should be reconsidered. The question then arises as to whether this Court is of the view that there are exceptional circumstances warranting the granting of special leave. The test has stringent requirements as the threshold is higher[2].

[7] In considering an application of this nature, the Constitutional Court remarked in *Liesching and Others v S*[3] that s 17(2)*(f)* was not intended to afford disappointed litigants a further attempt to procure relief that had already been refused. It was rather designed to enable the President to deal with a situation where injustice might otherwise result. The threshold for granting an application in terms of s 17(2)*(f)* is therefore high. There must be exceptional circumstances warranting reconsideration.

---

[1] *That section was amended by s 28 of the Judicial Matters Amendment Act 15 of 2023, which came into operation on 3 April 2024. In terms of the amended section the jurisdictional facts for the exercise for the President's discretion are, 'circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute.'.*

[2] *Notshokovu v S* [2016] ZASCA 112; 2016 JDR 1647 (SCA) para 2.

[3] *Liesching and Others v S* [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR178 (CC); 2019 (4) SA 219 (CC) para 139.

[8] This Court, in *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others*[4] held that 'the existence of exceptional circumstances is a jurisdictional fact that had to first be met, and absent exceptional circumstances, the s 17(2)*(f)* application was not out of the starting stalls'[5]. The question of the existence of exceptional circumstances is an issue that must be considered by this Court. In *Bidvest Protea Coin Security (Pty) Ltd v Mandla Mabena*[6], Unterhalter JA said that:

'Once the grant of leave has been refused (in the usual case) by a puisne judge in the trial court, and by way of a decision on petition by this Court, a very high bar must be met to have the question of leave to appeal reconsidered by this Court.'[7]

[9] The applicant must thus satisfy this Court, either that a grave injustice will result or that the administration of justice will be brought into disrepute to warrant the hearing of this matter again, after the application for leave to appeal was dismissed by the court of first instance and by two judges of this Court.

The facts

[10] The complainant testified that on the night in question she had been drinking alcohol at her home with family and friends. At some stage she felt drunk and went to her bedroom to sleep. She was fully clothed when she got into bed. She wore, among others, tight skinny jeans that came to above her waist. At some stage, after she had passed out due to intoxication, she woke up and found the applicant on top of her.

[11] She testified that they were both naked below the waist, her pants and panties were on the floor, and that nothing untoward was happening when she woke up. The

---

[4] *Motsoeneng v South African Broadcasting Corporation Soc Ltd* [2024] ZASCA 80; 2024 JDR 2195 (SCA).
[5] Ibid para 19.
[6] *Bidvest Protea Coin Security (Pty) Ltd v Mandla Wellem Mabena* [2025] ZASCA 23.
[7] Ibid para 16.

applicant then allegedly left the room, still undressed. She did not get up to lock the door. She testified that she immediately thereafter passed out because she was heavily intoxicated. She was examined by a medical doctor the following day. The J88 form, however, did not record any injuries or any other evidence of sexual assault.

[12] She could not explain why she did not feel the applicant pulling down her tight skinny jeans. The trial court held that the complainant was so intoxicated that she could not recall that the applicant undressed her; but incongruously found that the applicant did in fact undress her.

[13] The day after the alleged incident, the complainant initially called the applicant and demanded that he tells her the truth regarding what transpired the previous night. She threatened that she would lay a charge of rape against him if he did not tell the truth. She thereafter sent him about 74 WhatsApp messages, threatening to report the incident to the police, and repeatedly asking him what really happened the previous night. Nowhere in those messages did the complainant mention the version she testified to in court, namely, that she woke up to find the applicant naked below his waist and on top of her while her lower body was also naked.

[14] Those messages also show that she did not know if anything untoward had taken place between her and the applicant. She admitted that she lied to the applicant about being at a doctor's rooms and that semen was found on her. This she did to scare the applicant into telling her what really happened.

[15] In his testimony, Mr Henrico Botha ("Mr Botha"), who had stayed over at the complainant's house because he was extremely intoxicated, testified that the

applicant was wearing boxer shorts when he saw him in the complainant's bedroom; he was not naked. Mrs Bonita Botha, the complainant's sister, had already left the former's place by the time of the alleged incident.

[16] Mrs Botha testified regarding the report the complainant made to her the following morning. Significantly, her statement to the police differed in one material aspect from her testimony in court. In her statement she said that the complainant had a vague memory of what happened that evening but did not mention that the complainant had told her that the applicant was on top of her when she woke up. Mrs Botha, however, corroborated the applicant's version that she and the complainant had severely assaulted the applicant the following morning.

[17] The applicant's version was that he went to the complainant's house on the evening in question with a friend, Mr Andre Pietersen. There were several other persons present and they all consumed alcohol. He and the complainant thereafter twice went to her room to check on Mr Pietersen who had gone there for a nap. They kissed on both occasions.

[18] At some stage, after everyone had left, save for the complainant, the applicant, Mr and Mrs Botha, the latter asked the applicant to take her home. He did so. Mr Botha had passed out in the living room. The complainant then retired to her bedroom.

[19] Upon his return to the complainant's home, the applicant entered her bedroom and asked her permission to lie next to her. She agreed. They then started to kiss and touch each other. They both removed their pants and underwear. The complainant then told him that she did not wish to continue. He then stopped kissing and touching her. The complainant thereafter held him in a 'cradling' position.

[20] At some point, the applicant heard Mr Botha calling him. Mr Botha then entered the room while he and the complainant were still in bed. He got out of bed and left the room with Mr Botha. They chatted in the lounge about work related matters for some time. They did, however, not discuss what had happened between him and the complainant. Mr Botha thereafter took him home.

[21] The applicant said that the WhatsApp messages exchanged between him and the complainant were 112 in total, of which 74 were sent by the complainant. She, among others, threatened to open a criminal case against him and promised that she would not do so if he told the 'truth'. She said she wanted him to tell the truth because she did not know what happened between them. She also told him that she had been examined by a medical doctor who found traces of semen inside her vagina. He was adamant that he was coerced and duped by the complainant's lies, threats and false promises into admitting that he 'used [his] finger' and that 'it was just the head' (implying partial penetration).

[22] In one of those messages the complainant invited the applicant to her home on the pretext that she wanted him to apologise to her in person. He went to her home in the bona fide belief that they would be able to resolve the issues between them. Instead, the complainant and Mrs Botha seriously assaulted him, causing him to suffer cuts and bruises.

Discussion and analysis

[23] The complainant was a single witness regarding what happened in her bedroom. It is trite that evidence of a single witness must be approached with caution. Section 208 of the CPA, however, allows the court to convict an accused on

the evidence of a single competent witness. In *S v Rugnanan*,[8] this Court made the following remarks:

'The cautionary rule does not require that the evidence of a single witness must be free of all conceivable criticism. The requirement is merely that it should be substantially satisfactory in relation to material aspects or be corroborated.'[9]

[24] It is common cause that the complainant was heavily intoxicated at the time of the alleged incident and it is not surprising that evidence shows that she was an unreliable witness. Her statement to the police on 23 May 2019, a few days after the alleged incident, materially differs from her testimony in court. In her statement she only mentioned that she could vaguely recall the applicant being on top of her and having had drinks with family and friends. Under cross-examination she had difficulty explaining how she could subsequently remember all the detail to which she testified in court. She also threatened and coerced the applicant into making admissions. Moreover, she disingenuously brought the applicant under the impression that she had been to a doctor and that semen was found on her.

[25] The misleading and threatening WhatsApp messages were undeniably sent by the complainant to the applicant to coerce him into admitting that he had raped her the previous night. Even though the trial court found that the messages were dishonestly aimed at extracting admissions from the applicant, it inexplicably found that they did not in any manner affect the complainant's credibility. This, in my view, is a material misdirection on its part.

[26] The trial court found that the complainant's version that she and the applicant did not go to her bedroom on two occasions was corroborated by both Mr and Mrs

[8] *Rugnanan v S* [2020] ZASCA 166; 2020 JDR 2721 (SCA).
[9] Ibid para 23.

Botha. This was also a material misdirection. In fact, the versions of Mr and Mrs Botha contradict that of the complainant in this regard. Mr Botha testified that he did not watch the applicant the entire evening. Mrs Botha confirmed that the complainant indeed went to her bedroom to check on Mr Pietersen but could not recall whether the applicant also did so. She could, however, not dispute that he could have done so.

[27] In assessing the complainant's credibility, the trial court—and later the full bench—completely ignored the impact of her intoxication on her inability correctly to recall the events of the evening. Both courts ignored the fact that the evidence clearly shows that the complainant did not know what, if anything, had happened on the night in question. The full bench consequently erred in finding that there was no misdirection on the part of the trial court.

[28] In terms of s 219A of the CPA, an admission made by an accused person may be admitted into evidence if it was made voluntarily and without threat or promise by a person in authority. As to who is 'a person in authority', Zeffert and Paizes writes that '[o]ur courts have held that it clearly includes a magistrate, police officer or the complainant.'[10] The learned authors, however, do not cite any decided cases in support of this proposition. I am, however, of the view that it is not necessary for this Court to pronounce on the issue as to whether a complainant in a sexual offence case is a 'person in authority' for the purposes of s 219A, for the following reasons.

[29] It was common cause that the complainant told several lies and disingenuously made promises with the intention of coercing and deceiving the applicant into admitting that he had raped her. It is also not in dispute that the

[10] Zeffert & Paizes *The South African Law of Evidence*, 3 Ed (2017); See also E Du Toit et al *Commentary on the Criminal Procedure Act* (loose-leaf service 68, 2022) at 24-78A.

applicant made the aforementioned admissions - namely that he had used his finger and that 'it was just the head' - solely because of those threats and perhaps to avoid embarrassment for him and his family. It is therefore self-evident that, even if the admissions do not fall foul of the provisions of s 219A of the CPA because they were not impermissibly induced by a person in authority, their admission makes no difference because they have no probative value. The trial court thus correctly found that it could not place any reliance on the admissions, and the full court did not find that it misdirected itself in this regard.

[30] In addition, there was no evidence that supported the complainant's version and rendered the applicant's version regarding the issues in dispute less probable.[11] If the evidence regarding the admissions is disregarded, as it should be, the only remotely incriminating evidence that the complaint could proffer from her own knowledge was that at some stage the applicant was on top of her, he was naked, some of her clothing were on the floor and the following morning she had a 'funny' feeling in her pubic area. Importantly, apart from the fact that they do not establish the elements of the crime of attempted rape, namely that the applicant attempted to have sexual intercourse with the complainant without her consent, these crucial aspects of the complainant's testimony are not fundamentally irreconcilable with the applicant's version. In these circumstances, there is a reasonable possibility that the applicant's version could be true.

[31] Having regard to the totality of the evidence adduced in this matter, it is manifest that the trial court materially misdirected itself in the various respects mentioned previously. Exceptional circumstances is a high threshold. Errors of fact that turn on an assessment of evidence will not ordinarily amount to exceptional circumstances. Were it otherwise, almost every petition that is refused in the criminal

[11] *S v Gentle* [2005] ZASCA 26; 2005 (1) SACR 420 (SCA) para 18

cases that come before this Court would warrant reconsideration. However, where the compounding errors are so extensive that the risk of a wrong conviction is manifest, there is a probability of grave individual injustice. This is such a case. In my view, it is manifest that a wrong conviction on such a serious charge must inevitably result in a grave injustice for the applicant. I find therefore that there are exceptional circumstances as contemplated in s 17(2)*(f),* and the referral to this Court was properly made.

[32] It follows also, for the reasons set out, that special leave to appeal is granted and that the appeal must succeed. Both the conviction and the resultant sentence fall to be set aside.

Order

[33] In the result I make the following order:

1. The referral of the order of this Court refusing special leave to appeal in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 was properly made.
2. The order of this Court refusing special leave is set aside.
3. The applicant is granted special leave to appeal against his conviction and sentence.
3. The order of the full bench is set aside and replaced with the following order:

'(a) The appeal succeeds and the conviction and sentence imposed by the trial court are set aside.

(b) The accused is found not guilty and is acquitted.'

L M MOLOPA-SETHOSA
ACTING JUDGE OF APPEAL

Appearances

For the appellant:	A du Toit
Instructed by:	Riley Incorporated, Cape Town
	Webbers Attorneys, Bloemfontein
For the respondent:	L Snyman
Instructed by:	Director of Public Prosecutions, Cape Town
	Director of Public Prosecutions, Bloemfontein.