THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1285/2017

In the matter between:

THABO FLOYD ZULU **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Zulu v The State* (1285/2017) [2019] ZASCA 189 (11 December 2019)

Coram: Maya P, Wallis and Nicholls JJA and Dolamo and Hughes AJJA

Heard: 14 November 2019

Delivered: 11 December 2019

Summary: Application for special leave to appeal against refusal of leave to appeal – no reasonable prospects of success – application dismissed – reference for reconsideration in terms of s 17(2)(*f*) of Superior Courts Act 10 of 2013 – dismissal upheld.

ORDER

On application: Gauteng Division of the High Court, Johannesburg (Spilg J and Mkhari AJ):

The application for special leave to appeal is dismissed.

JUDGMENT

Hughes AJA (Maya P, Wallis and Nicholls JJA and Dolamo AJA concurring**):**

[1] The applicant, Thabo Floyd Zulu, was convicted in the regional court Roodepoort, Johannesburg, of the rape of an eleven year old girl (L) and sentenced to fifteen years' imprisonment. He initially sought leave to appeal against his conviction from the regional court but it was refused. Subsequently, in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA), he petitioned the Gauteng Division of the High Court, Johannesburg, (Spilg J and Mkhari AJ) for leave to appeal but his petition was dismissed. He then sought special leave to appeal against that refusal from this court in terms of s 16(1)*(b)*[1] of the Act. That was initially refused by two judges of this court, but the President thereafter referred the application for reconsideration in terms of s 17(2)*(f)* of the Act. The issue before us is whether any reason exists to vary the order dismissing the application for special leave to appeal. We approach the matter afresh unrestrained by the existing orders.

[2] The hearing was limited to whether the applicant should be granted the special leave to appeal that he sought. It involved a reconsideration of the decision by the high court refusing leave to appeal against the conviction and was not an appeal on the merits. The primary test is whether the applicant has reasonable prospects of success

[1] Section 16(1)*(b)* of the Superior Courts Act 10 of 2013 provides that 'an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal'.

in an appeal. If he does, special leave to appeal will be granted, the appeal will be upheld and the matter remitted to the high court for it to determine the appeal against his conviction. If not, then the application for special leave to appeal will be dismissed. This court in *S v Van Wyk & another* said 'the issue to be determined is not whether the appeal . . . should succeed, but whether the high court should have granted leave, which in turn depends upon whether the applicant could be said to have reasonable prospects of success on appeal'.[2]

[3] A party seeking special leave needs to show that special circumstances exist warranting a further appeal. What constitutes special circumstances was addressed by this court in *Van Wyk*, where it was stated that: **'**This may arise when in the opinion of this court the appeal raises a substantial point of law, or where the matter is of very great importance to the parties or of great public importance, or where the prospects of success are so strong that the refusal of leave to appeal would probably result in a manifest denial of justice'.[3] If the applicant has reasonable prospects of success in overturning his conviction if leave to appeal is granted, the prospect of him being acquitted of a serious offence and avoiding a lengthy term of imprisonment would ordinarily suffice to constitute special circumstances. Whether there are reasonable prospects of such a result depends upon the facts.

The facts

[4] I now turn to consider the factual background. On 17 December 2013, the complainant was in the company of her aunt Ms C and her cousins, Onai and B, Ms C's children. The complainant's mother, Mrs J N T, and Ms C are sisters. They had just returned, at about 22h30, from a baby shower hosted for the applicant's sister. Shortly after midnight, the complainant was raped whilst asleep in her cousin Onai's room. The applicant, who is the father of Ms C's children and her long-term partner, was alleged to be the person who raped her.

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[2] *S v Van Wyk & another* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA); [2014] 4 All SA 708 (SCA) para 14.
[3] *Van Wyk* fn 3 para 21.

[5] At the trial the complainant testified in camera, by way of Closed Circuit Television and through an intermediary, the regional court having granted an order in terms of s 158(2) of the CPA. Her testimony is summarised hereafter. She said that as they had arrived late from the baby shower, she and Onai did not proceed to her home as planned, but instead slept at her aunt's home which is situated in a secure complex.

[6] Whilst she and Onai were asleep on separate beds in Onai's room, shortly after midnight, she heard the sliding door of the living room being pushed aside. She explained that the sliding door could not lock and had been broken for a while. Though the room was in darkness and she could only see shadows, she noticed that someone had entered the room. This individual approached her bed and straightened the blanket. The complainant stated that she was lying on her stomach and pretended to be asleep. She then felt this person put their hands under her blanket, into her pyjama pants touching her bottom. She noted that Onai was sound asleep as they were facing each other. The complainant was adamant that the intruder was a male and she confirmed this cheekily under cross-examination when she stated: 'Because later on he did have a penis'.

[7] The complainant testified that her assailant took his hands out from under the blanket and went to Onai's bed. She was afraid that he would do the same to Onai, but instead it looked like he was merely checking up on her to see that she was asleep. He then returned to her bed pulled the blankets off, took off her pyjama pants and inserted his finger into her vagina, moving it in and out. She confirmed that it was his finger as she could feel the hardness of the finger nail. The applicant then turned her over, pulled his pants down, got on top of her, inserted his penis into her vagina and penetrated her, just as he had done with his finger. All the while, out of fear, she pretended to be asleep, but peeped out through her fingers to see who was assaulting her. She was clear in her evidence that although the room was dark and her observation was limited, the applicant was her assailant.

[8] After this horrific ordeal the applicant left the room. She heard the sliding door again, although whether it was being opened or closed she could not say, and immediately thereafter she telephoned her mother from her cellular phone. She only managed to whisper '[hi]' as she was afraid that her assailant would come back. They then communicated by SMS from 12.50 am to 01.06 am, when her mother arrived and took her to the nearby hospital. The chain of messages is significant both in regard to its content and in relation to the timeline of events and it is set out below:

'12.50am (L) Hi
12.51am (Mommy) What's wrong
12.51am (L) PLS CUM NOW!!!!!!!
12.52am (Mommy) Give me a clue please, I'm panicking
12.52am (L) I THINK IT IS WAS UNCLE THABO
12.52am (Mommy) What did you do!!
12.52am (L) He touched in the wrong place
12.53am (Mommy) And what else - is he around still
12.53am (Mommy) Don't allow him!!! Scream NOW
12.53am (L) And put his finger but I think he thought I was asleep and he did it to Onai too
12.53am (Mommy) I'm on my way
12:54am (L) I'm trying to wake up Onai help
12:54am (Mommy) I'm on my way
12:54am (L) Cum now must I wake up
12:54am (L) Ok
12:55am (Mommy) Pretend to be sleeping
12:56am (Mommy) I'm gettin in the car driving NOW
12:56am (Mommy) Did he just touch u only!!!
12:57am (Mommy) And the finger…. what did he do to u
12:57am (L) He put it on my kuku
12:58am (L) Also Onai
12:58am (Mommy) And what else baby
12.58am (Mommy) Did he take long
12:58am (L) He put his thing
12:59am (Mommy) Did it go inside
12.59am (L) Yes.'

[9] The gist of the SMS exchange between the complainant and her mother is that she identified her rapist as the applicant. She also described how he first inserted his finger in her vagina and thereafter he penetrated her vagina with his penis. She pleaded with her mother to come and fetch her immediately. Whilst communicating via SMS they kept each other abreast of their respective situations, the child on the situation in the house and the mother, of her whereabouts as she made her way to her.

[10] Dr Joubert, assisted by a female nurse, conducted a medico-legal examination on the complainant when she arrived at the hospital with her mother. His observations were consistent with her having been raped and the correctness of this was not challenged. Samples of DNA were collected by way of three vaginal swabs from the vulva, vestibule and introitus of the child's vagina. These swabs, together with the complainant's pyjama pants, were sealed in evidence bags and sent for forensic analysis. The medico-legal evidence of Dr Joubert was not admitted by the applicant, hence his testimony. The complainant's statement was taken at the hospital by a female police officer in attendance. The sexual assault kit containing the samples taken from the complainant, together with the bagged pants, was handed to the investigating officer, Sergeant Bojane, at the hospital. Sgt Bojane testified that he kept these items in a safe at his office until he handed them over to the forensic personnel for analysis at the Forensic Science Laboratory in Pretoria.

[11] The applicant's testimony amounted to a bare denial. He was adamant that he did not rape the complainant. He testified that he was in Meadowlands at his mother's home that entire day, but he attended the baby shower for a short while, whilst Ms C and the children were still there. He stated that he only returned home at 12.40am with Ms C opening the main door to let him. Ms C was called as a witness to corroborate his version. They were in bed together when the complainant's mother arrived at the house and confronted them. The result is that the sole issue at the trial was one of identification of the person who raped L. This in turn can be divided into a consideration of L's evidence of identification and the DNA evidence. I will deal with the latter first.

The DNA evidence

[12] I have already dealt with the circumstances in which DNA samples were obtained from L on the night of the rape. During the course of the investigations, on 20 January 2014, whilst the applicant was detained at the Krugersdorp Correctional Centre, he consented to providing a sample of his DNA for forensic analysis. Dr Brighten was responsible for the extraction of the sample and this was done in the presence of the investigating officer Sgt Bojane. He stated that he collected a specimen from the applicant by way of the buccal swab method. He recorded the sample as 13DBAA9798TF, which he personally sealed and handed to Sgt Bojane. Sgt Bojane confirmed having witnessed the collection of the swab from the applicant and that it was handed to him. In turn he handed the swab to the personnel at the Forensic Science Laboratory. Sgt Bojane testified that both the sexual assault crime kit of the complainant taken on the day of the crime and the DNA evidence collection kit of the applicant remained sealed at all times and had not been tampered with in anyway.

[13] Captain Masehla, a forensic analyst based at the Forensic Science Laboratory, Pretoria, testified that he conducted the analysis of both specimens on 11 July 2014. He confirmed the serial numbers on both samples, the one being the vaginal swab (ref:13D1AD0064), evidence bag with the pants (ref: PAD000626323) and the reference sample from the applicant (ref:13DBAA9798EP).

[14] He was asked to explain why different letters appeared at the end of the serial reference of the applicant's sample. He clarified that where the sample letters had changed from 'TF' at the end to 'EP' it denoted merely that the DNA kit's reference completed by the doctor ended with 'TF' and the pouch that the sample was in ended with the reference 'EP'.

[15] Captain Masehla testified that the samples were stored in a locker in his office and he was the only person who retained the key, which he kept on his person at all times. He personally removed the samples from the locker and on his inspection they showed no signs of having been tampered with. The Captain explained that he received three vaginal swabs and pyjama pants of the complainant and a reference

sample from the applicant. His analysis concluded that the DNA found on all the vaginal swabs and on the pyjama pants matched that of the reference sample of the applicant.

[16] Still on the issue of the DNA, the applicant provided no explanation for his DNA being found in the complainant's vagina and her pants: 'Well, I am not an expert in that field and I think an expert would be the right person to answer that question. Like I said I did not rape that *young lady*. And I was in the house, but I was in the bedroom sleeping upstairs'. (My emphasis.)

This evidence was significant because it involved an acceptance of the correctness of Captain Masehla's analysis and its conclusion that the applicant's DNA was a match to all the samples taken from L. At the end of his evidence-in-chief he undertook to have his own expert explain how his DNA was found in the complainant's vagina as he had not raped her. Even though he was provided with ample time by the regional court to procure an expert, none materialised. During cross-examination, he vehemently disputed that it was his DNA found in the complainant's vagina, but he could not advance an explanation for this in the absence of a well-founded forensic challenge to Captain Masehla's evidence.

[17] In argument in this application the applicant attempted to dispute the chain of custody of the evidence in respect of the DNA, but this was misplaced. From the record of the proceedings it is evident that the applicant failed to found a basis to dispute the chain of custody. There was a misconception in this regard that unless every person who had at any stage handled the samples was called as a witness it could not be established that the samples had not been contaminated or tampered with. That was incorrect. The samples taken on examination by Dr Joubert were sealed in his presence by the nurse assisting him and she was responsible for placing L's pants in the evidence bag. Dr Joubert's unchallenged evidence was that the swabs and pants were locked into a sealed container by his nurse and that it would have been handed directly to the investigating officer. That corresponded with the evidence of Sergeant Bojane. Some point was sought to be made of the fact that the identity of the nurse who assisted Dr Joubert and that of the nurse who handed the evidence bags to Sergeant Bojane does not appear from the record, but in the absence of evidence of tampering with the evidence bags this was neither here nor there. The overwhelming

probability was that Dr Joubert's nurse handed the evidence bags to Sergeant Bojane after sealing them herself. As to the sample taken from the applicant by Dr Brighten, it was sealed immediately and given to Sergeant Bojane, who delivered it to the laboratory. Finally, the evidence of Captain Masehla was that there was no opportunity for tampering while the evidence was in his possession. The unchallenged position was that there had been no interference with the various samples. The attempt to raise a dispute in that regard involved the improbable proposition that somehow the swabs taken by Dr Joubert and the pants had become contaminated with the applicant's DNA. How this could have occurred is quite unclear and it was never suggested that this was the case.

[18] The applicant's counsel refused to allow the s 212(4) affidavit to be admitted and instead demanded that the forensic analyst, Captain Masehla, be called. This led the regional magistrate to rule that both Captain Masehla and the doctors be called, which is what happened. The reason behind this emerged from the cross-examination of Captain Masehla. Counsel said that having examined the forensic report he had a crucial question for the forensic analyst. It then transpired during cross-examination of the Captain that in fact the applicant's counsel was confused as regards the XX (female) and XY (male) chromosomes. Pertinently, the exchange is set out below:

'[Mr Mashabane:] Then if the male person you need semen then why now you not mark [the complainant's samples] as XX?

[Masehla:] The marking of XY is the marking that indicates that, that particular sample, which is a vaginal swab the DNA result there shows that, that vaginal swab was donated by a male individual that is why you will see it is XY, which means that vaginal swab is a semen vaginal swab. So, the semen is donated by a male individual. That is why you will see that the vaginal swab [of complainant] has an XY because of the semen on the vaginal swab.

Then you are saying from the XY the first XY [intervenes] --- Yes?

Tested hundred percent to the reference sample of the male person is what you saying? --- What I am saying is that, that particular samples that was taken, which is a vaginal swab that was taken from [the complainant], that particular sample is the DNA results there coming from semen, is XY and the donor of the reference sample [is] Zulu Thabo [the applicant] also who donated that reference sample is also indicated XY.'[4]

[4] Volume 1 page 182 line 15 – 183 line 5.

[19] For those reasons there is no reasonable prospect of another court viewing the DNA evidence as anything other than conclusive as to the applicant's guilt. For that reason alone, the application must fail, but that would in any event be the result on the basis of L's evidence that the applicant was her assailant.

Identification evidence

[20] The applicant's attack against his conviction was also directed against whether the State had proved beyond reasonable doubt that the complainant identified him as the perpetrator. In this regard, his counsel argued that when dealing with the issue of identification, caution ought to be exercised as the complainant was a single child witness in a sexual assault case. To this end he submitted that during the course of her testimony she had retracted her initial affirmation that it was indeed him who entered the room and raped her. Thus, the argument went, that the complainant's testimony could not be relied upon because of this shortcoming.

[21] In my view, the contentions by the applicant were devoid of merit. Yes, indeed in her initial evidence L said she was certain that it was the applicant, and in cross-examination she conceded that she could not see clearly in the dark. But that was not the entirety of the evidence. The regional magistrate did not lose sight of the fact that the complainant had known the applicant virtually since birth. She knew him well and identified him by his large head. To my mind, taking proper cognisance of the lengthy relationship between the child and the applicant, even though it was dark and shadowy it is improbable that she would be unable to recognise him when he was on top of her, whilst her eyes were semi-closed, as she pretended to be asleep. It is evident from the record that the regional magistrate was aware of the caution to be applied and did so. The regional magistrate was mindful of the fact that she was dealing with a single child witness in respect of a sexual assault. Correctly so, reliance was placed on s 208 of the CPA, which provides that the evidence of a single witness is adequate to sustain a conviction, provided that it is satisfactory in all material respects. It is trite that the evidence of a child complainant is to be treated with circumspection and a conviction

on her evidence alone would not suffice.[5] In this case it was not submitted that L was not a good and credible witness.

[22] In the case before us, the complainant's quick thinking and courageous actions, by texting her mother and the speedy exit from the house to the hospital, must be applauded. The text messages were important. Firstly, there was the identification of the applicant as the perpetrator within minutes of the rape having occurred. There was no opportunity for a frightened young child to fabricate a false identification and no reason for her to do so. The fact that she said 'I THINK IT WAS UNCLE THABO' did not, as submitted by counsel, introduce uncertainty. While short message services are relatively novel it is well-established that the use of capitals is regarded as the text equivalent of shouting. Instead she was telling her mother as emphatically as she could who had assaulted her.

[23] The second important aspect of the text messages was that they provided a timeline against which to measure the events of that evening. They established beyond question that the rape occurred prior to 12.50 am. That was ten minutes after the applicant said that he arrived home. But his evidence in regard to that was inconsistent with that of security guard, Mr Zweli Mathome, who was stationed at the access controlled entrance of the gated complex that night. Mr Mathome testified that he was certain that the applicant returned to the complex at 12.25am. This certainty arose from the fact that he checked in the occurrence book (OB). When he was taken to task about the time being written in the OB, he supplied an honest explanation that there had been an incident at the applicant's unit number 33, and therefore he had to make such entries in the OB. There was no reason not to accept this evidence. But that must have been the very period when the rapist entered the home and committed his crime. Had the applicant arrived home when he said he did, then he and Ms C, would have surely heard or encountered the intruder as they proceeded to pass the room where the complainant was being assaulted. In turn, it is impossible to believe that L would not have heard the applicant knocking on the door and her aunt coming down stairs and

[5] *Mudau v S* 2013 (2) SACR 292 (SCA) at para 9.

opening it before shutting it again. Had that occurred she could have cried out and sought their assistance.

[24] The regional magistrate was alive to the fact that the complainant was a single child witness of a sexual assault and gave proper consideration thereto in the judgment, by the application of the cautionary rule.[6] In addition, the regional magistrate recognised that the identification of the applicant was an issue and in dealing with it concluded, rightly so, that this case was not one of mistaken identity as the complainant knew the applicant and was raised in front of him. In addition, Dr Joubert's evidence that her vagina was red, swollen and tender, absent the hymen with a watery discharge coming from it, corroborated her testimony that she was raped. When everything was taken together the identification of applicant as her rapist by L was supported by her knowing him well and her immediate identification of his as the perpetrator. His version was shown to be untrue as to when he returned home that evening. His belated evidence that the catch on the sliding door into the living room was not broken was a late suggestion not put to L. Then there was the gross improbability of his version which involved a child being raped in his home by an unknown intruder at the same time as he was arriving home and being let in by his partner, without either him or his partner noticing anything amiss and without L hearing the second and separate entry.

[25] Given all these features there is no reasonable prospect of an appeal by the applicant against his conviction succeeding. There is no reason to revisit the original decision to dismiss his application and it must be confirmed. The following order is made:

The application for special leave to appeal is dismissed.

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W Hughes

Acting Judge of Appeal

[6] *S v Sauls & others* 1981 (3) SA 172 (A).

APPEARANCES

For the Applicant:	Adv. E A Guarneri
Instructed by:	Johannesburg Justice Centre
	Bloemfontein Justice Centre
For the Respondent:	Adv. S H Rubin
Instructed by:	The Director of Public Prosecutions, Johannesburg
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