

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: K/S 87/03

Date: 16 / 04/ 2004

In the matter between:

Michael Russel

APPLICANT

And

The State

RESPONDENT

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

TLALETSI, J:

- [1] This is an application for leave to appeal against conviction. The applicant Michael Russel was convicted of the crime of Rape committed under the circumstances provided in Section 51 of the *Criminal Law Amendment Act 105 of 1997*, (the Act) by the Regional Court. His case was referred to the High Court for sentence in terms of section 52(1) (b) of the Act.

[2] A certified record of the proceedings at the Regional court was, with the consent of the state and the defence admitted as a true reflection of the proceedings in that court and made part of the record of the proceedings in this court.

[3] Advocate Cloete who appeared on behalf of the applicant as well as Advocate Van Dyk on behalf of the state were both given an opportunity to address the court on the merits of the case. I found the conviction of the appellant by the Regional Court to be in order and confirmed it.

[4] The record of the proceedings does not disclose that at any stage before and during the trial the applicant was warned that the state will be relying on the provisions of the Act. The applicant confirmed through his legal representative that he was at no stage made aware of this situation even though he was represented by an attorney at his trial. On the authority of *S v Ndlovu* 2003(1) SACR 331 (SCA) he was given the benefit of the doubt and the provisions of the Act were not put into operation regarding sentence. He was sentenced to undergo an imprisonment term of 15 years. His relevant previous conviction was taken into account.

[5] At the conclusion of the trial an instant verbal application for leave to appeal against the conviction was made by counsel on behalf of the applicant. The grounds relied upon were:-

5.1 that the court erred by accepting the evidence of the complainant as reliable;

5.2 that the court erred by rejecting the evidence of the accused as not reasonably possibly true.

Only half hearted argument was presented to the Court in a bid to substantiate the grounds relied upon or an attempt made for this Court to be satisfied that there are reasonable prospects of success on appeal. See *R v Boya* 1952 (3) SA 574 (CPD) at 577 B-C where *De Villiers JP* said the following:

*It seems to me that a reasonable prospect of success means that the Judge who has to deal with an application for leave to appeal must be satisfied that on the findings of fact and conclusion of law involved the Court of Appeal may well take a different view from that arrived at by a jury or by himself and arrive at a different conclusion.“

[6] The only submission made in support of the first ground is that the complainant lied by pointing the applicant as the person who raped her and connived with other state witnesses in a conspiracy against the accused. The application for leave to appeal is opposed by the state. It has been submitted on behalf of the state that:

6.1 it has not been shown by the applicant that there are reasonable prospects of success;

6.2 that the evidence of the complainant was corroborated by two other witnesses and;

6.3 no suggestion of conspiracy was put to the witnesses during the trial.

[7] The State evidence reveals that on the 25th December 2002 between 24h00 and 01h00 the complainant a 15 year old girl was in the company of one David Kagona, Gale Afrika and one Kay on their way home. They were from Knockdown Tavern. They were walking in a passage. The complainant and David Kagona stood aside and conversed. Gale Afrika and Kay walked further on. David Left the complainant and walked towards the other two. The applicant approached the complainant and offered to take her home. She refused. Gale came nearer them. David returned to the complainant and asked who the applicant was. The applicant claimed that the complainant is his

girlfriend. He slapped the complainant twice on her face telling her not to make him a fool by denying that she was his girlfriend. The applicant left after the intervention of Kay. At a later stage the complainant was waiting at the gate when the applicant approached her and pulled her to the veld where he raped her. On her return she met David and made a report to him. The police were called and applicant was arrested at the Knockdown Tavern.

[8] The applicant's defence is a bare denial. He denies ever seeing any of the state witnesses at the tavern and at the street. He was at all times at the tavern playing snooker. He alleged that one Tang who is the brother to David called him outside and accused him of raping a person. They then assaulted him for no reason.

[9] After analyzing the evidence, the Magistrate had the following to say:

“Nou wat betref die klaagster se getuienis is dit so dat sy haar getuiesnis hier op 'n redelik bevredigde wyse afgelê het en dit is ook so dat dit detail-getuienis is, oor die gebeure van die betrokke aand. Dit is ook so, soos mnr. Swanepoel toegee, dat daar wel onwaarskynlikhede in haar getuienis is. As sy nou al soveel deur die beskuldigde geterroriseer was soos sy sê, vind 'n mens dit 'n bietjie snaaks dat sy by die huis waar daar ingegaan is, om koeldrank te gaan koop, alleen buite staan. Aan die anderkant is sy nog 'n jong kind en werk haar verstand miskien nie soos die van 'n meer volwasse mens nie. Ook Gail Afrika en David Kagona was getuies wat hulle getuienis hier redelik breedvoerig afgelê het en war beswaarlik die weeregawe wat hulle gegee het, uit hulle duim kon gesuig het. Op die getuienis van die klaagster sowel as dié van Gale, is dit vir my duidelik dat daar voldoende tyd was om die beskuldigde behoorlik te identifiseer. Hulle het by meer as een geleentheid daar saam met die beskuldigde gaan staan en gesels en hoewel die ligte nie wonderlik was nie, was daar klaarblyklik voldoende beligting, selfs vir hulle om te kon sien dat die beskuldigde swart en rooi tekkies aangehad het. As hulle instaat was om te sien, dan sou hulle seer sekerlik ook instaat gewees het om die beskuldigde se gesig te identifiseer. Ek is tevrede dat ek die klaagster se getuienis, soos gestaaf deur Gale Afrika en David Kagona kan aanvaar.”

[10] With regard to the evidence of the applicant, the learned Magistrate said the following:

“Die beskuldigde se weergawe is eintlik ‘n blote ontkenning. Hy werk inderwaarheid in alibi op deur te beweer dat hy die hele aand te die Knockdown Taverne was; dat hy nooit daar weg was nie en getuig hy verder dat daar drie persone is wat sy getuienis in hiedie verband kan staaf. Ek vind dit tog hoogs onwaarskynlik dat die klaagster, as sy hom nie eers gesien het nie, soos die beskuldigde eintlik wil sê, wat die geval is, nou vir hom sal uitsoek en hom valslik sal impliseer by ‘n verkragtingsaak.”

[11] The nearest that one could find as a suggestion of a conspiracy against the applicant, is when applicant says that Tang is the brother of David Kagona, and he had a fight the previous night with Tang and his friends. Applicant did not see David during this fight. He did not see any of the state witnesses who were in the company of the complainant. The complainant was also not present. According to David the only time he saw a fight is when applicant was confronted with the rape allegations.

[12] I find the conspiracy allegation to be unfounded. As it was correctly argued it was not evenly raised during the evidence. I find the Magistrate’s approach to be in conformity with the following dictum by the Supreme Court of Appeal in ***S v Chabalala*** 2003(1) SACR 134(SCA) at 139 I – 140 A:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt the accused’s guilt.”

[13] In conclusion I am of the view that applicant has failed to demonstrate that on

the findings of the fact or conclusions of law involved another court would come to a different conclusion. The application should therefore not succeed.

I make the following order:

The Application for Leave to Appeal is dismissed.

L P TLALETSI
JUDGE

Counsel for the applicant	Adv Cloete
Counsel for the Respondent	Adv L Van Dyk

I therefore make the following order:

The application for leave is dismissed.

L P TLALETSI
JUDGE

On behalf of the Applicant	Adv J Schreuder
On behalf of the Respondent	Adv C Nekosi