THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 259/2018

In the matter between:

ANESH RUGNANAN **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Rugnanan v State* (Case no 259/18) [2020] ZASCA 166 (10 December 2020)

Coram: PETSE DP, MBHA and DLODLO JJA and MATOJANE and GOOSEN AJJA

Heard: 5 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 9:45 on 10 December 2020.

Summary: Criminal law and procedure – application for reconsideration of order refusing special leave – whether evidence of single witness passed muster – failure by the prosecution to call crucial witness – whether such failure warranted drawing of adverse inference – whether magistrate erred in not allowing cross-examination of the complainant in terms of s 227 of the Criminal Procedure Act 51 of 1977.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Poyo-Dlwati J and Monyemore AJ), dismissing applicant's petition seeking leave to appeal against refusal of leave to appeal by the regional court, Madadeni:

1 Condonation for the late filing of the applicant's application is granted.

2 Condonation for the late filing of the respondent's heads of argument is granted.

3 The application for reconsideration of the order of this Court granted on 29 June 2015 refusing special leave to appeal is dismissed.

JUDGMENT

DLODLO JA (Petse DP, Mbha JA, Matojane and Goosen AJJA concurring)

[1] The applicant, Mr Anesh Rugnanan, was convicted by the regional court, Madadeni, KwaZulu-Natal (the trial court), of two counts of rape read with the provisions of s 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act). He was also convicted of assault with intent to do grievous bodily harm and contravention of s 7(A) of the Sexual Offences Act 32 of 2007 for compelling the complainant, NR, to commit an act of masturbation. The applicant was effectively sentenced to 14 years' imprisonment. The trial court refused the applicant leave to appeal against his conviction. The applicant also unsuccessfully petitioned the KwaZulu-Natal Division of the High Court, Pietermaritzburg (high court) for leave to appeal against his conviction. He, thereafter, proceeded to apply for special leave to appeal to this Court. His application was dismissed, on 29 June 2015 by this Court (Shongwe and Mathopo JJA) on the ground that there were no special circumstances meriting a further appeal. Thus, this is an application to reconsider the earlier order which dismissed the petition. In other words, this Court is called upon to make a determination on whether the trial court,

the high court and this Court should have found that the applicant had reasonable prospects of success on appeal.

[2] Before dealing with the merits of the application, it is necessary to dispose of one preliminary issue. Both parties have made applications for condonation for non-compliance with the rules of this Court regulating time limits within which to lodge the application and file heads of argument respectively. The respondent did not oppose the applicant's condonation application. The applicant, on the other hand, opposed the respondent's condonation application. Although he did not file an answering affidavit, he made oral submissions in this regard. It is common cause that the respondent's condonation application explained that the relevant prosecutor to whom this matter was assigned fell ill and, as a result could not give this matter the attention it deserved. I am of the view that there are no justifiable reasons for the applicant to resist the respondent's condonation application which must be granted herein.

[3] Section 17(2)*(f)* of the Superior Courts Act 10 of 2013 (SC Act) confers a power on the President of this Court, in exceptional circumstances, to refer a decision of this Court refusing an application for leave to appeal to the Court for reconsideration and, if necessary, variation. Section 17(2)*(f)* provides:

'The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or to refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'

[4] In order for this application to succeed, the applicant must show that there exist exceptional circumstances. What constitutes exceptional circumstances in the context of s 17(2)*(f)* of the SC Act will be determined by considering the facts of each case.[1] In *MV AIS Mamas Seatrans Maritime*[2] Thring J remarked that:

'1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is expected in the sense that the general rule does not apply to it; something uncommon, rare or different . . .

[1] *Joseph Manyike v The State* [2017] ZASCA 96; see also *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 para 4; *S v Dlamin;, S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) paras 75-77.
[2] *MV AIS Mamas Seatrans Maritime v Owners*, *MV AIS Mamas and Another* 2002 (6) SA 150 (C) at 156 H.

2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a literal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'

[5] In *Liesching,*[3] the Constitutional Court enunciated the principles that are crucial to the enquiry by stating:

'Without being exhaustive, exceptional circumstances, in the context of section 17(2)(f), and apart from its dictionary meaning, should be linked to either the probability of grave individual injustice (per Avnit) or a situation where, even if grave individual injustice might not follow, the administration of justice might be brought into disrepute if no reconsideration occurs. A relevant example may be the kind of situation that occurred in the *Van Der Walt*, where "contrary orders in two cases which were materially identical" were made by the Supreme Court of Appeal, and considered in this court. In summary, section 17(2)(f) is not intended to afford disappointed litigants a further attempt to procure relief that has already been refused. It is intended to enable the President to deal with a situation where otherwise injustice might result and does not afford litigants a parallel appeal process in order to pursue additional bites at the proverbial appeal cherry.'

Holmes JA remarked in *De Jager*:

'It is clearly 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. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape the evidence to meet the difficulty.'[4]

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[3] *S v Liesching and Others* [2018] ZACC 25; 2019 (4) SA 219 (CC) paras 138 and 139.
[4] *S v De Jager* 1965 (2) SA 612 (A) at 613A-B; confirmed in *S v Liesching* [2016] ZACC 41; 2017 (2) SACR 193 (CC); 2017 (4) BCLR 454 (CC).

[6] In line with a strict construction of 'exceptional circumstances' in s 17(2)*(f)* of the SC Act, Mpati P held in *Avnit*:

'Prospects of success do not constitute an exceptional curcumstances. The case must truly raise a substantial point of law, or be of great public importance or demonstrate that without leave a grave injustice might result. Such cases will be likely to be few and far between and the judges who deal with the original application will readily identify cases of the ilk. But the power under s 17(2)(*f*) is one that can be exercised even when special leave has been refused, so "exceptional circumstances" must involve more than satisfying the requriements for special leave to appeal. The power is likely to be exercised only when the President believes that some matter of importance has possibly been overlooked or a grave injustice will otherwise result.'[5]

[7] In order to assess whether exceptional circumstances exist in this case, it is necessary to consider the evidence that was led at the trial in order to enable us to decide whether there are reasonable prospects of success for purposes of the appeal against the refusal of the petition.[6] The evidence led in this matter is foundational to the findings made by the trial court. It is for this reason necessary that such evidence is briefly set out hereunder. As this Court held in *Smith*,[7] ultimately, in order to be granted leave to appeal, the applicant must convince the Court 'on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding'.

[8] The applicant contended that he has prospects of success because, in his view, the trial court erred inter alia:

(a) In accepting the evidence of the complainant who was a single witness and rejecting his;

(b) in failing to call Ms Desiree Steenkamp (Desiree) and that this warranted the drawing of an adverse inference against the prosecution;

(c) his right to a fair trial was violated in that:

(i) the state did not 'timeously' offer Desiree as a witness to the defence;

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[5] *Avnit v First Rand Trading* [2014] ZASCA 132 para 7.
[6] *S v Matshona* [2008] ZASCA 58; [2008] 4 All 68 (SCA); 2013 (2) SACR 126 (SCA) para 5.
[7] *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

(ii) the trial court refused his application to cross-examine the complainant on her previous sexual history; and

(iii) inadmissible evidence was allowed.

[9] The complainant testified that she met the applicant through a social media platform called Mxit. She resorted to Mxit because she wanted to make friends. She exchanged her details with the applicant, resulting in the latter coming to her home in Nkandu Park, Newcastle. His arrival evoked no suspicion to the complainant because he was in the company of a woman who introduced herself as Jasmine. The three travelled together in the applicant's motor vehicle proceeding to the applicant's home in Lennoxton, Newcastle. The complainant was subsequently informed by Jasmine that her real name was Desiree and that she made a living by selling sexual favours to men. When the complainant wanted to go home, the applicant suggested that she stay over because it was late at night. All three of them spent the night sleeping in the same bed. The complainant was only taken home the next morning at 11h00. During the week, the complainant visited the applicant on several occasions. On one of those occasions, the applicant took the complainant to his place of work at Newcastle State Hospital, where he introduced her to his colleagues as his girlfriend.

[10] There was also an occasion when the applicant was on an outing with the complainant and stopped the vehicle in order to buy cigarettes. The complainant got out of the vehicle in order to converse with a friend who she saw at the shop. This, apparently annoyed the applicant, and he became very angry. He drove out of Newcastle town towards Chelmsford Dam. In the middle of nowhere, the applicant stopped the vehicle and ordered the complainant out of the vehicle and told her to walk home. He further told her that when she was with him she was not permitted to converse with other men. She had to promise that it would not happen again before she could be allowed back into the applicant's vehicle. Desiree who was also in the vehicle witnessed this episode. They went back to the applicant's home and on this occasion they slept in separate bedrooms; but when the complainant awoke in the morning she discovered that the applicant was in bed next to her trying to undress her. She told the court that she refused the applicant's advances because she was not ready for a relationship. After breakfast, the applicant

took her home. He kept on pressurising her into becoming his girlfriend. The complainant, having recognised signs of aggression on the part of the applicant, went to Mxit on her cellular phone and deleted him from her contact list. She later received a request on Mxit and when she responded to the request, she immediately realised that it was the applicant. The applicant then accused her of having stolen his four gold rings, cash and clothing which she denied. She explained to the court that on one visit when she stayed over, she had no extra clothes and was given a jacket, a t-shirt and sneakers to use by the applicant.

[11] Realising the false accusation, the complainant told the applicant that he could take back the items of clothing he had given her. She made it plain that she did not take anything else from the applicant. On the same day at 15h00, the applicant arrived at the complainant's house with the police to search for the allegedly stolen items. However, none of the items that were alleged to have been stolen from the applicant were found. Clothing which the applicant had given to her was handed back to him. She, nevertheless, was put in the police van and taken to the police station as an arrested person, where she was later questioned. The applicant asked that the police allow him to speak to the complainant on the side This was allowed and the two spoke at the smoking area of the police station in the presence of Desiree. There, the applicant told the complainant to either confess to theft or that she would be locked up. The complainant felt intimidated and scared, and this resulted in her agreeing to what the applicant proposed. She decided to instead go with the applicant to his home to search for the missing goods. This event resulted in the applicant not opening a case of theft against her. The applicant and Desiree took the complainant to the applicant's house. Once all three were inside, the applicant locked the driveway gate as well as the security gate to the house.

[12] Whilst the complainant was busy looking for the missing items in the kitchen, the applicant physically assaulted the complainant, forced her to remove her clothing and threatened to rape her, which he in fact later did. He also forced her to masturbate and took a video of this incident on his cellular phone. These photographs contained in exhibit A were tendered as evidence with the consent of the defence.

[13] Whilst all of this was happening, Desiree brought a piece of paper and a pen to the applicant who forced the complainant to write a confession, which he dictated to her. Eventually, the applicant returned her clothes and she got dressed. He told her that he would take her home. He threatened her that he would upload her naked photos to the internet. The applicant also took the complainant's cellular phone and identity book. He first drove to the police station with her and parked his vehicle at the official parking. He got out, but on realising that the complainant was about to alight from the vehicle, he suddenly returned and drove her to her home. Before dropping her off at her home, he told her that he now owns her and that she must become a prostitute so that she can pay back whatever she owed him. On arrival at her home, the complainant woke her ex-husband up and reported to him that she had been raped and assaulted. Her ex-husband immediately took her to the police station where the matter was reported.

[14] Detective Akram, who investigated this matter, noted numerous injuries on the complainant who was visibly upset and was crying at the time. Injuries noted by Akram, were inter alia;

(a) Scrapes on her left cheek which were red;

(b) three to four lineal welts on the left shoulder;

(c) a welt on the right buttock, swelling on the left elbow described as a 'lump';

(d) pinpoint blood dot on the right thumb; and

(e) a graze on the left knee.

At the applicant's home the detective found the applicant together with Desiree. The applicant handed over to the detective a written document received by the trial court as exhibit B, purporting to be a confession by the complainant to the theft of the applicant's items. The complainant's identity book and cellular phone were also recovered from the applicant's home by the detective.

[15] Mr Francois Renison, the complainant's ex-husband, testified as a first report witness. He explained how, late on Saturday night, 1 August 2009, the complainant came home traumatised and crying. She had bruises on her face and on her knees. He explained that the complainant reported to him how she was raped and assaulted.

[16] Under cross-examination, the complainant testified that it was because of the applicant's aggression and possessiveness that she decided to end their friendship. She denied that she and the applicant had a sexual encounter before 1 August 2009 or that she was in a sexual relationship with the applicant. She denied that on the night of the rape incident she had made sexual advances towards the applicant. Dr Singh, who examined the complainant after the incident, was not called to testify. Instead, the State handed in a statement in terms of s 212(4) of the Criminal Procedure Act[8] accompanied by a J88 form completed by Dr Singh.

[17] The applicant's evidence was that he met the complainant on an electronic platform known as MIG33 in 2004/2005. They had a sexual relationship that lasted for two to three months, before he terminated their relationship. He explained that he subsequently met her again in 2009 on Mxit.

[18] The applicant testified that the complainant stole six to eight rings from him and R600 in cash and that while they were at the police station, the complainant told him that they should go to his home and search for the rings. Indeed, he, the complainant and Desiree returned to the applicant's home. He told the court that the complainant made sexual advances towards him and that they had sexual intercourse later on. He also admitted to taking two of the photographs of the complainant depicted in Exhibit A. He denied that the video on his profile of a woman masturbating was the complainant, but he could not explain who the person was or how the video clip had got onto his phone. According to the applicant, the complainant agreed to leave her identity document and cellular phone with him and then wrote a confession regarding her misdemeanours. The so-called confession by the complainant was Exhibit B in the trial court. He drove the complainant home, but first stopped at the police station to inform the police that things had been sorted out. However, at the police station he decided against this and took the complainant home. He could not, however, explain how she sustained injuries.

[19] Under cross-examination, the applicant stated that from the moment he and the complainant met, the latter knew that he wanted sexual favours. Neither he nor the

[8] Criminal Procedure Act 51 of 1977 as amended.

complainant ever discussed that they recognised each other from a previous sexual relationship some three or four years previously. Importantly, the magistrate recorded that under cross-examination the applicant's memory seemed to fade and he could no longer recall the details he gave in his evidence-in-chief. He claimed his loss of memory was due to the fact that the incidents happened a long time ago and that he felt scared and intimidated by the prosecutor. He changed his versions of events on several occasions. The applicant's version was that the sexual intercourse they had in August 2009 was because the complainant enticed him and masturbated in his presence.

[20] The magistrate in evaluating the evidence took into account that the complainant was a single witness and he accordingly approached her evidence with caution. He found the complainant to be an honest witness. The magistrate found that she tendered her evidence in a straightforward manner and that even after a gruelling cross-examination her version remained constant. The magistrate also found that she gave a coherent account of the events to which she testified even under cross-examination. And that her ex-husband and Detective Akram confirmed the injuries she sustained. These injuries were also confirmed in the medico-legal examination conducted by the doctor.

[21] The applicant was found by the magistrate to have been an unimpressive witness. The magistrate also found that the applicant was making up his version of events as he went along in his evidence-in-chief. It is common cause that the applicant provided detailed accounts of at least the first six encounters with the complainant in his evidence-in-chief but when he was cross-examined, he claimed that his memory loss was due to intimidation by the prosecutor. The magistrate was justifiably concerned when he said the following in his judgment:

'The question arises; why take her back to his home to search for the goods if she stole it and it would not be there. The true version would be that it was the accused who lured the complainant by way of intimidation back to his home. He manipulated the complainant by the threat of arrest by the police, by assaulting and humiliating her into complying or into committing sexual acts to his perverted desire.'

[22] The applicant presented a version which was rejected as a lie by the magistrate. The remarks in this regard by the magistrate are telling: 'It is clear to this court that the

version of the accused cannot be believed and can safely be rejected as false'. The magistrate in his analysis of the evidence as a whole made credibility and factual findings. He took into account the fact that the complainant was a single witness and correctly employed the necessary caution relying on relevant authorities in this regard. As held in *S v Sauls and Others*,[9] the magistrate satisfied himself that the truth was told by the complainant in this matter.

[23] It is trite that an accused can be convicted of any offence on the evidence of a single competent witness.[10] The well-established practice though, is that the evidence of a single witness should be approached with caution and that his or her merits as a witness are properly weighed against factors which militate against his or her credibility. 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. As mentioned above, the magistrate's judgment demonstrated that the complainant's evidence was evaluated with caution. She was found to be a straightforward witness whose version remained constant notwithstanding protracted cross-examination. In *S v Francis*,[11] this Court guidingly warned:

'Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony.'

In *Mashongwa*, Mogoeng CJ pointedly held that:

'It is undesirable for this court to second guess the well-reasoned findings of the trial court. Only under certain circumstances may an appellate court interfere with factual findings of a trial court.

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[9] *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G:
'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber*. . .). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in *R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded" (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

[10] Section 208 of the Criminal Procedure Act.

[11] *S v Francis* 1991 (1) SACR 198 (A) at 204C-E. See also *Rex v Dlhumayo and Another* 1948 (2) SA 677 (A) at 705-706; *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426A-C.

What constitutes those circumstances are demonstrable and material misdirection and a finding that is clearly wrong. Otherwise trial courts are best placed to make such findings.'[12]

Thus, the trial court's factual findings cannot be faulted. The conclusion it arrived at was correct when one has regard to the totality of the evidential material and the fact that the applicant was demonstrably an unsatisfactory witness. It is trite that an appellate court's powers to interfere with findings of fact by a trial court are limited.

[24] Moreover, the evidence of the complainant's ex-husband, Detective Akram, as well as the content of the medical report provide corroboration of the complainant's evidence. The magistrate found no material contradictions in the State's case.I am unable to fault the learned magistrate in this regard. It matters not whether it was the complainant's knee or cheek that was injured. The proven fact is that she sustained injuries which were inflicted by the applicant. The fact that Desiree was not immediately available is of no consequence.The fact is that she was eventually made available to the defence as a witness and the State cannot be blamed for her disappearance. The applicant was on extended bail during the hearing. He was reportedly staying with Desiree. As the complainant was cross-examined on what Desiree would say, the conclusion that the defence must have had the opportunity to consult with her is accordingly justifiable. I fail to see how her disappearance thwarted the applicant's right to a fair trial.

[25] Another complaint put forth by the applicant is that the magistrate erroneously turned down his application to cross-examine the complainant about her previous sexual encounters. This was a reference to his application in terms of s 227 of the Criminal Procedure Act. The thrust of s 227 is that evidence and cross-examination directed at previous sexual experience may be allowed. When dealing with a sexual offence as is the case in this appeal, evidence and cross-examination relating to the previous sexual experience of the complainant is allowed only after the court has granted an application under s 227(2). It is to be noted that the court may grant such application only if it is satisfied that such evidence or questioning is relevant to the proceedings before the court.[13] The criteria is set out in subsecs (5) and (6). The applicant's version was that he

[12] *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36; 2016 (3) SA 528 (CC) para 45.
[13] Section 227(4) of Criminal Procedure Act.

had previously had a sexual relationship with the complainant in 2005/2006. Perhaps, therefore, the rationale behind the application was that since she had (on his version) previously consented, she was likely to consent years later. That is far-fetched and would have been unfair to the complainant. The application was clearly not relevant to the applicant's defence of consent. The magistrate was correct in dismissing this application. In any event the complainant denied that there was a previous relationship between them. And the applicant's assertion to the contrary is belied by the fact that even on his version he never, at any stage, mentioned this to the complainant during the period that he was still on friendly terms with her.

[26] The applicant did not establish any exceptional circumstances meriting a further appeal to this Court. Having painstakingly gone through the record of proceedings in search of prospects of success, I have found none. In order to be granted leave to appeal, an applicant must make out a case that the envisaged appeal would have a reasonable prospect of succeeding. Under s 17(1)*(a)* of the SC Act, leave to appeal 'may only be given' where one of these two requirements are satisfied:

(i) First, in terms of s 17(1)*(a)*(i) of the SC Act 'the appeal would have a reasonable prospect of success'; or

(ii) Second, in terms of s 17(1)*(a)*(ii) of the SC Act 'there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration'.

[27] The applicant has failed to meet the requirements stipulated by the SC Act. The truth is that the State in this matter presented a formidable case against the applicant; which case the applicant failed to meet. In the circumstances therefore, the application falls to be dismissed.

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

1 Condonation for the late filing of the applicant's application is granted.

2 Condonation for the late filing of the respondent's heads of argument is granted.

3 The application for reconsideration of the order of this Court granted on 29 June 2015 refusing special leave to appeal is dismissed.

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D V DLODLO

JUDGE OF APPEAL

Appearances:

For Applicant:	N Terblanche
Instructed by:	Beirowski Attorneys, Pretoria
	Peyper Attorneys, Bloemfontein
For Respondent:	C Cander
Instructed by:	Director of Public Prosecutions, Pietermaritzburg
	Director of Public Prosecutions, Bloemfontein