

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: CA 09/2016

In the matter between:

KAREL SAREL JOHANNES BAUMGARTEN

**APPELLANT/
APPLICANT**

and

THE STATE

RESPONDENT

Neutral citation: *Baumgarten v S* (CA 00/2016) [2017] NAHCMD 179 (30 June 2017)

Coram: LIEBENBERG J and USIKU J

Heard: 29 May 2017

Delivered: 30 June 2017

Flynote: Criminal procedure – Appeal – Application to receive further evidence on appeal – Onus – Applicant to satisfy requirements – Leave only granted in exceptional circumstances – Requirements discussed – Extent of further evidence – Credibility of complainant giving single evidence – Court of appeal in difficult position to receive further evidence without opportunity to

observe demeanour of witnesses already testified – Remittal to trial court preferable.

Criminal procedure – Remittal – Trial court – Bail application pending appeal – Magistrate pronounced court's view on credibility of witnesses forming basis of further evidence to be led – Irregularity – In view of – Case not remitted to trial court – Trial *de novo* ordered.

Summary: The appellant appealed against conviction by the Regional Court on a charge of rape, where after appellant sought leave to lead further evidence on appeal. Appellant in a substantive application to satisfy the basic requirements: (a) a reasonable explanation why the evidence sought to be led was not presented in the trial; (b) *prima facie* likelihood of the evidence being true; (c) evidence to be materially relevant to the outcome of the trial. Appellant satisfied all the requirements. Bearing in mind the nature of the evidence to be received on appeal, the court of appeal would find itself in a difficult position to receive such evidence as the court would be expected to re-evaluate all the evidence and more particularly, the credibility of the complainant. It would be in the interest of justice to remit the case to the trial court. However, during bail proceedings pending appeal the magistrate pronounced himself on the credibility of three witnesses whose sworn statements form the basis of the application. This constituted an irregularity as the case could no longer be remitted to trial court to receive further evidence. The court of appeal ordering a trial commencing *de novo* before a different magistrate.

ORDER

1. The conviction and sentence are set aside.
2. The matter is remitted to the Regional Court for the District of Lüderitz to start *de novo* before a magistrate other than Mr Zisengwe.

3. Bail of the applicant/appellant is extended on condition that he reports himself to the Clerk of the Criminal Court Lüderitz within one month as from the date of this judgment.

JUDGMENT

LIEBENBERG J (USIKU J concurring):

Introduction

[1] Applicant/Appellant (hereinafter the Applicant) by Notice of Motion seeks leave to adduce further evidence either under s 19(1) of the High Court Act, 1990¹ or in terms of the provisions of s 309(3), read with s 304 of the Criminal Procedure Act, 1977.² It was submitted that the application could be heard simultaneously with the appeal. It was however intimated to counsel beforehand that the application should be argued first and only thereafter, pending on the outcome, the appeal lodged by the applicant against his conviction on a charge of rape read with the provisions of s 2(1) of the Combating of rape Act of 2000³, would be heard.

[2] Subsequent to filing the Notice of Motion on 07 February 2017, Ms Shikerete, former State counsel for the respondent, requested a postponement of the hearing in order to consider opposing the application and to 'investigate' allegations made by the deponents in their affidavits filed in support of the application. Nothing constructive came from this and it was only with commencement of the present proceedings that applicant and the presiding judges were served in court with respondent's Notice of Intent to Oppose, annexed thereto answering affidavits of the complainant, Yahdeeh Faith Losper and her mother, Valencia van Schalkwyk. Ms Moyo, representing the respondent, explained the delay saying that the matter was

¹ Act 16 of 1990.

² Act 51 of 1977.

³ Act 8 of 2000.

only allocated to her during last week and she was unable to obtain the opposing affidavits sooner.

[3] Mr *Botes*, for the applicant, was of the view that as a result of the late filing of the answering affidavits, proceedings were likely to be postponed to afford the applicant to file replying affidavits to be obtained from those witnesses on whose statements the application is founded. Regrettably this would further delay bringing finality to the appeal itself. In view thereof it was agreed among counsel to dispose with the filing of replying affidavits, provided that new facts incorporated in the opposing affidavits are not deemed to be accepted as the truth thereof as it is left unchallenged by the applicant. On this basis counsel proceeded to argue the application.

The Notice of Motion

[4] As per the notice applicant seeks leave from the court of appeal to adduce the further evidence of four witnesses as contained in their respective affidavits, annexed to the applicant's founding affidavit. Alternatively, setting aside the conviction and sentence and remit the matter to the Regional Court from which it originates, with the direction that the matter is to be heard *de novo* by another magistrate; in the further alternative, to remit the matter to the trial court with specific directions as to the receiving of evidence, if any, as the State or the applicant may wish to lead pertaining to issues raised in the said affidavits filed in support of the application.

The Law

[5] The power vested in the court of appeal when faced with an application to receive further evidence were referred to and discussed in *S v Shipuata*⁴ from which it is clear that the High Court, being the court of appeal, may receive such evidence or, remit the case to the court of first instance with accompanying instructions relating to the taking of further evidence or any

⁴ 2013(3) NR 800 (NLD).

matter as the court of appeal may deem necessary.⁵ The provisions of both these Acts are basically identical and according to which the court of appeal is given the discretion to receive further evidence itself, or remit the matter to the court below. The power of the court of appeal to receive further evidence on appeal or have the case remitted to the trial court must be exercised sparingly and only where there are exceptional circumstances warranting the granting of such order. The South African Supreme Court of Appeal in *MK Nkomo v The State*⁶ stated the position thus:

[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.⁷ 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. Those are factors which must weigh heavily against the granting of the order of remittal.'

[6] I pause to observe that the present matter is not an instance where any of the witnesses who gave evidence, subsequent thereto retracted or recanted such evidence but rather where persons who had not been involved in the investigation or the trial itself, *mero motu* came forward and deposed to facts that had not until then been known to either the State or the defence.

[7] In *S v Nofomela*⁸ Nienaber JA, dealing in an analogous context with evidential material which a Court might properly make the subject of a remittal, pointed out:

'One is here dealing with relevance. "Relevancy is based upon a blend of logic and experience lying outside the law" (per Schreiner JA in *R v Matthews and*

⁵ Section 19 of the High Court Act, 16 of 1990; Section 309(3), read with s 304(2)(b) of the CPA, 51 of 1977.

⁶ (979/2013) [2014] ZASCA 186 (26 November 2014).

⁷ Citing (only) *S v Wilmot* 2002(2) SACR 145 (SCA) para 31.

⁸ 1992(1) SA 740 (A) at 748F-G.

Others 1960 (1) SA 752 (A) at 758A - B). Relevance can never be reduced to hard and fast rules and some allowance must be made for unforeseen and extraordinary cases.'

[8] From the above it is evident that the basic requirements which the applicant must satisfy to convince the court to accede to a request to receive further evidence, 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.⁹

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.¹⁰

Proceedings in the court *a quo*

[9] At the end of the trial the applicant was convicted and sentenced to 14 years' imprisonment of which 4 years' suspended on condition of good conduct. When testifying in mitigation of sentence, applicant informed the court that three of the complainant's friends *mero motu* had come forward and voiced their willingness to testify 'to the [applicant's] innocence' where after sworn statements in support thereof, were received into evidence by the trial court. Applicant subsequent thereto lodged an appeal against conviction and was admitted to bail pending the appeal. I will revert to the court's ruling during the bail application shortly.

[10] In order to properly deal with the application at hand it seems to me necessary to refer to certain parts of the evidence led at the trial which culminated in the applicant's conviction.

Evidence adduced at the trial relevant to the application

⁹ *S v Nkala* 1964(1) SA 493 (A) at 496A-B; *S v De Jager* 1965(2) SA 612 (A).

¹⁰ *S v Nkomo* (*supra*) at para [20].

[11] The trial court in its judgement alluded to facts which seemed to have been common cause namely, that at the relevant time the applicant was married to the complainant's mother and that their marriage was 'a tumultuous and factitious one, characterised by frequent squabbles and misunderstandings' which ultimately led to their divorce in March 2012. It is against this background that applicant, who pleaded not guilty to the charge, contends that the alleged rape is a mere conspiracy between the complainant and her mother to land the applicant in serious trouble with the law.

[12] The complainant, being the stepdaughter of the applicant, was 14 years old at the time of the alleged crime committed on the 24th of May 2009. Though schooling at Keetmanshoop, the alleged incident took place on the last day of the school holidays during a visit to her mother and stepfather in Lüderitz at the time. It is further common ground that the complainant gave single evidence as regards the alleged incident of rape which took place after she had arrived home that night and found the applicant already in bed. Her mother had attended a church service and it was only the two of them at home. The complainant recounted how the applicant came into her bedroom and forcibly had sexual intercourse with her. During the act her mother arrived and the applicant quickly returned to the main bedroom. She said he threatened to harm her if she were to tell her mother about what had happened. Though her mother found her in tears, complainant did not report the incident then because of applicant's threat.

[13] The first report was made in Keetmanshoop to two of complainant's school friends in June of that year, which set in motion a chain of events leading up to complainant's mother meeting with her in Keetmanshoop only in November 2009. When confronted by her mother complainant withheld information not only regarding the nature of the abuse, but also the identity of the perpetrator, and said she had been touched by an unknown person. It was only later that she made a full report of the incident in a letter written to her mother. Complainant was then examined by Dr Petzer who filed a report dated 11 December 2009 as to his findings. Besides for the hymen not being

intact, showing a healed tear on the posterior side, there is no evidential proof of a sexual assault perpetrated on the complainant reflected in the report; the probable reason being that the medical examination took place some seven months after the alleged sexual act. The court however deemed the injury to the hymen as corroboration 'in material respects' of the complainant's version.

[14] An injury to the hymen of the complainant observed after a period of seven months, can hardly be regarded as corroboration of the complainant's account by which the applicant is incriminated. It would at most be consistent with evidence of penetration but does not constitute corroboration *per se*. Moreover, in the light of evidence contained in statement(s) applicant now seeks to admit into evidence, about the complainant having been sexually active at the relevant time. Though such evidence would otherwise be inadmissible, it could on application to the trial court be admitted when satisfied that such evidence 'is so fundamental to the accused's defence that to exclude it would violate the constitutional rights of the accused'.¹¹ Once such evidence is received, the medical evidence relied on by the trial court (the ruptured hymen), would inevitably nullify the court's earlier finding of it being support for the complainant's version.

[15] The trial court acknowledged contradictions between the testimony of the complainant and that of her mother as regards the first report on the night of the incident about the applicant having touched her, but attributed this to a mistake made by the mother. Regarding the belated report about the rape made to her friends, the court reasoned that it was because she had been sworn to secrecy by the applicant and that it required persistent persuasion, coaxing and tact to make her disclose her secret. Though mindful of the contradicting explanations given by the complainant as regards the nature of the assault and the identity of the perpetrator, the court was not persuaded that it was supportive of applicant's defence of a careful woven conspiracy hatched by the complainant and her mother. The court in the end accepted the complainant's version as truthful whilst rejecting the applicant's plea of innocence and convicted him.

¹¹ Section 227A (1)(c) of the CPA.

Statements containing new evidence

[16] The application to introduce further evidence on appeal is founded on the affidavits of Joanie McKay, Serenity de Klerk; Alicia Sally-Anne September and Ms Marchall Khito, the mother to Serenity. It is not disputed that these girls were friends with the complainant at the relevant time. From a reading of the statements it is evident that same were deposed to only after Ms Khito learned that applicant was taken into custody (following his conviction), where after she questioned her daughter Serenity and her friend Sally-Anne on what the complainant had told them during her visit with the family in 2009. She was unaware of the applicant's trial in respect of the alleged offence until after his conviction, which equally is the position of the other witnesses.

[17] For purposes of the present application I do not deem it necessary to consider the content of the affidavits submitted in support thereof in any detail and it will suffice to focus on what each statement primarily conveys. Central to these statements are allegations about the complainant having confessed to her friends that she had lied to her mother about the applicant having raped her; that she had done this to get back at her stepfather (applicant) who hurt her mother by having an extra-marital affair; and despite complainant's assertion of being a virgin at the time, they knew that she was sexually active. Though Serenity said she kept quiet because it was told to them as a secret, Sally-Anne said that they at first did not consider the complainant to be serious and it was only after applicant's conviction that they realised how serious it actually was.

Does Applicant meet the requirements?

[18] Applicant in his founding affidavit, read with the supporting affidavits, in my view satisfactorily explains why the evidence sought to be led was not presented at the trial i.e. he was not aware thereof and only came to know

about it through intervention by a third party. The respondent equally submitted that this requirement has been satisfied.

[19] As regards the evidence meeting the requirement of a *prima facie* likelihood of it being truthful, it was argued on applicant's behalf that it is contained in sworn statements deposed to by the witnesses as being the truth which, in itself, should satisfy the requirement. I am in agreement with counsel's contention as it would appear to me that for purposes of an application as the present, a statement given under oath constitutes sufficient *prima facie* proof of the content being truthful and that there is no better proof which the applicant could rely on to satisfy the second requirement.

[20] The respondent argued to the contrary and filed in opposition the further statements of the complainant and her mother, disputing some of the allegations contained in those statements.

[21] I do not for purposes of this application find it necessary to determine the veracity of these statements which, if same were to be admitted into evidence, must be considered not in isolation, but together with the rest of the evidence adduced as well as the probabilities. It is not disputed that these witnesses were friends with the complainant at the relevant time and although the possibility of some factual mistakes having found its way into some of the statements (as argued by the respondent), it does not mean it must be ignored entirely. The circumstances under which the alleged confession(s) of falsehood were made by the complainant to the witnesses are stated in the respective statements, and form the crux thereof. Each of the statements essentially supports the applicant's plea of innocence in that he denies any sexual act committed with the complainant. I am accordingly satisfied that this requirement has equally been met.

[22] Turning to the question whether the evidence is materially relevant to the outcome of the trial, regard must be had to the court convicting on the single evidence of the complainant. There can be no doubt that the nature of the evidence contained in the statements is such that, assuming it is

ultimately shown that the contents thereof is found to be true, it will impact directly and adversely on the credibility of the complainant, being the sole source of the incriminating evidence adduced against the applicant at the trial. To this end it will definitely be materially relevant to the outcome of the trial.

[23] I am of the view that the applicant, on whom the onus rests, has satisfied all these requirements and that the application to lead further evidence on appeal would succeed.

Which court to receive new evidence

[24] Once leave is granted to lead further evidence, the court of appeal has a discretion to receive such evidence orally (or by deposition), or to remit the case to the court of first instance.¹² In the present instance the evidence of at least three witnesses will be introduced by the defence which is mainly aimed at discrediting the complainant. In view of such evidence the State may equally deem it necessary to reopen its case and lead further evidence to rebut new evidence to be introduced by the defence, or to recall the complainant and other witnesses who have already testified, for that purpose.

[25] For the court of appeal to hear new evidence and be required to evaluate such evidence together with the evidence already given by several witnesses without having had the opportunity to observe their demeanour when testifying, puts the court of appeal in an invidious position, especially as this court would be required to decide on the credibility of those witnesses. The court in *Rex v Mhlongo and Another*¹³ after leave was granted on appeal to hear further evidence stated the following at 134:

‘[However], ... that it was impossible to say how much importance the trial court might have attached to this evidence, and his Lordship therefore considered it preferable to remit the matter to the trial court for further hearing.’

¹² Section 19 of the High Court Act 16 of 1990.

¹³ 1935 SA 133 (AD).

[26] I am therefore in agreement with the submissions made by both counsel that it would be in the interest of justice to rather have the case remitted to the court *a quo*.

[27] This is however not the end of the matter. Consequential to his conviction and sentence the applicant successfully applied to be admitted to bail pending the appeal. In his ruling on the bail application the magistrate, for reasons unknown, remarked on the witness statements forming the subject matter of the present application which, it was argued, jeopardises the magistrate's continued involvement with the matter. The following passage is cited from the court's ruling (unedited):

'I will refrain from placing too much emphasis on the affidavits by three witnesses which purportedly exonerates the accused of any wrongdoing. For what they are worth, these affidavits purport to convey information to the effect that at some point the complainant approached and confided in them that the allegations against the accused were in all a fabrication meant to lend the accused person in trouble. Although it is in the discretion of the appeal court upon an application being made to it, to allow further evidence to be adduced on appeal, I have serious reservations about the value, relevance and *bona fides* of the averments contained in those affidavits. Without appearing to arrogate to myself the powers of the high court, which clearly powers I believe those affidavits raise more questions than they in fact answer. For instance, the timing of the affidavits does in itself raise eyebrows, the question being why now are these potential witnesses calling out of the woodwork so to speak. Why did it take them almost six years to come forward and attest to these allegations? All I can say that the accused's appeal rests, if accused's appeal rests squarely on the record of proceedings, if his prospects of success are indeed deem. Should the appeal court, per chance, allow the abduction of further evidence, the accused still has a mountain to climb to convince that court of the probative value of those statements'.¹⁴ (Emphasis provided)

[28] The magistrate's remarks are indeed unfortunate and, bearing in mind that same were made in the context of a bail application, unwarranted. Sight was clearly lost of the possibility that the case could be remitted to the trial

¹⁴ Record p374 – 375.

court if the application to lead further evidence on appeal were found meritorious. The magistrate has, on the strength of the witness statements alone, already pronounced himself on the veracity of the witnesses required to give evidence in respect thereof, from which a reasonable apprehension of bias may be inferred. In my view, against this background it would be irregular to remit the matter to the same court in order to receive such further evidence as contained in the statements. Mr *Botes* submitted that if possible, the matter should only as last resort be remitted to the same court. However, for reasons set out above, I am of the view that this is no longer a possibility. This court is alive to the inconvenience and the financial implications applicant has to endure when tried afresh, however, the charge preferred against him is serious and he cannot be allowed to escape the claws of justice.

[29] I have therefore come to the conclusion that the interest of justice would best be served to have the conviction and sentence set aside and remit the case to the Regional Court to be heard *de novo* before another magistrate.

[30] In the result, it is ordered:

1. The conviction and sentence are set aside.
2. The matter is remitted to the Regional Court for the District of Lüderitz to start *de novo* before a magistrate other than Mr Zisengwe.
3. Bail of the applicant/appellant is extended on condition that he reports himself to the Clerk of the Criminal Court Lüderitz within one month as from the date of this judgment.

JC LIEBENBERG
JUDGE

D USIKU
JUDGE

APPEARANCES

APPELLANT

Adv L Botes

Instructed by Dr Weder, Kauta & Hoveka,
Windhoek.

RESPONDENT

Ms C Moyo

Of the Office of the Prosecutor-General,
Windhoek.