IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG PIVISION, PRETORIA]

CASE NO: A364/2016

Not reportable

Not of interest to other judges

Revised.

18/8/2017

In the matter between:-

BAFANA HENDRY MAHLANGU Appellant

and

THE STATE Respondent

JUDGMENT

SKQSANA AJ

[1] This is a criminal appeal against the judgment of the Magistrate handed down on 18 September 2014. The appellant was convicted of rape, which conviction was based on a plea of guilty by the appellant accompanied by a statement made in terms of section 112(2) of the Criminal Procedure Act no.51 of 1977 ("CPA"). Leave to appeal was initially refused by the Magistrate but later granted after a petition to the Judge President of this Division.

[2] Alongside the appeal is an application for leave to present further evidence constituted by statements made by the complainant. Ms T Z and by the applicant.

[3] In summary, the salient facts of this matter are the following:

[3.1] The applicant was charged with rape, the actual charge being the following:

> *"That the accused is guilty of the crime of contravening the provisions of section 3 read with sections 1,55, 56,(1), 57, 58, 59, 60 and 61 of the Criminal Law amendment Act (Sexual Offence and Related Matters) 32 of 2007 also read with sections 9Z(2) and 94 and sections 256, 257 and 281 of the Criminal Procedure Act 51 of 1977, the provisions of section 51 and 5 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amender) as well as sections 261 and 92(2) and 94 of the Criminal Procedure Act 51 of 1977.*
>
> *In that on or about 31/074011 and at or near Leslie in the Regional Division of Mpumalanga, the said accused did unlawfully and intentionally commit an act of sexual penetration with a female person to wit, T Z (23 years) by having sexual intercourse with her without her consent."*

[3.2] The charges were essentially based *on* section 3 of the Criminal Law Amendment Act (Sexual Offences Act) no. 32 of 2007. Initially the appellant was charged for the same offence together with three other suspects. However, the charges were later withdrawn against three of those suspects, the fourth one having disappeared.

[4] On 18 September 2014, the matter came before the learned Magistrate, Mr Ball. The appellant was represented by Mr Bosman, an attorney. After the charges had been put to the appellant and read out on to record, the appellant confirmed that he understood the charges and pleaded guilty thereto. Thereafter Mr Bosman confirmed that the plea was in accordance with his instructions and consequently presented a statement in term of section 112 (2) of the CPA. It

would appear that Mr Bosman represented the appellant at the instance of the Legal Aid South Africa.

[5] Since the appeal concerns the conviction of the appellant on the basis of his plea, it is important to quote the section 112(2) statement in full:

> *"The accused admits that he is guilty of the crime of contravening the provisions of Sections 3 read with section 1, .55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Procedure Amendment Act 32 of 2007 also read with section 92(2) and 94 and sections 256, 257, 281 of the Criminal Procedure Act no. 151 of 1997 as well as the provisions of Sections 515 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended as well as Section 291 and 92(2) and 94 of the Criminal Procedure Act 51 of 1977.*
>
> *Accused admits that on or about 31 July 2011 at or near Leslie in the Regional Division of Mpumalanga the said accused did unlawfully and intentionally commit an act of sexual penetration with a female person to wit T Z, 23 years of age by having sexual intercourse with her without her consent.*
>
> *The accused admits that he knew it was an offence to have sexual intercourse with a person without her consent.*
>
> *Accused admits that he met the said complainant on the road close to Leslie and pulled her to the veld where he took the complainant, T Z's panty off and thereafter raped the said complainant by having sexual intercourse with her without her consent.*
>
> *Accused admits that he made this statement voluntarily without being forced to do so or influenced to do so while being of sober mind.*
>
> *Accused admits that the contents of this statement were explained to him.*

He understands the contents thereof and that the said statement was interpreted to him."

[6] The statement was signed by the appellant, his attorney and an interpreter by the name of Mr Mahlangu. After the statement had been handed up by the appellant's attorney, the appellant orally confirmed to the Magistrate that the contents of the statement were interpreted to him by the official court interpreter in the presence of his attorney, that he understood what was interpreted to him and that he confirms the content$ of the statement . Thereafter the State accepted the plea and the statement was also admitted as exhibit A whereupon the Magistrate convicted the appellant as charged.

[7] After previous convictions were admitted on behalf of the appellant, mitigation circumstances were presented as well as aggravating circumstances. As appears above, the charge against the appellant referred to specific sections of the Minimum Sentences Act[1] which required that a sentence of not less than 1O years be imposed on him. However, in imposing the sentence of ten years, four years of which was suspended for 5 years, the Magistrate regarded the fact that the appellant had admitted guilt to the charges and the substantial time that he had already spent in custody awaiting trial, as substantial and compelling circumstances entitling him to deviate from the prescribed minimum sentence of 10 years imprisonment[2] (Minimum Sentences Act). In terms of section 51(5) of the Minimum Sentences Act, the operation of such sentence shall not be suspended. The suspension of a portion of the sentence therefore constituted deviation.

[8] The appellant now brings an appeal against the conviction on the basis that the Magistrate ought not to have accepted the plea of guilty by the appellant. The grounds for this contention appear in summary to be the following:

[8.1] That the appellant was wrongly convicted of the statement made in terms of

[1] See section 51(2)(b)(i) read with Sched1,1le 2 Part JU of the Criminal Law Amendment Act 105 of 1997
[2] See footnote 1 above

section 112(2) of the CPA because he signed the statement under the false belief that a term of imprisonment would not be imposed upon him. This belief was created by his own legal representative, Mr Bosman. Mr Omar who appeared for the appellant further argued that, though this is not contained in his own affidavit, this promise to the appellant was also made by the Prosecutor.

[8.2.] That the Prosecutor failed to disclose a statement by the appellant and another statement by the complainant which contained exculpatory information. It is these statements that form the basis of the application to lead further evidence on appeal.

[8.3] That the complainant's statement refers to Lebohang as the place where the offence took place and not Leslie as alleged in the charge sheet and that, while such statement mentions by name the persons who had allegedly raped her, it did not mention the name of the appellant.

[8.4] Further, it was contended on behalf of the appellant that section 19(1) of the Superior Court Act 10 of 2013 empowers this court to receive further evidence on appeal and that the Magistrate did not do enough in order to comply with the requirements of section 112(2) of the CPA.

[9] The power of this court to allow the leading of further evidence on appeal has always existed even before the advent of the Superior Court Act[3].
However, the courts have always held that such power must be exercised only in special circumstances[4].

[10] The requirements for the exercise of the power in section 19(b) of the Superior Court Act have been a circumscribed as follows:

[3] See section 22 of the now repealed Supreme Court Act 59 of 1959. which continued substantially the same provisions as the present sub-section
[4] Colman v Dunbar 1933 AD141 at 161 2; De Aguiar v Real People Housing (Pty) Ltd 2011 (1) SA 16 (SCA) at 19 D-20D; Prophet v NDPP 2007 (6) SA 169 (CC) at 185E; ii Commuters Action Group v Transnet Ltd 2005 (2) SA, 359 (CC) at 88 C-E & 389 A-B; President of the RSA v Quagliani 2009 (Z) SA

[10.1] That there should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

[10.2] That there should be a *prim facie* likelihood of the truth of the evidence; and

[10.3] That the evidence should be materially relevant to the outcome of the trial[5]

[11] The above stringent conditions for the exercised of the powers of the court are normally strictly applied and if limy of those requirements are not complied with, the application to lead further evidence will fail[6].

[12] The grounds raised on behalf of the appellant do not fulfil the requirements set out above.. First, the appellant was represented by an attorney. There is no allegation that such attorney was incompetent or even inexperienced. It can also be safely assumed that the appellant's attorney was in possession of the docket containing the statements which are a subject matter of this application. He ought therefore to have been aware of the allegedly exculpatory material contained in those statements. There is no explanation proffered as to why those statements were not used at the trial.

[13] Second, although Mr Omar alleges to have been authorized by the appellant to depose to the affidavit on his behalf, there is no particular reason stated why the appellant himself did not depose to the affidavit in support of the application to lead further evidence on appeal. All that Mr Omar states is that it would have been an inconvenience. I am of the view that where an allegation is made, for instance, that the appellant was misled by his own attorney or the prosecutor, the matter becomes serious enough for the appellant himself to depose to the affidavit, especially because Mr Omar was not present when all that occurred.

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466 (CC) at 490 B-C

[5] See De Aguiar (supra) at 20E-21B; Rail Commuters Action Group (supra) at 388C-390D

[6] R v De Beer 1949 (3) SA 740 (A) at 748; S v De Jager 1965 (2) SA 612 (A) at 613 E F

[14] The exculpatory nature of the appellant's statement is of no moment since it is natural for any person in this position to deny the charges or allegations against him. As far as the statement by the complainant is concerned, to me it is also of no consequence that the statement refers to Lebohang instead of Leslie as the place where the offence had occurred. Of importance is that the charge sheet alleges that the offence occurred at Leslie and the section 112(2) statement drawn on behalf of the appellant which he accepted before the Magistrate as correct, admits that he met the complainant on the road close to Leslie where the offence took place.

[15] It is also not correct that the section 112 statement merely repeated what is contained in the charge sheet. On the contrary, the statement went further and explained how the rape had taken place including that the appellant had pulled the complainant to a nearby veld where he took off her underwear and proceeded to have sexual intercourse with her without her consent. The statement also covers *mens rea* by stating that this conduct was intentional, unlawful and committed with the full knowledge that it was wrongful.

[16] The statement further states within itself that it was made voluntarily without any force or influence being exerted on the appellant and that the statement had been explained to him in the language that he understands. He also confirmed this orally before the Magistrate.

[17] I did not read anything from the provisions of section 112(2) of the CPA and the cases that have been relied upon on behalf of the appellant to the effect that the Magistrate should ask for statements from the docket or other information which may prove the innocence of the accused person. On the contrary, the questions that may be asked in terms of section 112(2) are limited as opposed to those that may be asked by the Magistrate in terms of section 112(1)(d) where the accused is either unrepresented or merely makes an oral admission of facts. Section 114(2) allows the presiding officer to convi9t and sentence the accused

on a strength of such statement in lieu of questioning the accused under sub-section (1)(b). It is only where there are areas which need clarification that the presiding officer may exercise the discretion to put questions to the accused to clarify the matter raised in that statement.

[18] In this case, there is nothing that required clarity in the written statement handed up on behalf of the appellant nor is it contended that there was any ambiguity. The contents of the statement were sufficient to satisfy the Magistrate that the appellant is guilty with the offence of which he had been charged and to which he was pleading guilty.

[19.] In the circumstances, I find no reason to either grant leave for further evidence to be led or to set aside the appellant's conviction. Such evidence in any event relates to matters which may not be material to the case and which ought to have been raised either during the trial or at least when the application for leave to appeal was sought before the Magistrate.

[20.] In the circumstances, the following order is made:

[20.1] The application for leave to lead further evidence is dismissed;

[20.2] The appeal is dismissed.

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DT SKOSANA
Acting Judge of the High Court

I concur.

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NP Mali

Judge of the High Court