REPORTABLE

CASE NO:

593/96

THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

In the matter between:

ASARAM HANUMAN APPELLANT

and

THE STATE RESPONDENT

CORAM: SMALBERGER, HOWIE et ZULMAN JJA

DATE OF HEARING: 20 NOVEMBER 1997

DELIVERY DATE: 27 NOVEMBER 1997

JUDGMENT

SMALBERGER JA:

The appellant was convicted in the Regional

Court in Durban on counts of (1) rape and (2) indecent assault. He was found to have had sexual intercourse with his step-daughter S.S.

("the complainant") without her consent, and to have indecently assaulted her, on numerous occasions over the period mid-1991 to May 1993. The complainant was twelve years of age when these events commenced. The appellant was sentenced to 6 years' imprisonment, both counts being taken as one for the purposes of sentence. He unsuccessfully appealed to the Natal Provincial Division against his convictions and sentence.'

After the dismissal of the appellant's appeal the complainant made an affidavit retracting her allegations of sexual impropriety against the appellant. This affidavit formed the basis of an application to the Court a quo for leave to appeal to this Court. Leave was duly granted. Apart from the appeal before us there is an application to remit the matter to the trial court to hear further evidence. The evidence which it

is sought

to lead revolves around the complainant's affidavit. I shall deal first with the application for remittal.

In her affidavit the complainant claims that she "lied in every material respect in my previous statement to the police ...". (Somewhat surprisingly, and perhaps significantly, she says nothing about her evidence at the trial!) She denies that the appellant ever sexually abused her, and claims in effect that the reason why she preferred false charges against him was that he assaulted her mother and "I did not like him and wanted him to have nothing more to do with [her]".

It is a fundamental and well-established principle of our law that in the interests of finality, once issues of fact have been judicially investigated and pronounced upon, further evidence will only be permitted in special circumstances. The prerequisites

for a successful

application for remittal, as formulated in S v De Jager 1965(2) SA 612

(A) at 613 C-D, and applied in countless cases since, are:-

"(a) 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.

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."

As pointed out in Loomcraft Fabrics CC v Nedbank Ltd and Another 1996(1) SA 812 (A) at 825 A, while the requirements have not always been formulated in the same words, the underlying approach to the inquiry has essentially always been the same. It is common cause that the appellant, on whom the onus rests, has satisfied requirements (a) and (c) above. The appellant was convicted and sentenced on 7 June 1994. His appeal was dismissed on

24 August 1995. The complainant's affidavit is dated 7 September 1995. It is axiomatic that the appellant could not have had knowledge of the affidavit and its contents prior to his trial (or, for that matter, his appeal). Additionally the affidavit,

assuming its truth, would clearly be materially relevant to the outcome of the trial.

That leaves requirement (b). Although the "prima facie likelihood" test has been regularly applied, there remains some uncertainty as to its precise juristic connotation. Does it require some degree of probability that the evidence in question will be accepted as true, or will a reasonable possibility of that being so suffice? (See S v Steyn 1981(4) SA 385 (C) at 391 A - 392 H; Du Toit et al: Commentary on the Criminal Procedure Act 31-12.) The result could vary depending upon the test applied. In the Loomcraft Fabrics case

(supra at 825 C-D) it was said that whether there is a prima facie likelihood of the evidence being the truth or whether it is probable that the evidence will result in the outcome being changed (the test propounded in Staatpresident en 'n Ander v Lefuo 1990(2) SA 679 (A) at 692 B) amounts in effect to the same inquiry. The view I take of the present matter makes it unnecessary for me to decide whether the prima facie likelihood test requires some degree of probability, or merely a reasonable possibility, for it to be satisfied.

The complainant's affidavit must be seen against the background of the trial. There can be no doubt that the complainant was sexually abused. When examined by Dr Key on 10 June 1993 she exhibited clear physical and emotional signs of that being the case. Dr Key is someone with considerable

experience in the field of child abuse. No

serious challenge was directed at her evidence. The matter was handed over to the Child Protection Unit of the police and shortly thereafter the appellant was arrested. At that stage the appellant and his wife (the complainant's mother) were separated and in the throes of a divorce.

The trial commenced on 25 October 1993. By that time the appellant and the complainant's mother had become reconciled and had resumed cohabitation. The complainant was living with her aunt, Mrs Jagesar. She was the first person to whom the complainant made a report concerning the appellant's sexual misconduct. The complainant testified in detail and at length to various instances of sexual assault perpetrated upon her by the appellant in different ways and in different places and extending over a period of more than two years. She stood up well to a long

and probing cross-examination. Although her evidence

was not free from blemish, the trial magistrate nonetheless found her to be a truthful witness and accepted her evidence. He did so mindful of the fact that she was a complainant in a sexual offence, still a young girl and a single witness. It has not been suggested that the magistrate misdirected himself in any way in his judgment. Apart from unfounded speculation, there is nothing to suggest that anyone other than the appellant might have been responsible for the complainant's physical and emotional condition.

In her affidavit which forms part of the application for remittal, the complainant's mother stated, inter alia:

> "I can also confirm that prior to the trial in question proceeding in the Regional Court, I accompanied Sheleena to the public prosecutor where representations were made to have the charges
> withdrawn".

It appears, however, that the public prosecutor refused to withdraw the

charges.

If the complainant's affidavit is accepted at face value it means that when she gave evidence:

a) She knew that the charges she had laid against the appellant were false;

b) She had been party to representations made to have the charges withdrawn signifying a reluctance on her part to testify.

If she had testified in that frame of mind one would have expected her reluctance to have been, or to have become, apparent. One would also have expected considerable inroads to have been made into her evidence under cross-examination. Yet she never wavered significantly in her evidence.

A further consideration in determining the prima facie likelihood

of the complainant's affidavit is this. When the charges were laid in this matter the appellant and his wife had already separated and were no longer living together. The reason advanced by the complainant in the affidavit for laying false charges against the appellant was that she "wanted him to have nothing more to do with my mother". But this had already been achieved, at least at that time, by their separation.

In R v Van Heerden and Another 1956(1) SA 366 (A) at 372 B, Centlivres CJ stated:

> "I can see no reason why the Court should accept at their face value affidavits made by persons who allege therein that they gave perjured evidence at the trial."

He went on to add (at 372 H - 373 A):

> "It is not in the interests of the proper administration of justice that further evidence should be allowed on appeal or that there should be a re-trial for the purpose of hearing that further evidence, when the only further

evidence is that contained in

> affidavits made after trial and conviction by persons who have recanted the evidence they gave at the trial. To allow such further evidence would encourage unscrupulous persons to exert by means of threats, bribery or otherwise undue pressure on witnesses to recant their evidence. In a matter such as this the Court must be extremely careful not to do anything which may lead to serious abuses in the administration of justice."

Centlivres CJ quoted with approval from a judgment of Denning LJ in Ladd v Marshall [1954] 3 All ER 745 at 748 to the effect that:

> "A confessed liar cannot usually be accepted as credible. To justify the reception of the fresh evidence, some good reason must be shown why a lie was told in the first instance, and good ground given for thinking the witness will tell the truth on the second occasion."

What must be looked for is some credible evidence aliunde which suggests that the evidence originally given was false (van Heerden's case at 373 B). No such evidence is immediately apparent in the present instance. Mr Singh, for the appellant, sought to rely in this regard on

the affidavit of Mrs H., which forms part of the remittal application. In her affidavit she claims that the complainant "appeared very upset" and "indicated that she wished my assistance to take her to the police station as she wanted to have an affidavit drawn up there to right what she had done wrong." It was argued that the complainant's conduct and emotional state were consistent with her having previously given false evidence.

I must confess to having considerable reservations about certain aspects of the affidavits of Mrs H. and the complainant's mother. It seems to me that there is a strong improbability that a young girl would came forward spontaneously in the manner and circumstances suggested by Mrs H., particularly so long after the trial, bearing in mind that the prospect of the appellant's incarceration had been

present ever since. Other matters which cause me concern are, inter alia, the following. I find it difficult to accept that Mrs H., the sister of the complainant's mother, was unaware that the trial had been concluded (something which had occurred 15 months ago, and had been followed by an unsuccessful appeal the previous month). Equally strange (and unexplained) is the fact that she never told the complainant's mother either about the complainant's initial wish to make an affidavit or the fact that she had done so. The complainant's affidavit carries a note at the foot thereof "This statement taken down in the presence of my guardian Mrs B.H." and is signed by Mrs H. as "guardian". By her own admission Mrs H. was not present when the body of the affidavit was allegedly taken down by attorney Pillay, and there is nothing to suggest that she was ever the

complainant's "guardian". A further criticism is that there is no affidavit by either attorney Pillay, who is said to have prepared the complainant's affidavit, or the policeman who attested it. Finally, I find it somewhat astonishing that the complainant's mother (if she is to be believed) first heard about the complainant's affidavit when contacted by the appellant's attorneys with a view to a consultation with counsel.

But even if Mrs H.'s affidavit is taken at face value, a far more plausible explanation for the complainant's distressed state and subsequent making of an affidavit would seem to be the fact that she was improperly influenced into doing so by her mother who has every reason to wish to stave off imprisonment for the appellant. Reference has already been made to the fact that attempts were made to withdraw the charges before the prosecution

commenced. After the complainant had

given her evidence in chief the prosecutor placed on record that the complainant had advised him that she had been contacted by her mother who had tried to influence her not to proceed with the case. In this regard the following passage appears in the evidence of the complainant under cross-examination:

> "Didn't your mother get your permission to withdraw this case against your father and that's why you didn't come to court in the morning on Monday? – You see my mother always - my mother phoned home, right, and she says I mustn't put him in gaol, because she feels sorry for him. And then if - my mother is outside, you can tell her to come inside, you can ask her, and -and then she told me I mustn't put him in gaol because she feels sorry for him, and all my aunties and uncles said I must just do what's right and I must just tell the truth. So now I'm telling the truth and nothing else. (Witness answers in tears)"

The complainant's mother's claim that she only heard about the complainant's affidavit at a late stage strikes one as a conscious attempt

on her part to distance herself from any suggestion that she influenced

the complainant. An affidavit by attorney Pillay as to the circumstances in which he came to prepare the complainant's affidavit, and her emotional state at the time, might have had an important bearing on this issue.

On a conspectus of all the factors that bear upon the issue I am of the view, taking the matter at best for the appellant, that there is no reasonable possibility of the complainant's affidavit being the truth. In the result the second requirement in S v De Jager (supra) has not been satisfied.

Mr Singh contended that, even accepting this to be so, this Court has an overriding discretion to remit a matter for further evidence if the circumstances justify such a course. He referred

us in this regard to S v De Jager (supra) at 613 E-F and S v Myende 1985(1) SA 805 (A) at

811 F. On the assumption that this Court has such a discretion, it will only be exercised in rare instances where special reasons for doing so exist. Myende's case is an example of such an instance. The present matter does not fall into that category. Cases of a sexual nature where the only witness is a young child are relatively commonplace. It would be a dangerous precedent, and one which could lend itself to abuse, were this Court, on account of that reason alone, to exercise its discretion in favour of an appellant where there has been a recantation. In my view, given all the circumstances, this is not a matter where it would be appropriate for us to exercise any discretion we may have in favour of the appellant. The application for remittal can therefore not succeed.

That brings me to the appeal. The complainant's evidence is

fully

set out in the judgment of the trial magistrate. There is no need to repeat it. I have already referred to aspects of her evidence. It covers instances of sexual impropriety extending over a period of more than two years. Her testimony is an interesting mix of naivety and graphic, realistic detail and has a distinct ring of truth to it. She could only have testified from personal experience. That she was sexually abused, as previously observed, permits of no doubt. The evidence suggests the appellant as the obvious culprit. The complainant is corroborated in two important respects. The first relates to an incident where she testified that she was fetched from school one morning by the appellant and thereafter taken home and sexually molested by him. Contemporaneous school records support her evidence that she was fetched by someone who purported to be her father. Despite the

appellant's denial, the

person concerned could only have been him. The second refers to the occasion when she was forced to watch a pornographic video while being obliged to perform sexual acts on and with the appellant. The appellant admits to having had possession of a pornographic video although he claims, unconvincingly, to have watched it in different circumstances.

The magistrate was aware of the need to approach the complainant's evidence with the necessary caution dictated by the circumstances. He was also fully alive to the shortcomings in her evidence. He weighed up her evidence against that of the appellant and came to the conclusion that he could safely accept the former and reject the latter. His reasons for such conclusion cannot be faulted. It was not suggested that he had misdirected himself in any material respect. In the

circumstances no grounds exist for interfering with his findings on the merits.

The sentence of six years' imprisonment reflects the seriousness of the offences committed. The complainant was subjected to persistent and humiliating sexual conduct by someone she was entitled to look to for care and protection. The appellant abused his relationship with the complainant in order to gratify his own needs. The circumstances of the offences, the ever increasing prevalence of that type of offence, the need to protect young children and society's abhorrence of such conduct call for a substantial sentence. The magistrate did not misdirect himself and the sentence does not induce a sense of shock. No justification exists for interfering with it.

In the result both the application for remittal and the appeal

against the convictions and sentence are dismissed.

J W SMALBERGER
JUDGE OF APPEAL

HOWIE JA)CONCUR
ZULMAN JA)