THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

CASE NO. 180/2001

In the matter between

A L WILMOT **Appellant**

and

THE STATE **Respondents**

CORAM: MARAIS, ZULMAN, and NUGENT JJA

HEARD: 15 MARCH 2002

DELIVERED: 16 MAY 2002

Remittal to trial court for hearing of further evidence

JUDGMENT

ZULMAN JA

[1] The appellant was convicted in the Regional Magistrates Court for the Albany District sitting at Grahamstown of having raped a young girl ('the complainant'). He was sentenced to 11 years imprisonment of which three years were conditionally suspended. On appeal to the High Court of the Eastern Cape Division the conviction and sentence were confirmed. The court *a quo* granted leave to appeal against the whole of its judgment.

[2] The appellant was acquitted on three other charges, namely, rape, indecent assault and attempting to defeat the ends of justice. Those charges of rape and indecent assault arose from events that occurred during June 1997. The events which gave rise to the charge on which the appellant was convicted were alleged in the charge sheet to have occurred during August 1998 but the evidence of the complainant suggested that they might rather have occurred during June or July of that year.

[3] Shortly before the hearing of this appeal the appellant gave notice that he intended applying for further evidence to be received by this Court in the form of affidavits from four deponents (including the appellant), alternatively, for the matter to be remitted to the trial court for the hearing of the evidence of those deponents as well as 'further cross-examination of

(the complainant) with such instructions regarding the taking of such further evidence as this Court may deem appropriate'. For the sake of brevity I will refer to the application simply as 'the application'. In the result the appellant sought only the alternative form of relief. The application was opposed by the respondent.

[4] In order to properly understand the application it is necessary to refer to certain of the evidence given at the trial as also to the appellant's argument on the merits of the appeal.

[5] The appellant is a fifty-seven year old farmer who farms in the Grahamstown area. The complainant was almost 14 years old at the time of the alleged rape. She and the other complainants on the sexual offences charges gave evidence through an intermediary pursuant to the provisions of s 170A of the Criminal Procedure Act, 1977.

[6] The complainant, who was the first witness to testify, gave evidence to the effect that one Mutiwe Nohesi approached her mother on a Thursday some time during the second half of 1998 and asked whether she would allow the complainant to accompany her to fetch cabbages from a certain farm. Her mother was initially reluctant but eventually agreed. The complainant and Nohesi left in the company of two other persons and slept

over on a farm. On the Friday morning she and Nohesi walked along a certain road and waited alongside the road. A white man driving a white Isuzu van stopped. He chastised Nohesi for not stopping at ‘room 5’. They spoke in Xhosa. Nohesi and the complainant climbed into the passenger cab of the van. The man drove to a place alongside some bushes. Nohesi and the man alighted and went into the bushes. The man then came back. He asked the complainant to take off her clothes. The complainant started crying. The man went away and came back with Nohesi. Nohesi asked her why she was crying and opened the driver’s side door of the vehicle. The man then undressed the complainant and himself. Nohesi held the complainant by the arms while she lay on the seat in the cab. The man was at the passenger side door. He then proceeded to lie on top of the complainant and had sexual intercourse with her against her will. She thereafter dressed and remained in the cab of the vehicle with the doors closed while the man and Nohesi went into the bushes. A while later the man came back to fetch his jersey. He then left again. The man eventually returned and gave the complainant two R10 notes. Nohesi then returned and the three of them drove for some distance before Nohesi and the complainant alighted alongside the road. Nohesi then asked the complainant for the money that had been given to her, which the complainant handed over. Nohesi and the complainant then returned to where they had slept the previous night. The following morning Nohesi

washed the complainant's dress and panties and lent the complainant a skirt, which she wore. They then proceeded to collect cabbages from 'Tuti's field' and then went into Grahamstown where, amongst other things, Nohesi bought toy dolls for the complainant. They then returned to the complainant's home. The complainant made no report of the incident until some weeks later when she experienced a burning sensation when urinating. On 6 September 1998 she reported this to her mother. Upon further enquiry she then told her mother about the incident. The matter was reported to the police who arranged for the complainant to be examined by the District Surgeon the next day. Dr Dwyer testified that the examination was painful; her vagina admitted one finger; her hymen was torn and swollen; the swelling could have been as a result of infection or trauma to the hymen.

[7] The complainant said that she did not know who the man was who had had sexual intercourse with her but that she heard Nohesi 'say Tuti to him'. At no stage in her evidence did the complainant directly identify the appellant as her alleged assailant.

[8] Nohesi was not called to testify by the state. Earlier on during the testimony of the complainant the prosecutor indicated that Nohesi was available to consult with the defence. Seemingly on the basis of this

consultation defence counsel challenged certain of the complainant's evidence in cross-examination by putting to her that Nohesi would confirm going to the farm, but that it happened on 31 July 1998 (not later, as the complainant implied); that she did accompany the complainant, but that she did not hold the complainant; that the complainant was not raped; that the complainant stole the money with which dolls had been purchased; and that Nohesi never threatened the complainant in any way. There was no challenge of the complainant's evidence that Nohesi called the white man 'Tuti'; or that the complainant had sexual intercourse; or that the white man had a white Isuzu van; or that they fetched cabbages from 'Tuti's field'; or that Nohesi and the man went into the bushes; or that the man had asked Nohesi why they had not come to house 5. Nohesi was also not called to testify by the defence.

[9] The complainant's evidence was followed by that of her mother who confirmed the report made to her by the complainant. Apart from the later evidence of Dr Dwyer about his medical examination of the complainant no further evidence was presented which related directly to the charge on which the appellant was convicted.

[10] A certain Mrs Nxingo gave evidence for the prosecution on the charge of attempting to defeat the ends of justice. She deviated from her

original statement to the police and was declared a hostile witness. Before that occurred, and while giving evidence in chief, she said that the appellant was known as ‘Tuti’.

[11] Three young black women gave evidence concerning an incident that occurred late in June 1998 in which the appellant committed sexual acts with them with her consent. Their respective ages were found not to have been proved by the state, and accordingly no offence was proved to have been committed. According to their evidence (and that of two other witnesses, Ms Nolusindiso Nela and Ms Nomfusi Kosi) the appellant was known as 'Tuti'.

[12] What happened on that occasion was that the three women, accompanied by another woman (Stamelatjie) were allegedly picked up alongside the road by the appellant in his Isuzu van. Stamelatjie got into the front of the van and the others sat at the back. The appellant drove to Grahamstown where he dropped off a load of cabbages. He then drove back to a spot outside the town where he stopped at some bushes. He went down into the bushes and the three witnesses were told, in succession, to join him. The private parts of the first young woman were touched and fondled by the accused. He had sexual intercourse with the other two. Stamelatjie also went to him, but apparently escaped having sexual

intercourse with him because she was menstruating. The appellant gave each of them money (either R20 or R40) after each sexual encounter. Stamelatjie told them not to tell anyone what had happened. They were driven back to Grahamstown and dropped off there.

[13] The witnesses Nela and Kosi also testified that they met the appellant some time after the incident at a place called 'Number Five' or 'Five'. He admitted to Kosi that he had had sex with the children (presumably referring to the June 1997 incident). He also offered these two witnesses money to have the charges against him arising from that incident withdrawn.

[14] The appellant, as he was entitled to do, elected not to testify in his own defence at the trial, and no witnesses were called to testify on his behalf. At no stage in the cross-examination of any of the State witnesses, as was the case with the complainant in the rape charge, was a contrary version of events put to them. The general import of the cross-examination seems to have been to test the witnesses' version of events and to show that on their own version they consented to any sexual encounters with the person they alleged they were with.

[15] The magistrate believed the complainant whom he found to be 'a very good witness' who 'created a favourable impression'.

[16] In argument before this court the appellant relies upon the following six essential contentions in attacking his conviction:-

(1) The evidence of the complainant was not satisfactory in every material respect and material criticism may be levelled at her credibility.

(2) There is no corroboration for the complainant's evidence that she was raped.

(3) The trial court misdirected itself both on the evidence and by failing to apply the rules of logic formulated in *R v Blom*[1].

(4) The evidence as a whole did not establish with the requisite degree of proof that the assailant of the complainant was the appellant.

[1] 1939 AD 188 at 202 - 203

(5) The admission by the trial court (which was confirmed by the court *a quo*) of evidence relating to the June incidents as similar fact evidence to establish that the appellant was the person who raped the complainant was wrong in law and amounted to a misdirection.

(6) The evidence as a whole did not establish that the complainant did not consent to the act of sexual intercourse.

[17] Against this background I will now revert to the application. In his founding affidavit the appellant states that on 21 January 2002 he met a former employee of his, one Bukelwa Mantawule, in the street in Grahamstown. Mantawule told him that she had recently met the complainant who had informed her that she wanted to withdraw the charges against the appellant since the appellant had not raped her. She also told Mantawule that her mother would not allow her to withdraw the charges. The appellant then referred the matter to his attorneys instructing them to take the matter further on his behalf.

[18] As a consequence of this a Mr Haydock, a candidate attorney employed by the appellant's attorneys, conducted certain investigations. According to Haydock, who deposed to an affidavit in support of the

application, the appellant, in addition to telling him about his meeting with Mantawule in a street in Grahamstown, also told him that prior to this the complainant was involved in 'two further rape charges as a complainant'. This latter fact is not referred to in the appellant's founding affidavit. As a result of investigations which he conducted through the office of the relevant prosecutor and the detective branch of the police Haydock obtained copies of the contents of dockets in the two cases to which the appellant had referred him.

[19] The first docket related to the case of the **State v Minethu Nojoko** in which the accused was alleged to have raped the complainant. The docket also revealed that subsequent to the complainant laying the charge of rape on 4 February 2001 the complainant on 19 February 2001 retracted a sworn declaration that Nojoko had raped her and stated in an affidavit that Nojoko had had sex with her with her consent.

[20] In an affidavit annexed to Haydock's affidavit and deposed to by a Mr Wolmarans, an attorney who also practises in Grahamstown, it appears that the complainant in this matter was also the complainant in a charge of rape against two accused (Mzwanele Gladman Mani and Julius Tendisisiswe Maki) who were defended by Wolmarans. The complainant's evidence that she had been raped by the two accused was rejected by the

court. The accused were however, convicted of the statutory offence of having sexual intercourse with a girl under the age of 16. The complainant's evidence was that she was 14 years old at the time the offences were alleged to have been committed. According to the complainant's birth certificate, which was produced in evidence in the trial that is the subject of this appeal, she was 16 years and 3 months old at the time of that alleged offence.

[21] At the request of the appellant, Mr Rusa, an attorney employed by another Grahamstown firm of attorneys, took full statements from Ntombehkaya Ntlokwana (Ntombehkaya) and Noncedo Ntlokwana (Noncedo) relating to a conversation that they allegedly had with the complainant. Rusa attaches affidavits from these persons to an affidavit deposed to by him. In addition Rusa deposes to the fact that on 24 January 2002 (3 days after the appellant’s meeting in the street with Mantawule), the appellant brought Mantawule to his office and asked him to take a statement from her. He did this in the appellant’s absence. Rusa attaches an affidavit from Mantawule to his affidavit.

[22] The affidavit of Ntombehkaya was to the following effect:-

(1) On 8 January 2001 she, together with two friends of the complainant, were at the home of the complainant where they spent the afternoon.

(2) The complainant informed them that 'there was a white man at the station who sleeps with black females' and that 'the mothers of these females would lay charges against this white man for having slept with their children'.

(3) The complainant said that she 'did not want to lay charges against Mr Wilmot, but her mother insisted that she must do so'. She told them that the reason why she did not want to lay charges against Mr Wilmot was that she was not raped by him.

(4) Her mother asked her 'to allege that she had been raped by Mr Wilmot'.

(5) The conversation came about because her friends had asked the complainant why she was often attending court.

[23] Noncedo's affidavit is to the effect that:

(1) Early in March 2001 she was with the complainant who informed her that 'she was not raped by Mr Wilmot but asked by her mother to accuse him of having done so'.

(2) The complainant said that this was because she did not know the white male who raped her under the bridge. She said that she was told by her mother that Mr Wilmot had been arrested and charged for rape and that it could be him who had raped her. The complainant further said that 'she was informed by her mother that the little girls who were raped by Mr Wilmot were of the same age as her. She informed me that she went to the police to inform them that she was raped by Mr Wilmot.'

(3) During mid March 2001 the complainant visited her and her younger sister, Motiwe. During the conversation the complainant said that 'there were white men at Kongo who were sleeping with black females. She said that she was one of those females who slept with these white males. She further said that these white males would pay R20,00 or R60,00 to any female who slept with them. She invited Motiwe to visit Kongo in order to sleep with one of these males. However, Motiwe did not respond to the invitation.'

[24] Mantawule in her affidavit states that:

(1) In December 2001 she went to the complainant's mother's home.

(2) When she arrived there she found the complainant together with her friends, she asked the complainant where her mother was and was told that she had gone out for a few minutes but that she would be back soon.

(3) She decided to wait for the mother. Whilst waiting one of the complainant's friends asked the complainant what was happening with her case. The complainant replied that she wanted to withdraw the case but her mother did not want her to do so.

(4) The complainant was asked which white male the complainant had laid charges against. She replied by saying that it was Tuti.

(5) She immediately knew who the complainant was referring to as she had once worked for the appellant and he had always been known as Tuti.

(6) The complainant went further and said that Tuti had not raped her but that her mother told her to accuse Tuti of having done so. Mantawule then joined in the conversation and asked the complainant 'who had raped her if it was not Tuti. Her reply was that she did not know the identity of her rapist.'

(7) On Monday, 21 January 2002, whilst she was at her home, which is not far from the complainant's home, she noticed the complainant sitting alone under a tree. She decided to talk to her. After exchanging pleasantries and some talk about things in general she asked the complainant what was happening between her and Tuti. The complainant told her that she wanted to withdraw her rape charge against Tuti (the appellant) as, she said, she had not been raped by him. She said that because her mother refused to allow her to do so she had continued with the case.

(8) The reason why she asked the complainant about the appellant was that she had known the appellant for a long time as she had once worked for him on his farm. Furthermore, she was worried about the appellant as her former employer.

(9) On the afternoon of 21 January 2002, she co-incidentally met the appellant whom she had last seen in 1992. This was just after she had spoken to the complainant. She told him about the conversation she had with the complainant. The appellant said that he would refer the matter to his lawyers.

[25] Some eight affidavits have been filed by the respondent in support of its opposition to the application. The first is by the complainant in which the following appears:

(1) She refers to the allegations made concerning her by Ntombehkaya, Noncedo and Mantawule.

(2) She denies that she ever wanted to withdraw the case against the appellant on the basis that he was not the one

who raped her. She also denies that her mother at any stage persuaded or tried to persuade her to proceed with the case.

(3) She asserts that the appellant did rape her. She states that she would have pointed him out at court had she been afforded the opportunity to do so.

(4) She denies the entire contents of certain paragraphs of Noncedo's affidavit concerning, inter alia, the fact, that she said that she did not know the white man who raped her under the bridge; that during mid March 2001 she said that she was one of those who slept with white males who pay R20,00 or R60,00 to any female who slept with them. Perhaps due to an oversight, she does not deal specifically with paragraph 3 of Noncedo's affidavit. In this paragraph Noncedo states that the complainant had told her that 'she was not raped by Mr Wilmot.'

(5) She draws attention to the fact that Noncedo is the sister of Motiwe Nohesi who was present when the appellant raped her and that Nohesi was originally to have been called a state witness to confirm that she had been raped. She

contends that it would have been foolish and futile for her to try to tell Nohesi's own sister a different story because Nohesi would have told her sister that she (the complainant) was lying as she had seen what actually happened and that she was in fact raped by the appellant.

(6) As regards Ntombehkaya and Mantawule she states that she has never heard of them and that she asked her parents whether they knew these names but her parents were unable to help her.

(7) She states that she accompanied the police with her parents to both their home addresses; she said that she had never been there before and did not know the houses.

(8) She avers that on 5 March 2002 'we managed to get' (presumably meaning find) Bukelwa Mantawule's home. Although she mentioned my name and claimed to know me, I have never seen her before.'

(9) She admits that it is correct that she withdrew the rape charge against Nojoko but asserts that Nojoko did rape her.

The reason for her withdrawing the charge was because she was persuaded to do so by Nojoko's father who said that his son would lose his job and go to prison if convicted of such a serious crime. The father accompanied her to the police station when she withdrew the case.

(10) She states regarding the cases of Mani and Maki that she can do nothing about the fact that the magistrate did not accept her evidence (implying thereby that it was nonetheless true) and that the accused's attorney of record, Wolmarans, formally admitted her age and never investigated it - she did not realize the relevance of her age.

[26] In an affidavit deposed to the investigating officer in the appellant's case she states:

(1) She was also the investigating officer in the Nyoko case and that she took down the complainant's withdrawal statement in the presence of Nyoko's father and the complainant.

(2) Despite such withdrawal the prosecutor has refused to withdraw the case which has been remanded for trial in June 2002.

(3) She states that Nohesi was a key witness for the State who corroborated the evidence of the complainant materially but at the trial recanted on what the appellant had done.

(4) She annexes copies of different statements made by Nohesi who appears to have been 21 years old at the time. In one of these statements signed by Nohesi on 11 August 1999, she states that the appellant never had sexual intercourse with the complainant and that she had made a statement to the police falsely implicating the appellant because the police promised to pay her R1 000,00 for doing so. The affidavit also contains much argumentative matter which is not admissible.

[27] The next affidavit is that of the complainant's mother in which she corroborates what the complainant stated in her affidavit concerning her mother's role in the matter, the fact that Mantawule and Ntombekhaya are not known to her, and she denies allegations made by Noncedo and Ntombehkaya as far as they relate to her.

[28] In an affidavit by the complainant's stepfather he also states that he does not know Mantawule or Ntombehkaya. As regards Noncedo he states that she is his neighbour and that in the course of December 2001 she came to see him at his house and told him that the appellant wanted to see him ('Tuti soek vir jou') but that he ignored the request.

[29] The final affidavit filed in support of the respondent's opposition to the application is that of Hambile Wellington Stefane. He is a detective inspector in the police service. He was concerned with taking the complainant, her mother and her stepfather to the addresses of the deponents Ntombehkaya and Mantawule. He states that Ntombehkaya was unknown at the address given in her affidavit. He corroborates the statements of the complainant, her mother and stepfather that on visiting Mantawule's house and upon seeing Mantawule they claimed not to know her to which Mantawule responded to by questioning how they could say they did not know her.

[30] The appellant's replying affidavit consists essentially of a denial of all matters of relevance in the affidavits filed by the respondent.

[31] The prerequisites for a successful application for remittal, as formulated in *S v De Jager*[2] , and applied in numerous cases since, are:

[2] 1965 (2) SA 612 (A) at 613 C-D

> ‘(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.’

It is also, as pointed out by Smalberger JA, in *S v H*[3] 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.

Accordingly the power to hear new evidence on appeal or to remit a matter to a trial court to hear such evidence will be sparingly exercised and only when the circumstances are exceptional.[4]

A further factor which weighs against the exercise of the power of remittal is the possibility of fabrication of testimony after conviction

[3] 1998 (1) SACR 260 (SCA) at 262 g-h

[4] See for example *R v Jantjies* 1958 (2) SA 273 (A) at 279 B-F, *S v N* 1988(3) SA 450 (A) E-J at 458 and *S v de Jager* supra at 613 A-B

and the possibility of witnesses being bribed to retract evidence given by them.[5]

The mere fact that a witness at the trial has gone back on his statement given 'will not ordinarily warrant the grant of an order re-opening a concluded trial.'[6]

On the other hand even if an application for remittal 'fails the test' referred to above the court in the exercise of an overall discretion vested in it, and obviously only in very special circumstances, may nevertheless grant the application.[7]

The onus of establishing the requirements set out above clearly rests upon an applicant seeking remittal.

[32] In as much as the evidence sought to be led relates to events which occurred subsequent to the appellant's trial and is evidence which obviously could not be led at the trial, requirement (a) in *De Jager's* case has been satisfied.[8]

[5]See for example *R v Van Heerden and Another* 1956 (1) SA 366 (A) at 372B – 373A, *S v Nkala* 1964 (1) SA 493 (A) at 497 H and *Ladd vMarshall* (1954) 3 All ER 745 at 748 A-H.

[6] Ogilvie Thompson JA in *S v Zondi* 1968(2) SA 653 (A) at 655 F-G.

[7] Cf S *v Myende* 1985(1) SA 805 (A) at 811 C-F.

[8] Cf *S v Lehnberg and Another* 1976 (1) SA 214 (A) at 216 G and *S v N* (supra) at 464 B-C.

[33] As to the '*prima facie* likelihood' in requirement (b) there 'remains some uncertainty as to its precise juristic connotation'[9]. After referring to the very careful and comprehensive analysis of the question by Marais J in *S v Steyn*[10], the answer to the question was expressly left open in *S v H*[11]. The question is whether the test requires some degree of probability that the evidence in question will be accepted as true, or whether a reasonable possibility of that being so will suffice. The result could of course vary, depending upon which test is applied in a particular case. I will revert to this aspect of the matter presently.

[34] There is a clear dispute of fact on the papers as to whether the complainant made the statements retracting her allegation of having been raped by the appellant. Three persons Mantawule, Ntombehkaya and Noncedo state that the complainant told them that she had not been raped by the appellant but that she had falsely accused the appellant because her mother told her to do so. Mantawule avers that the statement was made to her by the complainant on two different occasions – once in December 2001 and again on 21 January 2002. According to Ntombehkaya a similar statement was made to her on 8 January 2001. Noncedo avers that she was told early in March 2001 by the complainant that she was not raped by the appellant but that she was asked by her mother to accuse him of doing so.

9 Smalberger JA in *S v H* (supra) at 263 c-d.
110 1981 (4) SA 385 (K) at 391A – 392H.
111 (Supra) at 263 c-e.

On the other hand the complainant in her affidavit denies that she ever made any such statements. She goes further and avers that she has never heard of Ntombehkaya and Mantawule. There are certain shortcomings and possible improbabilities in the affidavit evidence presented by the appellant. For example, in paragraph 4.4 of his replying affidavit, although he denies raping the complainant, he stops short of stating that he did not have consensual intercourse with her. He also does not deny or seek to explain the statement made by the complainant's stepfather that he had been given a message that the appellant wanted to see him.

[35] It is perhaps strange that the appellant would have met his former employee (Mantawule) by chance in the street in January 2002 when according to Mantawule she last saw the appellant some 10 years previously in 1992 and that she would have told him about what the complainant had allegedly told her. According to Mantawule she had spoken to the complainant on the very day of the meeting with the appellant (21 January 2002). The corroboration by the policeman (Stefane) and the complainant's mother and stepfather of the complainant's assertion that she does not know Mantawule also casts some doubt upon Mantawule's credibility. It is also strange that the police established on 1 March 2002 that Ntombehkaya was unknown at the address which she gave in the affidavit which she deposed to on 15 January 2002 as being her

residential address. On the other hand one cannot ignore the fact that the complainant was prepared to agree to Nojoko's father's request to withdraw the charge of rape which she had laid against Nojoko and to state that he did not rape her whereas, on her present version she knew that that was untrue. There is also the fact that she was disbelieved in the Mani and Maki trial in which she alleged that she had been raped. On her own version of what occurred in the Nojoko matter it seems that the complainant is vulnerable and responsive to the influence of others.

[36] I am mindful of the dangers of a court having regard to what happened in subsequent cases in which a complainant was involved and the Pandora's box of collateral issues which could be opened by doing so. But there can be no absolute bar to doing so. It is obviously something which a court should only be prepared to take into account in circumstances where the alleged behaviour of the complainant in subsequent cases is indicative of a proclivity to level false allegations of a distinctive and similar kind and there is real anxiety in the court's mind as to whether the exclusion of those circumstances may not result in the perpetuation of a possible miscarriage of justice. Just as similar fact evidence is admissible against an accused only in narrowly circumscribed circumstances, so should "similar fact" evidence of the proclivity of a complainant to give untrue evidence be admissible only in narrowly circumscribed circumstances.

[37] Here we have the disturbing feature that in two other cases involving allegations of rape by the complainant her credibility has been found wanting. Once because she herself made flatly self-contradictory statements on oath as to whether she was raped and once because her evidence conflicted in material respects with that of a friend who also testified for the State. The complainant's evidence in that case was found by the magistrate to be unreliable. There may well be innocent explanations for the latter. It is conceivable that the friend's evidence was the unreliable evidence and not the complainant's or that, faced with the conflict, the magistrate did not know whose version was correct. One does not know. In the former case, it may well be that her initial allegation of rape is indeed true and that her retraction of this allegation was the result of influence being brought to bear upon her but the fact remains that, at best, she succumbed to the influence and committed perjury in retracting her allegation that she was raped.

[38] Suffice it to say that I am not able to safely say where the truth lies in the clear dispute of fact which is apparent from the papers. In this connection I am conscious of the following wise remarks of Colman J, in

Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co. (Pty) Ltd.[12]*:*

> 'My conclusion rests upon my experience, and the experience of others before me, which shows that an assertion or a denial which seems very probable or improbable on a reading of a set of affidavits often takes on a different colour when the veracity of the person who has made it is tested by cross-examination. There is the rare case, of course, in which a disputed statement made on affidavit is so manifestly untrue, or so grossly improbable and unconvincing that the Court is justified in disregarding it without recourse to oral evidence.'

[39] I cannot say with any degree of confidence that the disputed statements made on affidavit in support of the application are 'so manifestly untrue, or so grossly improbable and unconvincing' that I am justified in disregarding them. The test postulated by Marais J in *S v Steyn*[13] is, I think, satisfied. I cannot say there is no reasonable possibility that the new evidence tendered could be true. If the test has to be set somewhat higher (a matter I, too, shall leave open) it is less clear that requirement (b) has been satified. But the exceptional circumstances of this case leave me with a feeling of unease that I have been unable to quiet. In such a situation, doctrinaire insistence upon the fulfilment of a

112 1971 (2) SA 388 (W) at 390 F-G.
113 Supra at 391 A – 392 H.

requirement which becomes increasingly difficult to fulfil the higher the test is set could be productive of miscarriages of justice.

[40] As to requirement (c) postulated in *S v De Jager*[14], and after careful consideration of all of the affidavits with due regard to what I have said above, I believe that the appellant has also shown that the evidence that he seeks to lead, if accepted as true, is materially relevant to the outcome of the trial. The credibility of the complainant who is a single young witness was at the heart of the State's case and was of prime importance in the conviction of the appellant on the sole charge which is now under attack. Indeed, as I have already pointed out, the magistrate found the complainant to be a very good witness. That credibility finding will obviously require revision if the magistrate believes the witnesses whom the appellant now wishes to call[15] or even if he is left in doubt as to whom to believe.

[41] Bearing all the above considerations in mind, I have come to the conclusion that the particular circumstances of the present case warrant this Court in granting the application. I reach that conclusion mindful of the fact that if the complainant was indeed raped by the appellant it involves the complainant having to face yet again the trauma of reliving the episode and testifying about events which occurred long ago. She may well be

[114] Supra at 613 C-D.
[115] Cf R v Weimers *and Others* cf 1960 (3) 508 (A) at 515 C-F.

hampered in doing justice to herself when testifying because of that. If she was indeed the victim of a rape by the appellant, it is distressing that she will have been subjected to yet further anguish. If, on the other hand, she was not telling the truth, she will have brought this upon herself. It goes without saying that the observations tentatively made in this judgment as to the possible veracity or lack of it of the new evidence are in no way to influence the magistrate who will assess the evidence independently and after having heard the witnesses testify and be cross-examined.

[42] The following order, which is in accordance with the orders made in cases such as *R v Kanyile and Others*[16], *R v Jantjies*[17], *S v Zondi*[18], *S v Njaba*[19] *and S v Myende*[20], is made:-

(1) The appellant's conviction and sentence on a charge of raping the complainant is set aside.

(2) The case is remitted to the trial court (Regional Magistrate M S Dunywa) to:

116 1944 AD 293 at 295.
117 Supra at 279 F-H.
118 Supra at 657 D-F.
119 1966 (3) SA 140 (A) at 145 D-E.
220 Supra AT 812 A - B.

(a) hear such evidence, if any, as the State or the accused may wish to give or call or the court may consider it necessary to call in the interests of justice relating to the issues raised in the said affidavits filed in this court;

(b) hear the evidence of the deponents to the affidavits filed in this court in the application of the appellant (accused) to lead further evidence, such evidence being subject to further examination, cross-examination and re-examination;

(c) consider such evidence, hear argument thereon, and give a decision *de novo* on all the evidence.

(3) In making the orders set out in paragraph 2 no derogation is intended from the provisions of s 151(1)(b) of the Criminal Procedure Act 51 of 1977.

R H ZULMAN

JUDGE OF APPEAL

MARAIS JA)

NUGENT JA) CONCUR