



# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

**Not reportable**

Case No: 838/2017

In the matter between:

**CHRISTOPHER FORTUIN**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Fortuin v S* (838/2017) [2018] ZASCA 5 (13 February 2018)

**Coram:** Shongwe ADP and Saldulker, Dambuza and Van der Merwe JJA and Pillay AJA

**Heard:** No oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

**Delivered:** 13 February 2018

**Summary:** Appeal – whether the high court should have granted leave to appeal to it against a conviction of attempted rape – reasonable prospect of a finding that the intention to penetrate was not established beyond reasonable doubt – appropriate to dispose of appeal without oral hearing – appeal upheld and leave granted to appeal to high court.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Kubushi J and Chesuwe AJ as court of appeal):

1 The appeal is upheld.

2 Leave is granted to the appellant to appeal to the Gauteng Division of the High Court, Pretoria against his conviction of attempted rape.

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## JUDGMENT

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**Van der Merwe JA (Shongwe ADP and Saldulker and Dambuza JJA and Pillay AJA concurring):**

[1] The appellant was convicted in the regional court of attempted rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He was sentenced to four years imprisonment. The regional court dismissed his application for leave to appeal against the conviction and sentence. On petition to it, the Gauteng Division of the High Court, Pretoria (Kubushi J and Chesuwe AJ) granted leave to appeal against the sentence but refused leave to appeal against the conviction. This court subsequently granted special leave to appeal to the appellant in respect of the conviction.

[2] It follows that the issue before this court is whether the high court should have granted the appellant leave to appeal to it against the conviction as well. The test is whether the appellant has shown a reasonable prospect of success on appeal against conviction. See *Mdluli v S* [2015] ZASCA 178 para 3.

[3] The parties were requested to indicate whether the appeal should be disposed of without the hearing of oral argument in terms of s 19(a) of the Superior Courts Act 10 of 2013. Both parties submitted that that course be followed. I agree. For the reasons that follow, leave to appeal to the high court against the conviction must be granted. A hearing before this court would result in unnecessary employment of scarce judicial resources, unnecessary costs and delay of the determination of the appeal.

[4] The regional court accepted the evidence of the complainant and rejected the denial thereof by the appellant as false beyond reasonable doubt. These findings are not challenged before us. The argument on behalf of the appellant is that on the evidence of the complainant, he should have been convicted of sexual assault in contravention of s 5(1) of Act 32 of 2007.

[5] The relevant evidence of the complainant may be summarised as follows. The appellant and the complainant were both members of the South African Police Service (SAPS). At the relevant time they both attended a course at the SAPS Academy in Hammanskraal. For this purpose, the complainant stayed at the female living quarters at the academy. At about 23h30 on Sunday 2 June 2013, the complainant heard a knock on her door. She opened the door, thinking that it was a friend who had returned after the weekend. However, it was the appellant that stood in front of the door. He was strongly intoxicated. He entered the room and took off his jacket and slip-on shoes. He said that he intended to sleep there. The complainant repeatedly asked the appellant to leave. However, he grabbed her by both her upper arms and pushed her down on the bed. Whilst holding her down he touched her breast with one hand. The complainant yelled and fought and kicked the appellant between his legs with her knee, whereafter he jumped up, grabbed his jacket and left.

[6] In order to secure a conviction of attempted rape it was incumbent on the prosecution to prove beyond reasonable doubt that the appellant intended to perform an act of penetration. See *R v B* 1958 (1) SA 199 (A) at 203H-204D. In accordance with *S v Du Plessis* 1981 (3) SA 382 (A) at

400B-D, the appellant must have had a 'finally formulated intention' to penetrate the complainant. The essential question, therefore, is whether there is a reasonable prospect of a finding by the high court that there is a reasonable doubt as to whether the appellant intended to penetrate the complainant, rather than to commit sexual assault.

[7] The incident lasted for a few seconds. The door of the complainant's room remained open at all times. The appellant touched the complainant's breast over her clothes and made no attempt to undress her or to expose his private parts. In my view there is a reasonable prospect of a finding that it was not proved beyond reasonable doubt that the appellant's drunken transgression was aimed at penetration.

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

1 The appeal is upheld.

2 Leave is granted to the appellant to appeal to the Gauteng Division of the High Court, Pretoria against his conviction of attempted rape.

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C H G van der Merwe  
Judge of Appeal

Appearances:

For Appellant:

J O van Schalkwyk

Instructed by:

BDK Attorneys (David H Botha, Du Plessis  
& Kruger Incorporated), Johannesburg

Symington & De Kok, Bloemfontein

For Respondent:

S Scheepers

Instructed by:

The Director of Public Prosecutions,  
Johannesburg

The Director of Public Prosecutions,  
Bloemfontein