REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 163/2013

In the matter between:

JULIUS ISACK VAN WYK **APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation: *Van Wyk v State* (CA 163/2013) [2016] NAHCMD 122 (21 April 2016)

Coram: HOFF J et SHIVUTE J
Heard: **7 October 2014**
Delivered: **21 April 2016**

Flynote: Criminal Appeal – Accused convicted of rape in contravention of the provisions of the Combating of Rape Act, 8 of 2000 – Fair trial – Prior to sentence Court obliged to inform unrepresented accused person *inter alia* that conviction of rape under coercive circumstances prescribes a minimum period of imprisonment – The accused must be informed of the minimum period of imprisonment , unless the court found substantial and compelling circumstances – The court must inform the accused person that the crime of rape had been singled out by Legislature for severe punishment and that the minimum prescribed sentence is not to be departed from lightly – The court must explain to the accused that if the court is satisfied that his

particular circumstances (and in considering the needs of society) would render the prescribed minimum sentence unjust, the court will be entitled to impose a lesser sentence.

The undefended accused is usually not in a position to comprehend the gravity of the matter where such information is not provided by the court, and such failure would amount to a violation of the right of an accused to a fair trial (a right guaranteed by the Constitution) – Accused must be provided with the necessary information in order to make an informed decision.

ORDER

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1. The application for condonation for the late filing of his appeal against conviction is refused.

2. The conviction is confirmed.

3. The application for condonation of late filing of his appeal against sentence is granted.

4. The sentence imposed by the magistrate is set aside.

5. This matter is referred back to the magistrate who convicted the appellant, for sentencing afresh, in compliance with the guidelines set out in *Gurirab.*

6. In considering an appropriate sentence the magistrate must take into account the period of imprisonment served by the appellant.

7. The appellant shall remain in custody until he has been so sentenced afresh by the magistrate.

JUDGMENT

HOFF, J:

[1] The appellant was convicted in the Regional Court of the crime of rape in contravention of the provisions of s 2(1)(a) of Act 8 of 2000, and sentenced on 26 July 2011 to 20 years imprisonment of which 3 years imprisonment were suspended for a period of 5 years on condition that the accused is not convicted of the crime of rape committed during the period of suspension.

[2] The appeal lies against both the conviction and the sentence. In an affidavit dated 6 March 2012, the appellant sets out his grounds of appeal together with a condonation application for the late filing of his notice to appeal.

[3] In the first paragraph of this affidavit the appellant alleges that he had not been 'fully alerted' by the magistrate 'in a manner comprehensible to a man of appellant's calibre' of the requirements of rule 67(1) and the consequences of failure to act timeously.

[4] The appellant quotes that part of the record[1] where his rights of appeal had in fact been explained to him, but avers that such explanation was 'meaningless and utterly insufficient to the unsophisticated person'. The appellant strangely then states that an applicant 'is not only required to lodge a notice of appeal, but has to set out clearly and specifically the grounds upon which the appeal is based', thereby indicating that he comprehended what had been explained to him.

[5] The appellant further states that his challenge in this regard was 'to understand how the law of evidence functions, apply his mind thereto and further to

[1] Page 213.

the manner the magistrate evaluated the evidence before court and then compile an appeal application'.

[6] The appellant further states that 'in accomplishing that, learning exactly what the requirements of the criminal appeal are. To this end appellant must or needs to comprehend the court's reasoning for sentencing him before adopting a strategy to undermine the magistrate's conviction and sentence'.

[7] The appellant further states that he 'is not of a reasonable degree of sophistication' and that it would not be in the interest of fairness to criticise applicant for the late filing a notice of appeal when the court in the first place omitted to enquire of applicant as to whether he had the necessary knowledge required to draft a notice of appeal timeously, and one which sets out specifically and clearly his grounds of appeal.

[8] In spite of portraying himself as a relatively unsophisticated person and blaming the presiding magistrate for not enquiring whether he had the necessary knowledge to draft a notice of appeal timeously, the appellant does not deal with the reasons for the delay of more than 7 months in filing his notice of appeal.

[9] The appellant states that he 'alternatively' requested his family for assistance in respect of the appointment of a 'lawyer' to prosecute the appeal and had been 'assured' by his mother that she was 'prepared' to make the necessary arrangements, but that due to the fact that she is a single mother with three other off-spring to maintain, she was not able to raise the necessary funds required, which as a consequence left the appellant in a 'cul-de-sac'.

[10] The appellant significantly does not refer to any dates, for example, when he had approached his family and when he was so 'assured' by his mother.

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[11] In respect of the grounds of appeal, the appellant stated the following:

'The court erred in fact and in law:

1. by finding that the State had proved beyond reasonable doubt that there was an insertion of a penis into the vagina of the complainant;

2. by finding that the evidence presented by the State proves beyond reasonable doubt that the appellant committed the rape;
3. by convicting the appellant substantially relying on the evidence of the complainant, notwithstanding the fact that the complainant was an unimpressive single witness whose evidence was riddled with contradictions, lies and inconsistencies and improbabilities.'

[12] The appellant was undefended during the trial in the regional court. In these appeal proceedings, the appellant is represented by Mr. G. Kasper, *amicus curiae*.

[13] Mr. Kasper filed an amended notice of appeal as well as an amended condonation application.

[14] In this amended notice Mr. Kasper first deals with what is referred to as 'the right to a fair trial' under which six grounds were listed, namely:

1. 'The court proceeded on 21 June 2011 with the trial without the appellant being represented;
2. The learned magistrate erred in law and/or on the facts in failing to inform the appellant of his legal rights at the commencement of the trial;
3. The learned magistrate erred in law and/or the facts by admitting the J88 into evidence without explaining to the accused, its purpose, the right to challenge the findings and the effect of not challenging same;
4. The learned magistrate erred in law and/or the facts in failing to explain the effect and meaning of 'coercive circumstances' and 'substantial and

compelling circumstances' before he pleaded and again after he was convicted;

5. The learned magistrate erred in law and/or the facts by failing to explain sufficiently the purposes of cross-examination; and
6. The learned magistrate erred in law and/or the facts by failing to take a more active part in measure to address the disadvantage that an undefended accused may suffer from lack of legal representation.'

[15] In respect of conviction, ground 7 was in essence a repeat of grounds 1 and 2 reflected in the original notice of appeal and ground 8 a repetition of ground 3 of the original notice of appeal. Ground 9 states that the magistrate failed to properly analyse and consider the evidence, ground 10 states that the magistrate erred in finding that the vast number of inconsistencies within the personal testimony of the complainant and the further number of discrepancies between her testimony and that of the third, fourth and fifth State witnesses did not discredit the version of the complainant as a clear fabrication. Ground 11 states that the magistrate erred in not discrediting the State's case on their failure to hand in evidence of the rape kit used to test both the appellant and the complainant.

[16] In respect of sentence (grounds of appeal not dealt with in the original notice to appeal) the following grounds were listed:

'12. the learned magistrate failed to take into account adequately that:

(a) the appellant was a first offender;
(b) no evidence of the complainant having suffered any short or long term mental or emotional harm was presented into evidence by the State, wherefore the Court could possibly not have found that the complainant had suffered mental harm as a result of the alleged rape.

13. the learned magistrate over-emphasised the seriousness of the offence and the interest of society.

14. the magistrate erred in taking into account statistics as to the prevalence of rape in his jurisdiction area:

(a) No evidence whatsoever as to statistics was led, and ex parte statements by the Prosecutor were taken into account;
(b) The appellant was not informed that the Magistrate intended taking into account during sentencing the said statistics and was therefore not afforded the opportunity, to lead evidence in respect thereof, or to present argument to the trial court.

15. the sentence is so unreasonable that no reasonable court would have imposed it.'

[17] Before considering the grounds of appeal I find it opposite at this stage to deal with the judgment of the magistrate. I shall quote the judgment fully since it is an accurate summary of the testimonies of the witnesses and reflects the reasons for conviction. The judgment reads as follows (*verbatim*):

'[1] The accused is charged in terms of section 2(d) of the Combating of Rape Act 8 of 2000. It is alleged "that on or about the 12th day of July 2010 and at or near Okahandja, he wrongfully, unlawfully and intentionally under coercive circumstances namely that the complainant Diana Gehardt is a minor of 6 years old and is by reason of her age exceptionally vulnerable (being under the age of 14 and accused more than 3 years older than the complaint) committed a sexual act with the complaint by inserting his penis into her vagina".

[2] When the charge was put to the accused, he in terms of section 115 of the CPA, disclosed the basis of his defence. He stated that he did not do it and that he was not present at home when or during that time. During his plea in terms of section 119 of the CPA, he stated that he did not rape anybody, and that during the mentioned time date when the incident took place he was not at the said area. In other words, the accused relied on the defence alibi.

[3] Throughout the proceedings, I have been mindful of the fact that the burden of proof rests upon the State to prove the guilt of the accused beyond a reasonable doubt. That

there is no burden proof on the accused to prove his innocence. It is also a principle of our law that if the accused's version may reasonably possibly be true he is entitle to his acquittal. (See *R v Difford* 1937 AD 370).

[4] The summary of relevant evidence is as follows. It is common cause that the complainant, a six year old girl at the time of commission was residing with her parents in a shack dwelling which was in the yard of one of state witnesses, Joseph Kathindi. It is common cause that the accused was their close neighbor at that stage, only the fence is separated their houses. Complainant testified that on the date in question she came back home from school about around 12h00. Whilst inside their shack and after she took off her school uniform and put on her plain clothing, suddenly the door was pushed open from outside as she forgot to lock it after she entered therein. In that process she was hit on the forehead by the door when it was pushed whilst she was standing next to the door. She sustained some bruises as a result on the forehead. She realized that the person who pushed the door open was the accused whom she knows before by the name Funny and who stays just next door to her house.

[5] Complainants testified further that the accused then pushed her on the bed, took off her panty and pulled her next to him. She stated that further that the accused then put his "lulu" into her "koekie". She said when the accused put his "lulu" into her "koekie" she felt painful. When asked by the prosecutor as to what she meant with reference to the accused's "lulu" and "koekie" she testified that the "lulu" is something which the accused used to "pee" with and the "koekie" is something which she use to "pee" with. No doubt she was referring to the accused's penis and vagina. She stated further that at that stage, when the accused was doing all that to her, she wanted to shout but the accused put his dirty shirt into her mouth and threatened her not to tell anybody otherwise he will rape her again.

[6] Complainant further testified that the accused was wearing a t-shirt and a trouser but he took all his clothes off when he was raping. When her mother and father saw blood on her panty, they assaulted her and she reported to them that the accused had raped her. When asked why she mentioned initially to her mother that a certain young boy, the son of Joseph Kathindi had raped her, she responded that she was afraid of the accused who threatened that if she mentioned to anybody that the accused had in fact raped her, the he will rape her again.

[7] In cross-examination by the accused, the complainant remained adamant that she was telling the truth that the accused had raped her and not somebody else. In fact neither the accused during the cross-examination had put to the complainant that somebody else had raped the complainant. The accused specifically however asked the complainant in cross-examination as to why she first tell her parents that it was “Mattie” who raped her. Complainant repeated that due to the fact that accused had threatened that if she mentioned the accused as her rapist, then he will rape her again. The threat the accused posed to her was the reason why she mentioned Mattie.

[8] It must be born in mind that Matie is the son to Joseph Kathindi and the evidence of Kathindi is that Mattie was six years old at the time of the commission of this offence. I will refer to his evidence later in this judgment.

[9] The summary of evidence of the remaining state witnesses is as follows: Jacqueline Ouxurus is complainant’s biological mother. She testified that on 12/07/2010 when she came back home at around 17h30 she noticed blood on the bottom part of complainant’s panty. By then the complainant was taking a bath in the room. The complainant’s young brother and her father were also at home at that stage. It is her testimony that she asked complainant several times what blood was on her panty but she kept quite. She then started beating the complainant thinking that another child has done bad things to her. She testified further that she realized that complainant was scared. Later on complainant’s father Willem Henock Gebhardt also asked complainant to tell them what was going on with her. Her father also started beating her. It was at that point that the complainant reported to them that it was the accused (“Funny”) who pushed the door open and sat her down on the bed and took off her panty and put his penis into her vagina.

[10] Jacqueline, when asked by the prosecutor whether the complainant had told her that somebody else had raped complainant she testified to that effect that complainant initially told her that a young boy Matie had done it to her. But after she was beaten by her father she reported to them that it was the accused who raped her. Jacqueline testified further that when she left in the morning there was no blood on the complainant’s panty. Her clothes were all clean.

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[11] Jacqueline and Gebardt reported the matter to the police on the same day and took complainant to the hospital for examination. In fact Willem Henock Gebhardt, the complainant's biological father corroborated the evidence of his wife Jacqueline in a very important material respect especially that he also noticed blood from complainant's panty after a report was made to him by Jacqueline. He confirmed that he has beaten complainant and thereafter complainant reported to him that she was raped by the accused. Jacqueline testified that complainant was 6 years old at that stage as per Exhibit "A".

[12] Gebhardt further testified that on that day when he came back home for lunch at 13h00 he found the complainant at home. He stated further that he found also the accused sitting under the tree next to his house. The accused then asked complainant the whereabouts of Oumatjie, the latter who is Jacqueline's sister. Gebhardt then went back to work after lunch leaving the complainant in the house whilst the accused was still sitting under the tree.

[13] Joseph Kathindi testified that on 12/07/2010 between 14:00 and 15:00 he came back home and he noticed that the door to the complainant's shack was locked from inside because the padlock was not locked from the outside as usual. He then went to fetch his children from their grandmother's house. He brought the kids home and later in the afternoon he heard the complainant crying. He then went to complainant's shack and confirmed that complainant was being beaten by her parents and complainant first mentioned that it was his son who did it but later after complainant was beaten by her father, she mentioned that it was accused who did it. He further testified however that his son was not at home at that stage when the incident allegedly took place. He testified that his son was six years old by then. He also testified that he saw the accused on that day sitting underneath the tree between 14:00 and 15:00. He however did not see the complainant at that time.

[14] The complainants was medically examined at the hospital that same day by Dr. Limbi who compiled a medical report marked (exhibit "B") which was handed in by agreement. The doctor testified and made findings: *"That the complainant's heyman was broken; blood and lacerations on the genitals, i.e. fresh oozing of blood from the vagina which was consistent with a recent injury and he concluded that the injuries sustained where evidently consistent with complainant having been sexually assaulted".* The doctor

testified further that he examined the complainant at around 23:00 some 6 hours prior to the incident of rape. He also confirmed the age of complainant and according to him it was not normal for a child of 7 years to experience fresh oozing blood from her vagina before her menstruation. This was abnormal to him.

[15] To all this evidence, the accused version is merely a denial. The accused testified and called two witnesses. He testified that on the date in question, when he woke up at around 09:00, he went to watch TV inside her mother's house as he was staying at the outside room. He stated that he watched TV up to 13:00 afternoon. Thereafter he went to the neighbouring house next door where the complainant stays. He found complainant there and he asked her whether her aunt was there. But complainant apparently did not respond. He did not know whether complainant was angry. Then the complainant's father responded to his question by saying that he did not see complainant's aunt.

[16] Accused testified further that he then left and went to the Pink Club to enjoy himself. He stayed there until 15:00 and later together with his two witnesses left the club at around 17:00 and, suddenly thereafter, he received a call from her sister that he should go home very urgent. He went home and he was told that he had raped complainant. He denied and later he was arrested by the Police and locked up. The accused denied that he had committed any sexual act with the complainant as alleged.

[17] His two witnesses namely Drops and (Markus) Michael testified and confirmed accused version that they were together at the Pink Club but they knew nothing about the allegation of rape levelled against the accused. Therefore the evidence did not take the defence of accused any further.

[18] The main question of which this court has to answer based on the totality of evidence before court is whether the accused did commit the sexual act with the complainant as alleged on 12/07/2010.

[19] In an elaborated plea explanation given by the accused at the commencement of the proceedings, he denied having committed a sexual act with complainant as alleged. It appears from his explanation that he relied on the defence of alibi. However, in his evidence in-chief and during cross-examination, the accused admitted having been at or near the complainant's house between 09:00 am and 13:00 in the afternoon. By so

admitting, he placed himself at the scene when and where the alleged rape had been committed. There is also corroboratory evidence by the two state witnesses namely Kathindi and Gebhardt to that effect that the accused was seen sitted under the tree next to complainant's house the morning hours of the 12/07/2010. In actual fact the accused admitted having talked to both complainant and her father Gebhardt on that day when he asked them the whereabouts of complainant's aunt.

[20] Therefore I am satisfied that it has been proved that the accused was at the complainant's house on the date and time mentioned supra.

[21] Equally, with regard to the identity of accused by complainant, I am satisfied that his identity is not an issue to be decided due to the fact that the accused did not deny the evidence of complainant that she knows the accused very well. The accused admitted that he knows the complainant for the past 6 years as she grew up before him.

[22] I am also satisfied based on the medical evidence marked *(Exhibit "B")* by Dr. Limbi that the complainant has been sexually assaulted after examination and that the injuries sustained by complainant was consistent with rape and therefore there is no need for me to elaborate further on the findings of the doctor as his evidence remain uncontradicted.

[23] The age of complainant also has been proved beyond doubt that she was six years old at the time of the commission and when she gave her evidence she was 7 years old *(Exhibit "A")*.

[24] This court is aware of the cautionary rule applicable to the evidence of a single witness. The complainant in this matter is a single witness with regard to the actual allegations of rape against her by the accused and it is indeed so that the court must be cautious when it comes to cases of single witness.

[25] However section 208 of Act 51 of 1977 specifically stipulates "that a court may convict an accused of any crime with which he is charged on the evidence of a competent witness. In ***R V Mokoena 1932 OPD 79 on page 80*** it was held that: *"In my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect".*

[26] In cross-examination the accused in this matter did not suggest that the complainant's evidence is a recent fabrication. There is no evidence that somebody has suggested to complainant that complainant must come and tell the court that it was the accused who raped her on 12/07/2010.

[27] Although the complainant made a report to her parents that it was the accused who raped her after she was assaulted, I am satisfied that the report is admissible, because the complainant herself has testified in court and repeated that it was the accused who raped her on 12/07/2010 inside her own parents shack. In fact the complainant gave reasons before this court as to why she did not first mention that it was accused who raped her. She repeated her testimony in chief during cross-examination by the accused that accused had threatened her not to tell anybody that he raped her otherwise he will harm her again. Surely it is my concerted view that any reasonable child in the position of complainant considering her age could have become afraid of that imminent threat by the accused.

[28] In cross-examination the accused asked complainant: *"what did your parents ask you".* Then complainant responded: *"they asked me who had done it to me and I told them that it was the accused".*

[29] When the complainant was asked by the prosecutor about whose voice the complainant was hearing before court. She responded that it was the voice of the accused who raped her and that she did not want to talk to the accused anymore because he hurt her. It must be born in mind that the complainant gave her testimony from behind the child friendly room through a TV screen whereby she could only hear the voice of the accused but she had no eye contact with the accused. However the accused had the benefit of witnessing the complainant from the dock through the screen and he could also hear her voice.

[30] Due to the fact that complainant was younger than 14 years, she was admitted to give evidence without taking an oath or making the affirmation. I however admonished her to speak the whole truth before given her evidence in terms of S164(b) of the Criminal Procedure Amendment Act 24 of 2003.

[31] Given the above reasons, I am of the view that:

- The complainant gave a clear and straight forward version.
- Her version of event was corroborated by the evidence of all state witnesses although they gave circumstantial evidence.
- The complainant did not contradict herself and she was not evasive in her version when she was attacked by the accused during cross-examination.
- There are no inherent improbabilities in her evidence.
- All the other state witnesses gave firm and resolute evidence.

[32] For the afore-going reasons, I am of the opinion that complainant was a competent and credible witness and that the truth has been told. I am therefore satisfied that the state has proved beyond reasonable doubt that the accused person had committed a sexual act with complainant on 12/07/2010 as alleged.

[33] His explanation could not reasonable be possible true in the circumstances and the denial is rejected as false.

[34] In the circumstances the accused is convicted as charged.'

[18] It should be pointed out that the word 'prior' in paragraph 14 of the judgment of the court *a quo* is an obvious mistake and should read: 'after'.

[19] The first ground of appeal, namely that there was no proof of penetration, is not supported by evidence presented by the State, and is unfounded. The complainant testified about the painful sexual intercourse. It is common cause that there was blood on the panty of the complainant and in addition, the medical evidence by the medical practitioner who examined the complainant, found that the injuries sustained by the complainant was 'consistent with complainant having been sexually assaulted'. This finding by the doctor was never disputed during cross-examination by the appellant.

[20] In respect of the second ground of appeal which in essence puts the identity of the perpetrator in issue, the complainant testified and identified the appellant as the person who had raped her. This was never categorically denied by the appellant

during cross-examination of the complainant. The complainant's mother's testimony was that the complainant reported to her that it was the appellant who had raped her. The witness Joseph Kathindi saw the accused in the vicinity under a tree between 14h00 and 15h00 on the day of the incident. This was also not disputed by the appellant during cross-examination. The evidence, in my view, proves beyond reasonable doubt the identity of the perpetrator namely, the accused person.

[21] In respect of the third ground of appeal, the appellant did not, save for referring to 'inconsistencies, contradictions, and improbabilities', spell out with reference to the record those inconsistencies, contradictions and improbabilities.

[22] Presumable these inconsistencies, contradictions and improbabilities refer to:

1. The fact that the complainant initially reported that Kathindi's six year old son, Mati, raped her.
2. That complainant did not scream throughout her ordeal, and
3. Complainant not alerting either parents immediately on arrival at home after work.

[23] In respect to the first point: - this can be explained by the evidence of the complainant – that the appellant had threatened to harm her again should the complainant identify the appellant as the perpetrator of the sexual assault.

[24] The complainant testified that the appellant had threatened to rape her again, whilst the mother of the complainant testified that complainant informed her that the appellant had threatened to beat her, should she reveal that he had raped her. Kathindi corroborated the testimony of the mother of complainant on this point.

[25] This also explains the third point, namely that the complainant was scared when her parents arrived from work. It is common cause that the complainant only informed her parents that she had been raped when they confronted her with the

blood on her panty and after she had received a hiding. In respect of the second point, the uncontradicted evidence of the complainant was that the appellant prevented her from screaming by closing her mouth with his dirty T-shirt.

[26] Dr. Rimbi, the medical practitioner, excluded the possibility that a six year old boy could have inflicted the injuries observed on the genitalia of the complainant with his penis. In addition the undisputed evidence of Kathindi was that his son was not at home at the time when the incident occurred.

The amended grounds of appeal in respect of the right to a fair trial

[27] Points 1 and 2: It appears from the record that the appellant had been informed of his right to legal representation as well as his entitlement to legal aid on two separate occasions by the district magistrate and the appellant elected to conduct his defence himself. This stance was repeated in the regional court when he was required to plead to the charge of rape. These points are without merit.

[28] Point 3: The medical practitioner who drafted the J88 was cross-examined by the appellant. The medical practitioner explained to the appellant why the examination was done namely to access and document the injuries sustained, and also to collect evidence. It is not clear in these circumstances in which way the presiding magistrate erred by admitting the J88 as evidence. This ground is unfounded.

[29] In respect of point 4, regarding the failure by magistrate to explain the effect and meaning of ‘coercive circumstances’ and ‘substantial and compelling circumstances’ it should be noted that the ‘coercive circumstances’ is clearly set out in the charge sheet.

[30] There is no obligation for a presiding officer to explain to an accused person what ‘substantial and compelling circumstances’ are *before* an accused person had

pleaded. This obligation only arises *after* the accused had been convicted. I shall later in more detail deal with this issue.

[31] Points 5 and 6 are not at all supported by the record. Points 7, 8, 9 and 10 are not grounds of appeal, 'but are conclusions drawn by the draftsman of the notice without setting out the reasons or grounds thereof'.[2]

[32] The 11th ground of appeal in respect of conviction refers to the failure by the magistrate 'to hand into evidence the rape kit used to test both the appellant and the complainant'. The appellant does not state what such a kit would have established and why it was necessary to have produced such a kit as part of the evidence against the appellant – nothing turns on the non-production of the rape kit.

[33] The grounds of appeal in respect of the conviction raised by the appellant are in our view unfounded. It can thus not be averred that the magistrate committed irregularities, the basis on which the conviction may be set aside.

[34] In respect of sentence: I shall now return to the issue of 'substantial and compelling circumstances'.

[35] This court in *S v Gurirab*[3] enumerated some guidelines to be implemented in respect of a conviction under the Combating of Rape Act, Act 8 of 2000, especially where an accused person is unrepresented.

[36] At 517I to 518A appears the following:

'it must be pointed out to the accused that as a result of the fact that he had been found guilty of the offence of rape under coercive circumstances (the coercive circumstances must be mentioned and explained) that unless the court finds that substantial and compelling circumstances existed, which would justify the court to impose a lesser

[2]See S v Beyer 2014(4) NR 1041 at 1044B.
[3] 2005 NR 510 at 517H – 518A.

sentence, the court will have to impose at least a period of imprisonment of (the term of this minimum imprisonment period must be specified).'

And at 518 C - E:

'it must be explained to the accused that the court must take into account that this particular crime had been singled out by the Legislator for severe punishment and that the minimum prescribed sentence is not to be departed from lightly or for flimsy reasons, but that the court will take into consideration all the facts and factors the accused will advance in order for the court to come to a just conclusion.'

And at 518B - C:

'it must be explained to the accused that if the court is satisfied that his particular circumstances render the minimum prescribed sentence unjust, in that it would be disproportional to the crime, the accused's personal circumstances and the needs of society (that an injustice would be done by imposing the minimum prescribed period), the court will be entitled to impose a lesser sentence.'

[37] The reason this court prescribed those guidelines, was to impress upon the accused the seriousness of the matter and the need for him to participate meaningfully in the process by advancing mitigating factors.

[38] It appears from the record that the magistrate explained to the appellant that he may address the court in mitigation of sentence or may testify in mitigation of sentence and the differences between these two processes. The appellant was also informed that he may call witnesses in mitigation of sentence.

[39] Thereafter the appellant proceeded to address the court. At some stage during the mitigation process the magistrate said the following (*verbatim*):

'I wish also to bring to the attention of the accused person that he had been convicted under the Combating and Rape Act no. 8 of 2000 and it is likely that he is facing a

minimum sentence as prescribed by the Act unless substantial and compelling circumstances exist or are present which justify this court to impose a sentence less than the prescribed minimum sentence. So is there anything else that he wish to bring to the attention of the Court, with regard to that? Especially in view of the fact that coercive circumstances was present, due to the fact that the complainant was only six years old and he more than three years older than the complainant, the accused person.'

[40] I need to make two observations. Firstly, it is not entirely correct to state that it was 'likely' the accused would face a minimum sentence. The presiding officer is *obliged* to impose the prescribed minimum sentence (unless substantial and compelling circumstances are found to exist). As was stated in *S v Lopes*[4] in which this court adopted the judgment of Marais AJ in *S v Malgas*[5] the specified sentences are not to be departed from lightly or for flimsy reasons which cannot withstand scrutiny.

[41] Secondly, the magistrate did not inform the appellant what the minimum prescribed sentence was, which the appellant faced at that stage.

[42] As was stated in *Gurirab*, this is important information which must be conveyed to an accused person in order for him to understand the gravity of the offence. The accused person was unrepresented. How would he have known that he faced a minimum of 15 years in prison?

[43] I am of the view that the failure by the magistrate to inform the appellant of the specific minimum sentence violated the right of the accused to a fair trial as far as the sentence imposed is concerned.

[44] What was stated in *Gurirab*[6] applies equally to this case, namely:

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[4]2003 NR 162 (HC).
[5]2001(2) SA 1222 (SCA)
[6]Supra at 518G-I.

'Applying the above-mentioned principles, I have little hesitation in concluding that an irregularity occurred which violated the sentence part of the trial when the appellant in this matter was sentenced. He was simply never properly informed about the applicability of any minimum prescribed sentence or what the meaning of 'substantial and compelling circumstances' is.

Although it may be that in the circumstances of this case, there will eventually be no difference between the sentence imposed by the learned magistrate and the sentence to be imposed by him after the above-mentioned guidelines have been followed, that is not the issue. What is at stake is that any undefended or unrepresented accused should be afforded a fair trial. Fairness is hardly capable of being achieved if an accused is uninformed.'

[45] In considering an application for leave to appeal, in addition to the reasons for the late filing of the notice, the prospects of success on appeal must also be considered.

[46] I have dealt with the grounds of appeal in respect of conviction and am of the view that there are no prospects of success in respect of the conviction of the appellant of the crime of rape and that condonation should accordingly not be granted.

[47] In respect of the sentence as indicated, the right of the appellant to a fair trial was violated, there are reasonable prospects of success on appeal, and that condonation should be granted in respect of the appeal against sentence only.

[48] In the result, the following orders are made:

1. The application for condonation for the late filing of his appeal against conviction is refused.

2. The conviction is confirmed.

3. The application for condonation of late filing of his appeal against sentence is granted.

4. The sentence imposed by the magistrate is set aside.

5. This matter is referred back to the magistrate who convicted the appellant, for sentencing afresh, in compliance with the guidelines set out in *Gurirab.*

6. In considering an appropriate sentence the magistrate must take into account the period of imprisonment served by the appellant.

7. The appellant shall remain in custody until he has been so sentenced afresh by the magistrate.

E P B Hoff

Judge

I agree

NN Shivute

Judge

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APPEARANCES

PLAINTIFF:	S Nduna
	Office of the Prosecutor, Windhoek
DEFENDANT:	L Kasper
	Murorua & Associates
	Amicus Curiae