CASE NO.: CA 85/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JACOBUS DOMINGO
APPELLANT

versus

THE STATE
RESPONDENT

CORAM: DAMASEB, J *et* VAN NIEKERK, J

Heard on: 12 November 2004
Delivered on: 19 October 2005

APPEAL JUDGMENT

VAN NIEKERK, J: The appellant was convicted in the Regional Court on two counts of rape in terms of the Combating of Rape Act, 2000 (Act 8 of 2000). The counts were taken together for the purposes of the sentence, which is 15 years imprisonment.

The appeal lies against sentence only, but was filed some 5½ months late. Attached to the notice of appeal is an application for condonation for the late filing of the notice of appeal. The application is in the form of an unsworn statement in which the appellant gives the following explanation: He says that he is a first offender and, in effect, that he does not have any experience regarding appeals. Secondly he says that his family had promised that they would assist him to engage lawyer, but they disappointed him. Thirdly he says that he was not able to afford a lawyer and had to lodge the appeal and condonation application on his own. He adds, in effect, that he is not willful in complying with the legal provisions concerning the noting of appeals.

Mr Pickering of the Society of Advocates appeared *amicus curiae*. The Court appreciates his assistance. He submitted that condonation should be granted as the appellant had given an acceptable explanation for the delay and that there were reasonable prospects of success on appeal.

The facts of the matter may be summarized as follows:

The complainant, 39 year old woman, left her workplace, a restaurant, at about 01h30 during the night of 3 November 2001. She was dropped off at home, where she knocked on the door, but there was no response. After repeatedly knocking at the door and the side windows to no avail, she realized that no-one was at home. She unsuccessfully tried to raise the neighbours and then went to a friend's house to make enquiries about her son, who she expected to have had returned home by then.

On her way back to her house, she encountered the appellant who had a glass in his hand. He called out and said she must take the glass and drink beer. Complainant did not respond and walked on. The appellant came running towards her, stood in front of her and again spoke to her about drinking. He grabbed her necklace and tried to runaway with it. She called him back where after he put the glass down and grabbed her. She threw her handbag in the neighbour's yard so that she could wrestle with the appellant. Appellant grabbed her on the throat. The complainant did not struggle or scream as she could not breathe. The appellant said that he was going to have sexual intercourse with her at the fountain. When they reached this place he threw her on the ground and struggled with her. Then she managed to scream and called for one Andrew to help her as someone was

killing her. She then became unconscious. A while later she became aware again that the appellant was struggling with her, holding her on the neck and saying he would have sexual intercourse with her in the riverbed. There he threw her to the ground, put his knees on complainant's stomach and removed her panty and his trousers. After putting on a condom he raped her.

Thereafter the complainant put on her panty and said she wanted to leave. The appellant exchanged some words with her and a short distance away stated that he would have sexual intercourse with her again. He grabbed her and threw her down again. This time he did not remove his trousers and did not use a condom. He only removed her panty and raped her a second time. After this he returned the necklace he had removed earlier. After further exchanges the complainant said that he should let her go and she left him standing there.

The complainant returned to her friend Lucia's house and managed to get help from her. She told Lucia what had happened. While trying to retrieve her handbag, the said Andrew appeared from the same direction as the appellant had done earlier. She also reported the matter to Andrew and described

her assailant. Andrew immediately recognized the appellant from the description as, fortuitously, he had spent the evening in the company of appellant and the complainant's son. With the help of Andrew the police located the house where appellant resided and the complainant pointed out the appellant early the next morning, where after he was arrested.

Dr Nande who examined the complainant on 3 November 2001 at 06h35 found bruises on her neck and a laceration along the midline of the perineum between the genitalia and the anus. He explained that the perineum is a very difficult place on the body to injure unless the person is lying down and that such a laceration could have been caused by force, such as a finger or a penis. Based on the injuries caused, his conclusion was that the possibility of rape having taken place was "most probable".

The appellant denied the whole incident, stating that he was at home that night, but his version was rejected and he was convicted.

In his notice of appeal, which the appellant drew without the assistance of a lawyer, the appellant raised several grounds of appeal against the sentence imposed, some of which were that

the trial magistrate over emphasized the seriousness of the offence and failed to take into account that the complainant was not injured. Mr *Pickering* in oral argument expanded upon these grounds by formulating the submission that the magistrate erred in sentencing the appellant to a period of imprisonment of 15 years in terms of section 3(1)(a)(iii) of the Combating of Rape Act, as there was no evidence that the complainant suffered grievous bodily or mental harm. The aforesaid section provides that any person who is convicted of rape under the Act shall be liable in the case of a first conviction, where the complainant has suffered grievous bodily or mental harm as a result of the rape, to imprisonment for a period of not less than fifteen years.

From the extremely brief judgment of barely a page on sentence it is clear that the trial court did not find that the complainant suffered grievous bodily harm. The learned magistrate did, however, state the following:

> "The complainant in this case will have to live with this scar of having been raped and as testified to by the social worker who had the opportunity to speak to her this person is still suffering that trauma she is still going through that trauma even now."

It is clear from the rest of the judgment that the magistrate must have concluded that the complainant had suffered grievous

mental harm and therefore regarded herself bound by the provisions of the aforesaid section to impose a sentence of fifteen years, taking the two counts of rape together for purposes of sentence.

The question arises: what is meant by the words “grievous mental harm”? The Combating of Rape Act does not define the expression. I was unable to find any judgment which deals with the expression and counsel did not rely on any authority for his submissions. The expression “grievous bodily harm” has been defined as “harm which in itself is such as seriously to interfere with health” (*R v Edwards* 1957 R & N 107 at 109). In *S v R* 1998 (1) SACR 166 (W) Nugent, J referred to the discussion of the term “grievous bodily harm” in *S v Melrose* 1985 (1) SA 720 (ZSC) and said (at p170a) that the Zimbabwe Supreme Court “pointed out that it is a relative term but connotes serious injury to the health of the victim.” In *S v Mbelu* 1966 (1) PH H176 (N) the Court, while dealing with the meaning of assault with intent to do grievous bodily harm stated:

> “[H]owever one expresses it, it is at least clear that there must be an intent to do more than inflict the casual and comparatively insignificant and superficial injuries which ordinarily follow upon an assault. There must be proof of an intent to injure and to injure in a serious respect.”

Applying these authorities by analogy to the expression “grievous mental harm” is not as easy as it may seem. At first glance it seems to me that “grievous mental harm” must mean serious harm of a mental or psychological nature, or serious harm to the mental health of the person. It further seems to me that the legislature had in mind, not the “normal” or usual mental trauma associated with the offence of rape, but harm more serious, damaging or lasting in its effect or consequence. I am partly led to this conclusion by the fact that the Act provides for minimum sentences of five and ten years as well. I would consider it very unusual for complainants in such cases of rape not to experience some, if not all, of a range of feelings such as fear, shock, humiliation, shame, distrust, degradation, depression, feeling “dirty”, aggression, constant alertness, etc. By this I am not to be taken as implying that the normal mental trauma suffered by rape survivors is not considerable, but it does not necessarily mean that such trauma causes serious mental harm, which, it seems to me, would be evidenced by some form of psychological damage or even resulting physical damage to the health or wellbeing of the complainant, which is substantial and not of a passing nature. In reaching this conclusion I found it useful to have regard to various authorities on the issue of

delictual liability for emotional shock (see “Emotional Shock”, by JM Potgieter (updated by L Steynberg) in LAWSA vol 9; *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A) 779H; *Muzik v Canzone Del Mare* 1980 (3) SA 470 (C).) (See also *N v T* 1994 (1) SA 862 (C); *Jackson v Jackson* 2002 (2) SA 303 (SCA) at 310-312). Proof of such damage as a result of the rape would normally require medical, psychiatric or psychological evidence. (See eg. *N v T (supra); S v R* 1996 (2) SACR 341(T) 343*h*; 345*a*) but see *M v N* 1981 (1) SA 136 (Tk).)

In this case the only evidence concerning this aspect was evidence which the prosecution presented in aggravation of sentence, namely the evidence of Ms Garuses, who was studying towards a B Degree in Social Work at the University of Namibia. As part of her fourth and final year she was performing an internship as a social worker at the Woman and Child Protection Unit where the focus of her work concerned domestic violence. She had been engaged in this work since January 2003 and conducted an interview with the complainant in July 2003. According to her the complainant had not been coping well with the trauma of the rape incidents and was referred to the witness for counseling. Ms Garuses explained that the counseling entailed helping the client to re-experience the traumatic event

and to assess the manner in which she has coped with the trauma since the event. An assessment is made of the strengths and weaknesses of the client; of her current fears and of her coping mechanisms. According to her the complainant had not talked to anyone about the events, but merely repressed them in her mind. She described the complainant as very traumatized as she was living with the fear of possibly having contracted a sexually transmitted disease. It seems from her evidence that the complainant had been in fear to submit herself for the necessary tests and yet wanted certainty. She also discussed her experience testifying in court against the accused and told, it would seem, Ms Garuses that the sight of the perpetrator caused her to shake and lose control. The complainant described that she had nightmares about the rape incidents whenever she was informed about the next court hearing. The evidence further is that they explored all the pros and cons of having the HIV test and how to deal with fears regarding the uncertainty and the possible results of the test. No further counseling or therapy was planned or scheduled as the complainant first had to absorb the information given to her and make her decision on being tested.

I have several difficulties with the evidence of Ms Garuses. The evidence as to what the complainant told her is hearsay and

inadmissible. Unfortunately the complainant was not led on any of these aspects nor did she describe any of her symptoms. She was not asked to confirm the information she allegedly conveyed to Ms Garuses. Ms Garuses is not an expert witness on whose opinion the court can rely as to the effect of the trauma suffered by the complainant. She also did not know the complainant before the rapes to be able to describe how she has changed, as a family member might have done. The evidence is not detailed enough for the court to make reliable conclusions. The indications were in any event that no further counseling was needed. There is no indication why the complainant did not undergo counseling or testing earlier.

Ms *Herunga,* who appeared for the respondent, submitted that there is a clear indication that the complainant was still suffering psychologically two years after the rape. For this she relied not only on the evidence of Ms Garuses, but also on a statement by the prosecutor during his address on sentence in which he said:

> "It is indeed so that even if you are not experts we had observed ourselves the demeanour of the victim in this case Your Worship and that she had collapsed after giving evidence in court here in front of the Court where she had difficulties in dealing with that face to face confrontation with this accused person for the second time or for the first time after the rape has taken place."

There is no indication in the record of the case that the complainant had indeed collapsed. Even if it is accepted that she did, the reasons for the collapse was not led in evidence. It is one thing to observe the demeanour of a witness, it is another to ascribe causes to the demeanour and then to draw conclusions as if these were evidence. Surely the complainant should have been asked under oath to explain herself what her problem was?

The conclusion I have, regrettably, reached is that the admissible evidence is not sufficient to establish beyond a reasonable doubt that the complainant indeed suffered grievous mental harm.

Ms *Herunga* submitted that the complainant suffered grievous bodily harm. She referred to the complainant's description of the attack on her, especially the fact that the appellant grabbed her on the throat rendering her unconscious. There was also the fact that there was a laceration on the perineum, which is indicative of forceful entry while the complainant as in a lying position. I have no doubt that the attack must have been a terrifying experience. I have no doubt that the violence was brutal. However, I am not convinced that the injuries suffered as a result were grievous. The doctor did not give any details about the gravity of the injuries, how long they would take to heal, what

treatment was given, if any, or how long or deep the laceration was. There simply is not sufficient evidence on which to conclude beyond a reasonable doubt that the complainant suffered grievous bodily harm.

The result of the above findings is that the magistrate was not bound to impose the sentence of fifteen years in terms of section 3(1)(iii)(aa) of the Act.

Mr *Pickering* further submitted that in the circumstances of this case the provisions of section 3(1)(a)(ii) are applicable and that the minimum sentence of ten years is the competent sentence. Alternatively, he submitted, the magistrate should have applied the provisions of section 3(3) of the Act which states that the minimum sentences prescribed by the Act are not applicable in respect of a convicted person who was under the age of eighteen years at the time of the commission of the rape and that the court may in such circumstances impose any appropriate sentence. Counsel referred to an allegation made by the appellant in his notice of appeal that he was 16 years old at the time of the commission of the crime. This of course is no evidence. Counsel also referred to a note made by the magistrate at a pre-trial appearance on 7 March 2003 that the

appellant is 19 years old and submitted that this confirms that the appellant was under the age of eighteen when the offences were committed. It is not known why the magistrate made the note that the appellant was 19 years old nor who supplied the information. The offences were committed on 3 November 2001. If the age of 19 years was the correct age, it is possible that the appellant was under the age of eighteen at the time the offences were committed. However, the charge sheet itself indicates the appellant's age at that stage as 18 years. According to the charge sheet the appellant was arrested on the same day as the date of the offence. This was also complainant's evidence. Probably for this reason he was not treated as a juvenile during any of the court proceedings. When he placed mitigating factors on record he did not state his age, neither was he asked how old he was or what his date of birth was. In my view the magistrate erred in not doing so. Where a person's age is important because it could provide a jurisdictional fact for the implementation of a statutory provision relating to sentence, care should be taken to establish with as much certainty as possible the relevant age. In this case the court would have had an unfettered discretion to pass sentence if the appellant was under eighteen at the time of the commission of the offence. The court has a duty towards the accused, especially in the case of an undefended accused to

make certain that the accused is not entitled to the benefit of relying on his age. On the other hand, making certain of the age will also enable the court to fulfill its duty towards the community and the victim by ensuring that an accused who is not entitled to the benefit does not receive a lighter sentence. It is not clear on the record what the accused's age is. As it is crucial in the circumstances of this case, I am of the view that the matter should be referred back to the trial court to receive proper evidence on this aspect and to sentence the accused afresh.

In the result I make the following order:

1. The application for condonation for the late filing of the notice of appeal is granted.

2. The appeal against sentence succeeds and the sentence of fifteen years imprisonment is set aside.

3. The matter is remitted to the trial court to receive evidence on the age of the appellant and to sentence the appellant afresh.

4. The appellant shall remain in custody until sentence is passed by the trial court.

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VAN NIEKERK, J

I agree,

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DAMASEB, JP

APPEARANCE FOR PARTIES:

For the Appellant:	Adv. Pickering *Amicus Curiae*
For the Respondent:	Ms R Herunga Office of the Prosecutor-General