CASE NO. CA 155/07

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ELVIS KHEIB **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **NDAUENDAPO, J *et* SWANEPOEL, J**

Heard on: 06 March 2009

Delivered on: 4 October 2010

APPEAL JUDGMENT:

NDAUENDAPO, J: [1] On 30 November 2006 the appellant was convicted in the Regional court, Swakopmund on a charge of contravening section 2(1)(a) of

the combating of Rape Act, 2000 (Act 8 of 2000). He was sentenced to ten (10) years imprisonment. In the *court a quo* he was represented by Mr. Karstens.

[2] He now appeals against conviction only. In this court he was represented by Mr. Kauta and the respondent by Mr. Truter.

[3] Mr. Kauta filed an amended notice of appeal and the grounds are stated as follows:

"**AD THE MERITS:**

1. That the learned magistrate erred in finding that the state had proved beyond a reasonable doubt:
    1.1. that the appellant is clearly guilty of the crime of rape.
    1.2. that the appellant has indeed inserted his penis under circumstances where he overpowered the complainant by pinning her down.
    1.3. by admitting the evidence of the complainant in contravention of section 194 of the Criminal Procedure Act 51 of 1977 as amended.
    1.4. by not declaring that the complainant is an incompetent witness because of her mental state.
    1.5. by not making a ruling on the admissibility of the complainant's evidence in terms of section 174 after it came to his knowledge that the complainant is insane.

1.6. by relying on the plea explanation given by the appellant's defense counsel as a basis to convict the appellant and reject his version that there was a communication problem and/or error by the interpreters".

[4] In the *court a quo* the appellant pleaded not guilty. In his plea explanation, Mr. Karstens on behalf of the appellant, informed the court as follows: "your worship, the plea of not guilty is in accordance with my instructions from the accused person. Your worship, my instructions are that since, around about 2002 the accused person on (sic) regular occasions had sexual intercourse with the complainant in this matter. My instructions are further that on the 24th of April 2004 the accused person and the complainant in this matter attended a party together and after the party they arrived at the room locked with a padlock and a chain and thereafter they entered the premises. They started kissing and they had, or the accused person had sexual intercourse with the complainant. My instructions are further that during or since 2002 the accused person had sexual intercourse with the complainant with her consent". Those instructions were confirmed by the appellant in court.

[5] **The State's case:**

The state called the following witnesses: Immaculata Guriras, Menesia Guriras and Josef Kaoseb.

Immaculata Guriras:

She testified that on 24 April 2004 she was sleeping on a bed at her mother's house. The appellant broke the wooden door and entered the house. She further testified that the appellant blocked her mouth with his hand to prevent her from screaming and in the process she sustained an open wound on her upper lip. He then inserted his penis in her vagina without her consent. After he raped her, he called the name "Bollie", but she said to him: "you are lying, I know you". She then lit the candle and recognized the appellant and she told him that she is going to report him. The appellant then told her not to report the case because he was going to give her N$5-00 dollars. The next morning she reported the matter to her mother. She then went to the clinic where she was examined by a nurse and from there she proceeded to the police station and laid a complaint of rape against the appellant. She also testified that she never had a relationship with the appellant and that she had a boyfriend by the name of …… During cross-examination it was put to her that she regularly had sex with the appellant including the evening of 24 April 2004. She vehemently denied that.

Menesia Guriras:

She is the mother of the complainant. She testified that the complainant was 25 years old. On 24 April 2004 around 19h00 she left the house and walked a friend out to her house. On the way she met the complainant returning home. She was alone. She told the complainant that she had slaughtered a chicken and that she should go home and cook some porridge. After an hour she returned home. She found the complainant breathing heavily. When she inquired what was wrong, she replied that she was raped by the appellant. She also observed scratch

marks on her throat and an open wound on her upper lip. She testified that she observed the wooden plank of the door was broken. In the morning she and the complainant went to the police to lay a charge of rape. During cross-examination it was put to her that since 2002 the appellant and the complainant had sexual intercourse on several occasions, she denied and told the court that the appellant and complainant never had a relationship.

Josef Kaoseb:

He testified that the appellant is his aunt's son. During April 2004 he came from the farm, Swartklip, to Okombahe to attend a traditional feast. After the feast he went to his aunt's place. The aunt informed him that the appellant had done something and that he was missing from the house. She was worried that the appellant will commit suicide and she asked him to go and look for him. He returned back to farm Swartklip and searched for the appellant, but to no avail. After 3 days he returned to Okombahe and to his surprise he found the appellant at his aunt's place. He advised the appellant to hand himself to the police. He saw a police vehicle passing by and he stopped the vehicle. He told the police that the appellant was at home. They went and picked him up and took him to the police station. That was the case for the state. By agreement between the state and the appellant, the medical report (J88) exhibit "A" and the psychological report (exhibit "B") in respect of the complainant was handed in. Exhibit "A" (the relevant part) stated that there was a bruise to the upper lip. Exhibit "B" – (the relevant part) stated that she is able to tell right from wrong and she suffered from moderate mental retardation.

Appellant's case:

Mr. Kheib testified that on 24 April 2004 he attended a traditional feast at Okombahe. He met the complainant there and prior to the meeting at the feast, he had a sexual relationship with the complainant. At the traditional feast the complainant told him that he should inform her when he was going home so that she could go with him. As he was going home the complainant followed him and they went up to the complainant's mother's house. At the house he slept with the complainant, but never had sex with her. He denied having put her hand on her mouth and nose. When asked by Mr. Karsten why he instructed him – in his plea explanation – to tell the court that he had sexual intercourse with her consent, he replied by saying that it was a misunderstanding and that he only slept with her without having sex.

That was the case for the appellant.

[6] Mr. Kauta submitted that the learned magistrate relied heavily on the fact that the appellant's plea explanation contradicted his evidence. This is despite the fact that the appellant testified that the meaning of his plea explanation was lost in the interpretation. This submission by Mr. Kauta is without any merits. The plea explanation was interpreted in damara/nama (the language of the appellant) and when asked by the court he confirmed it. In addition, during cross-examination of the complainant and the mother of the complainant, it was

also put to them that the appellant had a consensual sexual intercourse with the complainant. No where in the record does it show that the appellant corrected his counsel to put to the witnesses that he never had sex with the complainant on that date. Moreover if the version of the appellant – that he had sex with the complainant since 2002 – is to be accepted, why did the complainant suddenly changed and accused the appellant of rape? During cross-examination the appellant confirmed that he never had a quarrel with the complainant. No motive was shown by the appellant why the complainant falsely accused him of rape. The evidence of the complainant that the wooden door was broken, that she sustained a cut on the upper lip was also corroborated by her mother as well as the medical report. The mother also confirmed that when she saw the complainant returning home, she was alone. Mr. Josef Kaoseb (a relative of the appellant) testified that he was told by the mother of the appellant that he went missing from her house and that she enlisted his assistance to find him and to persuade him to hand himself to the police because he was wanted by the police. Mr. Kaoseb had no reason to lie to court, yet the appellant denied having been missing and having been told that the police were looking for him.

[7] Mr. Kauta further submitted that the *court a quo* should not have relied on the evidence of the complainant because she was an incompetent witness. He further submitted that the "*court a quo* should have disregarded the evidence of the complainant because of her insanity. Insanity in this instance has been proven beyond a reasonable doubt. The state handed up exhibit "A" (it should be

exhibit “B” as “A” was the J88) and the *court a quo* was precluded to hear any evidence of the complainant after admission of exhibit “B” section 194”.

[8] Section 194 of the Criminal Procedure Act 51/1977 provides as follows:

> *“194 Incompetency due to state of mind: No person appearing or proved to be afflicted with mental illness or to be laboring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason shall be competent to give evidence while so afflicted or disabled”.*

[9] The learned authors: Schmikkard and van der Merwe (Principles of Evidence 2nd Ed at 394 (when referring to section 194) said the following:

“It is also clear that the section is directed at a certain degree of mental illness or imbecility of mind, which deprives the witness of the ability to communicate properly in regard to the subject-matter in question. Therefore, a person who is affected to some extent but still endowed with the proper use of his reason, which enables him to convey his observations in an understandable way to court, will be a competent witness”.

[10] ***Zeffert, Paizes & Skeen (SA Law of Evidence)*** at 670 observe:

> *“Insanity should mean insanity which renders the evidence totally worthless”.*

[11] From the record, the evidence of the complainant was clear, coherent and understandable. It was clearly not worthless.

[12] In conclusion, I do not find that the magistrate misdirected himself on the facts or the law to warrant an interference.

[13] In the result, the appeal is dismissed.

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NDAUENDAPO, J

I concur

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SWANEPOEL, J

ON BEHALF OF THE APPELLANT	**MR. KAUTA *(Amicus Curiae)***
ON BEHALF OF THE RESPONDENT	**MR. TRUTER**
INSTRUCTED BY	**Prosecutor-General**