CASE NO.: CA103/2009

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

SAKEUS KORNELIUS **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **LIEBENBERG J & TOMMASI J**

Heard on: 08/12/2010
Delivered on: 08/04/2011

APPEAL JUDGEMENT

TOMMASI J: [1] The appellant a 24 year old male, was convicted in the regional court of rape in contravention of section 2(1) (a) read with sections 1, 2(2), 2(3), 3,4,5,6 and 7 of the Combating of Rape Act, 2000 (Act 8 of 2000) and sentenced to 10 years imprisonment. The appellant now appeals against the conviction and sentence.

[2] The respondent, represented by Mr Shileka, raised the following points *in limine:* the notice of appeal does not comply with rule 67 of the Magistrate's Court Rules, in that it does not contain grounds of appeal as envisaged in rule 67 (1); and the subsequent amendment thereto is equally of no force and effect. He further submitted that, if the Court finds that such grounds exist, condonation should not be granted as the appellant failed to provide a reasonable explanation; and there are in any event no prospects of success. He further submitted that the magistrate was left with very little time to respond to the amended notice of appeal and given the short period opted not to add any additional reasons.

[3] Mrs Kishi, acting on behalf of the appellant *amicus curiae*, filed an application for condonation for the late noting of the appeal and the late filing of the amended notice of appeal. She submitted that there are prospects of success. Ms Kishi went to great lengths in an attempt to rectify the procedural errors made by the appellant. The Court is indebted to counsel for her efforts made.

[4] It was common cause that the appeal was noted outside the prescribed time limits. The appellant was convicted and sentenced on 14 March 2008 and his notice of appeal is dated 6 September 2008. The appeal was thus noted more than 5 months outside the prescribed period. There is no indication on the record when exactly the notice of appeal was received by the clerk of court. The statement of the magistrate does not reflect the date on which it was drafted and there is no indication whether the clerk of court complied with rule 67(4), which provides that the clerk of court should, upon receipt of the judicial officer's statement, forthwith inform the appellant that the statement has been furnished. This makes it virtually impossible for this Court

to determine whether or not the appellant complied with rule 67 (5). The period within which the appellant may amend the notice of appeal is calculated seven (7) days from the date the appellant has been so informed.

[5] A "N*otice of Condonation*" accompanied the notice of appeal. This notice does not contain an explanation of the appellant under oath. A further letter was written by the appellant on 19 August 2010 explaining the reasons for the delay. This explanation was also not given under oath. The only explanation given by the appellant under oath is attached to the application for condonation prepared with the assistance of Ms Kishi. The appellant admitted that his right to appeal was explained to him by the court *a quo* but averred that he did not know how to note an appeal. An additional reason was that the clerk of court delayed in furnishing him with the record. These are common reasons advanced for non compliance with the rules by appellants who personally prosecute their appeals.

[6] A large number of accused appearing in the district court are not legally represented. The protection of the unrepresented accused's right to a fair trial demand that he/she be informed of his/her right to appeal. It has however become apparent that most unrepresented appellants lack the knowledge to do so in accordance with the rules, despite them having been informed of their right to appeal. It has now become imperative that the issue of assistance to the unrepresented accused after sentence and conviction, should be addressed. The administration of justice requires this. The Court is constantly burdened with appeals that are not in accordance with the rules. If it is allowed to continue, the administration of justice will "*degenerate into disorder*"(*S v KAKOLOLO* [1]

[1] *2004 NR 7 (HC)*

[7] The noting of an appeal from the Magistrate's Court is governed by rule 67 of the Magistrate's Court Rules and section 309 of the Criminal Procedure Act, 51 of 1977. It outlines the procedures, step by step to be followed by all the parties in clear terms. It even affords some assistance to an accused who has physical disabilities or who is illiterate. If all the parties involved play their part, there should be no reason why appeals cannot be dealt with expeditiously. Regretfully, this is not the case.

[8] The court *a quo,* after conviction and sentence advised the appellant that he may note an appeal with the clerk of the court within 14 days from the date he has been so convicted and sentenced. Rule 67 (1) requires that the appeal should be noted in writing and that the appellant should:

> *"set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based"* (my emphasis)

[9] Many unrepresented accused have little or no formal education. It would be difficult for those individuals to understand the import of Rule 67 (1). This rule presupposes that the person noting the appeal would be able to discern when an error in law was made. Many qualified legal practitioners have difficulty drafting a notice of appeal with the particularity that is required. In *S v KAKOLOLO(supra)* and S v *WELLINGTON* [2]legal practitioners were responsible for failing to draft proper grounds of appeal. Given the rate of appeals by unrepresented accused, it is evident that it is simply not enough to inform the accused of his right to appeal but that the procedure

[2] *1990 NR 20 (HC*)

should also be explained. This would to some extent level the playing fields between represented and unrepresented accused.

[10] What follows is meant to be helpful guidelines to the judicial officers when explaining the right to appeal to an unrepresented accused. The accused should be informed of his right to appeal to this Court; and that he may do so on his own or assisted by a legal practitioner, be it one of his own choice or appointed by the Directorate of Legal Aid; In respect of the procedure the accused should be advised that he/she:

- should note the appeal in writing; (Rule 67 (1));
- may approach the clerk of court for assistance to write out the notice of appeal if unable to do so due to a physical disability or illiteracy (Rule 67(2));
- could obtain a copy of the record from the clerk of the court and if not able to afford payment for same then the magistrate may be approached with a request that it be provided free of charge or at a reduced fee (Rule 66(9));
- should set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based (Rule 67(1));
- should stipulate in the notice of appeal whether the appeal is against the conviction or sentence or both the conviction and sentence;
- should affix a date to the notice of appeal;
- should lodge the notice of appeal with the clerk of court within 14 days from date of conviction and sentence (Court days i.e Saturday, Sunday and public holidays excluded; and calculated by excluding the first day and including the last day); (Rule 67 (1) & Rule 2(2));

- if for some reason he/she is unable to note the appeal within the prescribed time limits, he/she should apply, in writing, to this Court for extending the period by, explaining under oath, the reasons for the failing to comply with the stipulated period; (Section 309 (2) of the Criminal Procedure Act, 1977 (Act 51 of 1977); and to state reasons why there are prospects of success on appeal;
- should, without delay, file the application for extending the time limit with the clerk of court.
- may amend the notice of appeal and file such amended notice with the clerk of the court within seven (7) days after being informed by the clerk of court that the magistrate had furnished his statement envisaged in rule 67 (3)

[11] Once it is apparent from the record that the accused has been informed, not only of his right to appeal, but also how to note the appeal; and that this information has been received by the accused (*this can be achieved by including confirmation that a copy of a document setting out the procedure to be followed, has been handed to the accused*), a stricter approach, which is required for the efficient administration of justice, will be taken by this Court. If it is expected of an appellant to adhere to the rules of court then the Court must be satisfied that he/she knows and understands what the provisions of those rules are.

[12] Given the fact that this appellant was informed of his right to appeal but did not know how to note the appeal, the Court should determine whether non compliance of the rules should be condoned based on whether or not there are reasonable prospects of success.

[13] The facts are briefly as follow: A school teacher noted that the complainant, a learner in her class, was menstruating heavily. She sent the complainant home to go tell her parents. The teacher resorted to a written note to the mother of the complainant when the complainant came to school the next day without washing her soiled dress. The teacher discussed this issue with the mother when she visited the school. The mother considered the complainant too young to start menstruation and mentioned the possibility that her daughter may have had sexual intercourse with the domestic worker in whose care she left the children. The mother indicated that she would talk to the complainant.

[14] The teacher, after the discussion she had with the mother, called the complainant to the staff room and encouraged her to talk. Initially the complainant was reluctant to speak and just started crying. The teacher asked her if it was somebody at the house and she replied that "*it is Madala*"(the alias of the accused). She asked her where it happened and she said that it took place at home. When the teacher wanted to know where her mother was at the relevant time, she informed the teacher that her mother was in hospital.

[15] The mother was summoned to school again and the complainant in her presence, confirmed that she was raped by "*Madala"*. The principal then instructed the mother of the complainant to take her daughter to the hospital. The complainant was taken to hospital and examined by a medical doctor who compiled a medical report.

[16] The complainant testified that she was in the cooking room (kitchen) with her younger brother Leonard and her cousin. Her father went to the field with the accused. After some time

the accused returned to the homestead. He lifted her from the kitchen and took her to his room. The complainant testified that her brother and cousin were present in the room when he took off her panties and had inserted his penis into her vagina. He told the other children to take the calves to the camp. After the appellant had sexual intercourse with her, she returned to the kitchen. The appellant threatened all the children to beat them if they should tell anyone about it. She did not tell anyone out of fear that she would be beaten by appellant until she was confronted by the teacher at school. When cross-examined she testified that this happened on 6 June 2006 at 07H00 am. Complainant's mother confirmed that she was in hospital since June 2006 and was away from home for a period of 3 months. On her return she found a note from the school requesting her to come to school which she did. She confirmed the teacher's account of the first and second visit to the school.

[17] Leonard, a ten (10) year old brother of the complainant testified that he was present when the appellant took the complainant from the kitchen to his room. He testified further that he was in the room and he observed that the appellant took off the panty of the complainant. According to him they covered themselves with a blanket. He testified that complainant was complaining and the appellant ordered them to leave the room to attend to the calves. They met the appellant when they returned from the field and he threatened to beat them if they would tell anyone about the incident. This witness was 8 years old when he witnessed the incident.

[18] The appellant pleaded not guilty and although the record is not very clear, it appears that he, in his plea explanation, indicated that the mother of the complainant had a personal grudge against him and that he has been falsely accused of raping the complainant. He denied that he

had sexual intercourse with the complainant and during cross examination put it to the complainant that he was not in the village during the time the offence was committed. He called one witness to confirm that he was not in the village at the time. This witness could not recall the dates when the appellant left the village.

[19] The appellant objected to the handing in of the medical report in the court *a quo* and raised it as a ground of appeal in his "*Notice of Appeal"*. The court *a quo* ruled that it was admissible. In terms of s212 (7A)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977) as amended [3] the medical record prepared by a medical practitioner who treated a victim of an offence with which the accused is charged, is admissible at that proceeding and *prima facie* proof that the victim concerned suffered the injuries recorded in that document. The court *a quo* therefore correctly admitted the medical report into evidence. The appellant objected to the handing in of the report of the doctor but the court ruled it to be admissible. The medical report reflects that the complainant's hymen was "*broken*" and that there was evidence of an old penetration in the vagina. Save to mention that the mother testified that she discovered the complainant was sexually molested when examined; the court *a quo* did not refer to the contents of the report. It cannot therefore be said that this fact played a significant role when the court *a quo* weighed the evidence. The court *a quo* was in any event entitled to accept as *prima facie* proof that the complainant suffered the injuries mentioned therein. The findings of the doctor as contained in this report is consistent with the allegation made by the complainant that sexual intercourse took place. There is therefore no merit in this ground of appeal.

[3]Criminal Procedure Amendment Act 24 of 2003

[20] A further ground of appeal mentioned in the amended notice of appeal was that the Court *a quo* failed to apply the cautionary rule to the evidence of the complainant who was a single witness and a child witness, susceptible to suggestions from adults. Factually, the submission that the complainant was a single witness is not entirely correct. Leonard was present when the complainant was taken from the kitchen; and witnessed how the appellant removed the complainant's panty in his room. It is only the sexual act itself he did not observe as he testified that they covered themselves with a blanket.

[21] The second submission that caution should be applied when considering the evidence of a child, is also not correct. Section 164 of Act No. 51 of 1977 as amended[4], provides as follow:

> *"A court shall not regard the evidence of a child as inherently unreliable and shall therefore not treat such evidence with special caution only because that witness is a child."*

[22] Ironically, the mother suggested to the teacher that perhaps the child was having a heavy menstruation because she had sexual intercourse with the domestic worker who she had left at home when she was hospitalised. The teacher did not even think of this possibility until it was suggested by the mother of the complainant. Nowhere on the record does it indicate that anybody suggested it to the complainant that she was raped by the appellant. The teacher, on the strength of what she was told by the mother, confronted the complainant by asking probing questions. The complainant of her own accord mentioned that it was the appellant. The teacher did not know the appellant and could not have suggested this to the complainant. Although the mother indicated that she would talk to the complainant, the record reflects that the complainant's mother only learnt that the complainant was raped when she was summoned to the

[4](*Supra)*

school the second time. The mother of complainant testified that she was not the one implicating the appellant and that she bore him no ill will. There is therefore no evidence on record that any suggestion was made to the complainant. This ground of appeal, equally, is without merit.

[23] The remaining grounds of appeal as contained in the Amended Notice of Appeal are that: the court *a quo* disregarded the discrepancies in the evidence of Leonard Hatutale Gabriel and the complainant; the court *a quo* totally ignored the defence of the appellant and did not assist him to establish his alibi. The criticism levelled against the evaluation of the evidence by the court *a quo* is to some extend justified and it is perhaps prudent to repeat what has been said in this regard before in S v ENGELBRECHT 2001 NR 224 (HC) at p 226 E-G

> *"On a situation like the one this case presents Leon J's remarks in S v Singh 1975 (1) SA 227 (N) at 228F-H are apposite.*
>
> > *'Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the abovementioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses'."*

[24] The court *a quo* in his judgment concludes: "*It must be borne in mind that these are young children that cannot make up such serious stories of intercourse.*" From the judgment it is apparent that the court *a quo* to some degree relied on this conclusion to determine that the two child witnesses were reliable.

[25] The premise on which this conclusion is based is the inverse of the provision contained in section 164 of the Criminal Procedure Act i.e that the evidence is reliable because it is a child. The credibility of young witnesses should be determined in the same manner as all other witnesses and it would therefore not be correct to conclude that the evidence is reliable merely because it was given by young children.

[26] Given this misdirection by the court in evaluating the evidence and the valid criticism that the court did not consider the discrepancies in the evidence of the complainant and Leonard; this Court should evaluate the evidence of the two child witnesses to ascertain whether they were in fact credible witnesses. There were some discrepancies between the evidence of the complainant and that of Leonard. One would be that the complainant failed to mention that the blanket was pulled over them. Another would be the place where the appellant threatened them. These discrepancies are minor discrepancies that does not detract from the material allegations i.e that the appellant took the complainant from the kitchen into the room, he had taken off her panty; that he sent the other children out of the room to attend to the calves and that he threatened to beat them. These minor discrepancies are hardly surprising given the lengthy period that passed between the date that the incident took place i.e 6 June 2006 and the date the trial commenced on 26 February 2008. Having considered the evidence of these two witnesses the Court arrives at the same conclusion as that of the court *a quo* i.e that Leonard's testimony substantially corroborates the complainant's version of the events that took place.

[27] The appellant's defence was essentially that the complainant's mother influenced the complainant to implicate him because he refused to do household chores and that he was not present in the village at the time. The court *a quo* rejected the appellant's submission that the allegations were fabricated for the reason advanced by the appellant. This Court found that there was no evidence to support the contention that the complainant was influenced by anyone to implicate the appellant. The mother of the complainant further denied that she had a personal grudge against the appellant in the following words:

> "*How could I hate Madala that way, because when he was brought from Ndabe from Okalidi to our village, he was just broke, and was sleeping from (sic) my house.*."

In my view the court *a quo* correctly rejected the appellant's submission that the complainant implicated him because her mother had a dispute with the him.

[28] The court *a quo* afforded the appellant the opportunity to call a witness to confirm that he was not present during the month the complainant alleges he had sexual intercourse with her. The appellant wanted to know if this witness could recall the month that he had taken a boy by the name of Matheus to a cattle post. This witness was however not able to recall the month this took place. The court *a quo* correctly concluded that this witness' evidence did not assist the appellant. The mother confirmed during cross-examination that she left the appellant at the village when she went to the hospital during June 2006. The appellant confronted the complainant with the fact that he was not around in the village at the time of the rape. The complainant responded as follow: *"When he was having sex with me, Leonard was around. He was around also."* The complainant provided the appellant under cross-examination with the date and time it took place. The appellant, although he raised the fact that he was not present

when cross-examining the complainant, does not give the details of his whereabouts when he testified.

[29] In *S V VAN DER MEYDEN 1999 (2) SA 79 (W) (1999 (1) SACR 447) Nugent J* at p 449 H-E remarked as follow:

> *"A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence.. "*

[30] The appellant was well known to the complainant and Leonard. This reduces the risk of them being mistaken about the appellant's identity. The independent report made to the school teacher by the complainant in respect of the identity of the person who had sexual intercourse with her further strengthens the evidence of the complainant. The medical evidence is further consistent with the complainant's averment that sexual intercourse took place. The material aspects of the complainant's evidence are corroborated by an eyewitness. The appellant on the other hand relied heavily on the fact that the mother and daughter implicated him falsely. The proven facts do not support such a finding. Furthermore, although no onus rests on the appellant to prove his alibi, there is no cogent evidence upon which the Court can consider whether it is reasonably possibly true that he appellant was not present at the time. The State provided clear evidence that the appellant was present at the time. The appellant opted not to elaborate on this defence and to place the facts thereof before the court *a quo.*

[31] The Court finds that the State had proven, by way of direct credible evidence, that it was the appellant who had sexual intercourse with the complainant against her will and that he used

threats to stop the complainant and Leonard from reporting it to their parents. In the final analysis, this Court when evaluated the body of evidence including the version of the accused, cannot come to a different conclusion than that of the court *a quo.* There are no meritorious grounds found upon which this Court can conclude that the appellant has reasonable prospects to succeed in his appeal against conviction.

[32] No ground was raised and no argument presented by counsel for the appellant in respect of the sentence. The court *a quo,* found that there are no substantial and compelling circumstances present and imposed the minimum sentence. This Court, having regard to the evidence presented in mitigation and the reasons for sentence by the court *a quo,* in any event is of the opinion that there are no reasonable prospects of success in the appeal against the sentence.

[33] In the result:

1. the application for condonation is refused and the matter is accordingly struck from the roll
2. this judgment must be brought to the attention of the Chairperson of the Magistrate's Commission

TOMMASI J

I concur

LIEBENBERG J