REPUBLIC OF NAMIBIA

CASE NO. CA 37/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

VINCENT SIMATAA **APPLICANT**

and

THE STATE

RESPONDENT

CORAM: **SWANEPOEL, J** *et* **SHIVUTE, J**

Heard on: 2011 February 14

Delivered on: 2011 June 13

RULING ON APPLICATION FOR LEAVE TO APPEAL

SHIVUTE, J: [1] The Applicant was convicted in the Regional Court sitting at Swakopmund on a charge of rape in contravention of the

Combating of Rape Act, 2000 (Act 8 of 2000). The Regional Court found that the Applicant had raped the complainant, a female whose age was estimated to be about 15 years. The complainant was an orphan who was staying with Applicant. At the conclusion of the trial the Applicant was sentenced to fifteen years' imprisonment. He subsequently appealed against the above conviction and sentence. The appeal was heard on 04 October 2010 and it was dismissed on the same day on the ground that the trial Court did not misdirect itself as the reading of the record shows that there is overwhelming evidence to convict the Applicant. Further reasons for the dismissal of the appeal were given in the *ex tempore* judgment. This application is a sequel to such dismissal.

[2] During the hearing of the appeal, the Applicant was represented by Mr Grobler on the instructions of Legal Aid. He is now appearing in person. The Respondent is represented by Ms Nyoni, the same counsel who appeared during the appeal proceedings.

[3] Counsel for the State raised a point in *limine* that the application for leave to appeal was out of time and the applicant had failed to apply for condonation for leave to appeal.

[4] The Applicant wrote a document titled "Applicant's notice of application for leave to appeal". This document bears a stamp of the Ministry of Safety and Security dated 14 October 2010. As mentioned before, the Applicant's appeal was heard on 04 October 2010. However, it appears from the document that it was received by the Office of the

Registrar only on 25 October 2010. Counsel for the Respondent rightly pointed out that the 14 days within which the applicant was supposed to file his notice of the application for leave to appeal expired on 18 October 2010.

[5] It is evident from the applicant's notice of application for leave to appeal that it was written within the prescribed 14 days period, because as was pointed out already, it appears to have been handed over to the officials of the Ministry of Safety and Security at the very least on 14 October 2010. The officials lodged it with the Office of the Registrar only on 25 October 2010. It appears that the delay to file the notice of the application for leave to appeal on time was caused by the officials in whose custody the applicant was. We have considered that the accused being a prisoner, he could not have done more than what he did to ensure that his application for leave to appeal was filed on time. On those grounds we formed the view that the delay could not be attributed to the Applicant and we decided to condone the late filing of the application for leave to appeal and proceeded with the hearing of the merits of the application.

[6] In order for the Applicant's application to succeed, he must satisfy the Court that he has reasonable prospects of success on appeal. See *S v Nowaseb* 2007 (2) NR 640.

[7] The Applicant in his notice of application for leave to appeal stated that this Court erred by confirming the conviction and sentence by the

court *a quo* as it did not consider the grounds which I will summarize as follows:

(a). That the Court *a quo* erred in finding that the State had proved its case beyond a reasonable doubt as it did not properly analyse or evaluate the evidence tendered by the State;

(b). That the Court *a quo* failed to have due and proper regard to the fact that the complainant was in most respects a single witness and that it failed to warn itself properly on evidence regarding a single witness, and

(c). That instead of rejecting the evidence of State witnesses, the Court *a quo* found their evidence to be credible and accepted it.

[8] In addition to the above grounds, the Applicant advanced arguments which include the contentions that he was not represented during his appeal as his counsel did nothing at all and only pretended to represent him; that he was not properly consulted by his counsel, and that counsel did not argue all his grounds of appeal. He gave an example that his counsel omitted to advance argument in connection with sentence. The Applicant further argued that this Court did not consider the alleged contradictory statements given by the State witnesses, especially the medical report which allegedly did not correspond with what the doctor explained in Court, namely that the medical report stated that the hymen was torn but that the doctor testified that she did not observe injuries.

[9] When the Applicant was asked by this Court to state where it erred to warrant him to be granted leave to appeal, he responded that he was not in a position to blame the findings of this Court. However, he argued further that he was not guilty and another Court might arrive at a different conclusion.

[10] I accept counsel for the Respondent's argument that the Applicant must satisfy this Court that he has a reasonable prospect of success on appeal. This is trite law as already stated. It is not enough for the Applicant to hope that another Court might come to a different conclusion. Counsel for the Respondent is also correct to say that the Applicant raised similar grounds to the ones he raised during the appeal before this Court. This Court had already considered the grounds of appeal raised by the Applicant and found that the Court *a quo* did not err in finding that the State had proved its case against the Applicant beyond a reasonable doubt. For the Applicant to be granted leave to appeal, he must show that this Court erred by upholding the conviction of the Magistrate in the Court *a quo*.

[11] Regarding the issue raised by the Applicant that he was not represented during his appeal, as correctly pointed out by counsel for the Respondent, the Applicant was represented by an experienced legal practitioner who filed written heads of argument and amplified them orally. Although it is true that Mr Grobler did not argue the appeal in respect of sentence, it was clear from the grounds of appeal prepared by

counsel who represented the accused in the Regional Court that there were no grounds of appeal in connection with sentence. The appeal against sentence not having been expressly abandoned, however, we had to consider it. Furthermore, it must be remembered that the Applicant was sentenced to a mandatory minimum sentence. In addition to what was submitted by counsel who argued the appeal on his behalf, Applicant was given the opportunity to address the Court and this Court had considered the relevant issues he raised for the purposes of his appeal. Having considered the proceedings conducted on the 14 February 2011, I am of the view that the Applicant's appeal was properly conducted.

[12] The Applicant also stated in the grounds of appeal raised in this application that the age of the complainant was not proved. Applicant went on to say that because the complainant testified about her own age, that was hearsay and the Regional Magistrate ought not to have accepted it. Counsel for the State argued, correctly, in this regard that the Magistrate did not simply accept the complainant's testimony concerning her age. He looked at the complainant, who as previously mentioned, is an orphan and consequently none of her parents could testify about her age. The trial magistrate estimated her age in terms of section 337 of the Criminal Procedure Act, 1977. This section allows the Court to estimate the age of any person. Furthermore the guilt of the accused did not depend on the age of the complainant. There were other coercive

circumstances present: The complainant testified that there was violence or physical force and that the Applicant was her guardian.

[13] Concerning applicant's argument that the Court did not make a proper consideration that the complainant was a single witness in most respects, the Court *a quo* found, correctly, that there was corroboration of the evidence of the complainant and that of the witness Agnes to whom the first report of rape was made and who examined the complainant and noticed that her underpants were wet. She also observed some injuries on the complainant's private parts. A reading of the record shows that the Court *a quo* properly analysed and scrutinized the evidence before it arrived at its finding.

[14] As far as the testimony of the doctor is concerned, the doctor who examined the complainant came to the conclusion that the findings were consistent with rape. Although the doctor said that the injuries she found on the complainant could not be longer than two days, the evidence presented in Court is that the offence was committed on 4 August 2002 and the complainant was examined on 8 August 2002. The doctor in her opinion thought that the injuries could not have been sustained 48 hours prior to examination. The rape occurred four days prior to the examination and there is no other evidence suggesting that it had occurred any other time besides the date presented in evidence.

[15] The evidence was further that complainant managed to scream whilst she was being raped by the Applicant. Complainant testified that

the Applicant jumped up after she screamed, went into the toilet and flushed it. The wife of the Applicant woke up. This piece of evidence was corroborated by both the Applicant and his wife. Although none of the two accepted that the complainant was raped, both testified that the Applicant went into the toilet and that he was wearing trunks at that stage. There is also evidence by the complainant that after the Applicant had gone back to his bedroom, he returned with a belt with which he wanted to beat up the complainant. The Applicant in his evidence accepted that after he went to the complainant's room initially dressed in trunks he went back to his bedroom, dressed in a track suit, took a belt and went to the complainant's room. He gave a different reason for having wanted to assault the complainant: He alleged that he wanted to assault the complainant because she came home late.

[16] I will now turn to the issue whether the Applicant had satisfied the Court that should leave be granted, he has reasonable prospects of success on appeal. We have considered the submissions made by the Applicant's counsel during his appeal. We have also considered the evidence adduced during trial as appearing on record as well as submissions in this application made by the Applicant in relation to those aspects of the evidence and grounds of appeal before this Court which in the submission of the Applicant, this Court erred by confirming the conviction and sentence by the Regional Magistrate and of course submissions made by counsel for the State. We are of the view that there

is overwhelming evidence implicating the accused in the commission of the offence.

[17] The court *a quo* had properly analysed and scrutinized the evidence before it. It further exercised its discretion properly by estimating the age of the complainant. It is evident from the judgment of the Regional Magistrate that he had assessed the evidence of the State witnesses which he found to have been corroborated in some material respects and weighed the evidence in its totality before he arrived at his conclusion. The Applicant also said he has no complaint against the decision of this Court to dismiss the appeal.

[18] It is for the above reasons that we are of the opinion that there are no reasonable prospects of success on conviction. As regards sentence no grounds were furnished before this Court why the sentence should be interfered with.

In the result:

The Application for leave to appeal is refused.

_____

SHIVUTE, J

I agree

SWANEPOEL,

Appearance for the parties:

For the State:	**Mrs Nyoni**
Instructed by:	**Office of the Prosecutor-General**
For the accused:	**In Person**