Unreportable

CASE NO.: CA 06/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WILLEM KAULUMA APPELLANT

and

THE STATE RESPONDENT

CORAM: PARKER J et NDAUENDAPO J

Heard on: 2011 July 17

Delivered on: 2011 August 16

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[1] The appellant (the accused in the court below) was charged with, and convicted of, contravening s. 2, read with ss. 1, 3, 4, 5, 6 and 7, of the Combating of Rape Act, 2000 (Act No. 8 of 2000) ('the Act'). The appellant was accordingly sentenced to five years' imprisonment on 27 August 2009.

[2] The appellant filed a notice of appeal against conviction and sentence. The appellant relies on 16 grounds of appeal. Grounds 1 to 11 concern conviction and Grounds 12 to 16 sentence. It is those grounds that the State was called upon to meet and it is, therefore, those grounds that this Court must consider. In *Mwatala and Others v The State* Case No. CA 124/2007 (Unreported) at para [5] the Court made the following quite clear about grounds of appeal.

> In this regard, the point must be made firmly that when the Court heard the appeal, it was not rehearing the matter; it was determining an appeal based on the record of proceedings in the trial court by, *a fortiori*, considering the grounds of appeal that the appellants had raised and placed before the Court and which the State had been called upon to meet. Consequently, as a general rule the appellants were confined to the grounds of appeal as set forth in their notice of appeal (see *S v Baloyi* 1991 (1) SACR 265 (B)).

Accordingly, the appellant is confined to the grounds of appeal as set forth in his notice of appeal.

[3] Grounds 1 to 10 are on the authority of *Gey van Pittius and Another* 1990 NR 35, not grounds of appeal: they are an admixture of the appellant's views and conclusions about the alleged rape; and so we will not waste time considering them.

[4] As I understand Ground 11, the appellant relies on the defence of alibi; and the appellant seems to say that the learned trial magistrate misdirected herself on the facts in not finding that the appellant could not have committed the offence he

was charged with on the basis that 'I did not see the complainant that day she said she was raped.' It appears to me that the ground is that the learned magistrate misdirected herself in not accepting the appellant's defence of alibi; and so it is to this ground that we now direct the enquiry.

[5] As to the defence of alibi; the onus rests on the State to prove that it was the accused who committed the offence, and not on the accused to prove his alibi; and that much Mr. Konga, counsel for the State, does not dispute. Accordingly, '[a]ll that is required of the accused is *to present evidence from which it appears reasonably possible that his alibi may be true* (*R v Biya* 1952 (4) SA 514 (A) 521C-F at 521C-F)' (Italicized for emphasis)

[6] The only question that arises, therefore, for determination in these proceedings regarding the conviction is this: Did the appellant present evidence from which it appears reasonably possible that his alibi may be true? It is significant to note that Mr. Elago, counsel *amicus curiae* did not make any submission on the only one ground of appeal on conviction that is really relevant in these appeal proceedings. Be that as it may, from the appellant's examination-in-chief-evidence and his cross-examination-evidence, the only reasonable conclusion we are able to make is that the appellant failed to place before the court below evidence – that is sufficient evidence – from which we are able to find that from the evidence it appears reasonable that the alibi may be true. In this regard, it is significant to signalize the fact that the appellant had, during the trial, the services of counsel who could have adduced such sufficient evidence. It follows that Ground 11 is rejected as being baseless. That being the case the appeal against conviction fails.

[7] We pass to consider Grounds 12-16, which, as I have said previously, concern sentence. The State did not appeal against the sentence; but the appellant did. The fact that the State did not appeal against the sentence does not *ipso facto* mean that the Court is prohibited from considering it, and in considering it, close its eyes to patent irregularity or misdirection committed by the trial court in the interpretation and application of the relevant provision of the Act.

[8] As to the appeal against sentence; the appellant appeared before the Court on 26 November 2010 and the hearing of the appeal was postponed to 4 March 2011 to enable the Court to inform the appellant – which the Court did on that date – that if the conviction was confirmed, he would be given the opportunity to address the Court as to why the custodial sentence of five years should not be increased to 10 years in accordance with s. 3 of the Act. Mr. Elago did not make any written submissions on the point under consideration; neither did he make any real oral submission on the point when he was invited to do so. It is Mr. Konga's submission that specified sentences such as in the present case must not be departed from lightly and for flimsy reasons, and he cites *S v Malgas* 2001 (2) SA 1222 (SCA) at 1235-6 as authority for so submitting. We accept Mr. Konga's submission on the point under consideration. Indeed, since the learned trial magistrate found that compelling and substantial circumstances were not present, in our view, she was obliged by law to impose, at least, the minimum sentence. We also do not find any substantial and compelling circumstances to exist, entitling us to impose a lesser sentence than the applicable sentence prescribed in s. 1 being, in these proceedings, 10 years.

[9] We repeat what we said in open court. The Court is always grateful to counsel who appear *amicus curiae* in such criminal appeals; and we say again that we are grateful to Mr. Elago.

[10] In the result, we make the following order:

(1) The appeal against conviction is dismissed.

(2) The sentence imposed by the learned magistrate of the Regional Court, held at Katutura, Windhoek, is set aside and the following sentence is put in its place:

10 years' imprisonment, backdated to 27 August 2009.

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PARKER J

I agree.

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NDAUENDAPO J

COUNSEL ON BEHALF OF THE APPELLANT: Mr P S T Elago

Amicus Curiae

COUNSEL ON BEHALF OF THE RESPONDENT: Adv B S Konga

Instructed by: The Prosecutor-General