IN THE HIGH COURT OF NAMIBIA

In the matter between:

MICHAEL DAVIDS APPELLANT

and

THE STATE RESPONDENT

CORAM: MULLER, J *et* **SWANEPOEL, J**

Heard on: 7 March 2011

Delivered on: 18 March 2011

APPEAL JUDGMENT

MULLER, J.: [1] The appellant was convicted in the Regional Court Otjiwarongo of an offence of contravening Section 2 (1)(a), read with several other relevant sections of the Combating of Rape Act No. 8 of 2000. He was discharged on two other alternative charges. After his conviction and when no previous convictions against him were proved, the appellant refused to provide any mitigating circumstances. After the magistrate attempted to enquire from him by way of questions pertaining to circumstances which might be considered as mitigating circumstances, the appellant even refused to divulge his age. The magistrate delivered judgment on sentence and sentenced him to 20 years imprisonment.

[2] When the appeal was heard on 7 March 2011 the appellant was legally represented by Adv Van Zyl and the State by Adv Nyoni. Both counsel provided heads of arguments, as well as supplementary heads of arguments. The court expressed its gratitude's to Adv Van Zyl who appeared as *amicus curiae* on behalf of the appellant in this court.

[3] Although the issue of condonation was taken as a point in limine by Ms Nyoni in her heads of argument, she indicated, after certain submissions were made by Adv Van Zyl in this regard, that she does not strenuously pursue this issue. It should be mentioned that when Adv Van Zyl

came into the picture, he filed a new a notice of appeal with certain additional grounds of appeal which were not clear from the appellant's original notice that was given just after his conviction and sentence. A formal application for condonation was also filed. The court decided to hear arguments on the merits and indicated that the same will be considered to establish whether there were indeed prospects of success, which is also a requirement for condonation for the late filing of a notice of appeal. The following deals with the merits of the appeal.

[4] Adv Van Zyl confirmed that the appellant's appeal against this conviction is based on the identification of him as the person who raped the complainant. He also confirmed that the question whether the complainant was sexually assaulted, or not, is not in issue. Both counsel consequently confined themselves to the evidence presented in the court *a quo* in respect of the identity of the appellant as the person who committed this offence.

[5] It is clear from the record of the proceedings in the Regional Court that the evidence regarding the identification of the appellant as the person who raped the complainant is mainly based on her identification of him on three different occasions, namely:

a) shortly after the incident occurred at the house of her aunty where she lived;

2. at the charge office of the police station at Otjiwarongo; and
3. in the Regional Court, Otjiwarongo.

[6] Adv Van Zyl also relied on the fact that the complainant was a young girl and a single witness in respect of the incident and that the court *a quo* needed to be cautious when considering the evidence of a single witness. Adv Van Zyl emphasized that the evidence of a single witness should only be accepted if it is credible and reliable in all material circumstances. In this regard he referred to several decisions of our and South African courts. (See: S *v Mtetwa* 1972(3) SA 766 (A) and S *v Nango* 2006 (1) NR 14 (HC)). Adv Van Zyl could not take the issue of the medical examinations of the complainant, as well as of the appellant any further and no submissions were made in that regard, save to point out the fact that the results of the forensic testing of samples and objects sent away for that purpose, were never returned before the trial and did not form part of the evidence presented at the trial.

[7] In respect of the identification of the appellant as the person who raped the complainant, Adv

Van Zyl relied on certain passages of the complainant's evidence as it appears in the record. In this regard Adv Van Zyl referred to extracts from the record for his contention that the complainant's identification of the accused is founded on the suggestion made initially by her sisters (nieces), at the time when the appellant arrived at a house of their aunt where the complainant resided. This was the first occasion that the appellant had allegedly been identified by the complainant as her rapist. In this regard he referred to what appears on page 20, line 29 to page 21, line 3 of the record: *"...the accused person then came there an asked for water. Then my sisters said that maybe I was raped by the man who came and asked for water. That is all."*

In respect of the second occasion when the complainant allegedly identified the appellant at the charge office, where he was sitting next to sergeant Areseb, Adv Van Zyl referred us to what the complainant had said just before she entered the police station, which appears on page 33, lines 1-2 of the record:

> *"Didyou know that he would be there? ... Yes I was told."*

[8] In relying on his contention of suggestibility and the fact that children are more susceptible to suggestion than adults, Adv Van Zyl submitted that the complainant only identified the appellant on these occasions because of the initial suggestion by *"her sisters"* that he may be the man who raped her and that she then, still acting on that suggestion and knowing beforehand that this person will be at the police station, identified him. Adv Van Zyl referred in this regard to the case of *State v Noble* 2002 NR 67 (HC) at 71B-H. Adv Van Zyl also referred to certain contradictions in the evidence of the complainant which he submitted should be considered in the context of the cautionary rule in respect of the single witness, namely whether she dressed herself after the rape, whether she could pull out his penis while her hands were still tied and the fact that no bruises were found on her wrists to coincide with her evidence that he hands were tied.

[9] Adv Van Zyl submitted that the learned Judge misdirected himself by relying on the credibility of the evidence of the complainant as a single witness in respect of the identity of the appellant. He also submitted that it is improbable that a grown person who had just raped a girl, will go to her house soon thereafter. He further referred us to the discrepancies in her evidence in respect

of the clothes allegedly worn by the appellant, which was never found. In respect of the complainant's reaction when she saw him afterwards at the house and at the police station, Adv Van Zyl based this also on his argument of suggestibility. As mentioned, he could not take the injuries found on the penis of the appellant by doctor Zeko any further and conceded that the appellant's evidence that everybody, including the doctors, conspired against him, is not supported by any other evidence.

[10] Adv Nyoni, on behalf of the State, submitted that the appellant was clearly identified by the complainant and that the magistrate was correct in his conclusion and did not misdirect himself by accepting her evidence as credible and reliable in all respects. In respect of the criticism by Adv Van Zyl of the identification evidence of the complainant when she first saw him after her incident at the house of her aunt, Adv Nyoni submitted that this evidence should be read in context. She referred to what preceded the possible suggestion that the appellant may be the man who raped her. She submitted that the complainant was first examined by the sisters and when the appellant turned up and asked for water they then mentioned that the same man who asked for water, may be the man who raped her. Adv Nyoni submitted that this identification should not be confined only to the quotation from the evidence of the complainant in the record relied on by AdvVan Zyl, but should be regarded in the context of the reaction of the complainant, namely that she got a fright. The complainant herself testified that when the appellant turned up at the house she got afraid and one of the sisters or nieces, Natasha, testified that she shifted from a position where she was seated when she saw the appellant at the house and Natasha's impression was that the complainant froze and was uncomfortable when she saw the appellant. It is also clear from the complainant's evidence that she could identify the appellant immediately in court. In this regard she said at page 20, lines 1-6 or the record:

> *"Can you tell us what happened that day? ...So while I was walking that*
>
> *man seated there was seated under a tree.*
>
> *Can you just point with your finger what man?*
>
> ***Ms Interpreter:*** *Pointing to the accused person who is seated."*

In respect of the identification at the police station and Adv Van Zyl's submission that she identified the appellant because it was previously suggested that the appellant was the man who raped her and that she was told prior to her entrance at the police station that he will be there, Adv Nyoni submitted that, that evidence should again not be considered in isolation, but

in the context of the complainant's demeanour at the time.

[11] Adv Nyoni also relied on the examination by the doctor of the injuries sustained by the complainant. According to doctor Zaranyika's observation she was raped, because there were injuries to her genitals. It is not disputed that she was raped. Adv Nyoni also referred the court to the findings of doctor Zeko who examined the appellant the same day that the incident occurred and who found a green/black raised area on his penis, which according to the doctor was not the result of a natural condition, but related to the entrance of the penis into a narrow opening like a vagina of a child. Adv Nyoni also submitted that the evidence proved beyond reasonable doubt that the complainant was raped by the appellant and that all the evidence is consistent with that submission. She submitted that although the complainant is a young child and a single witness, the magistrate was conscious of the cautionary rule and the *Mtetwa* case. She submitted that the magistrate correctly relied on the evidence of identification of the appellant by the complainant and that the appeal on the merits should be dismissed.

[12] According to the record, the magistrate bent over backwards to assist the appellant, who was unrepresented. All his rights were properly explained to him and the magistrate throughout the appellant's cross-examination of the State witnesses assisted him by formulating his questions so that the essence thereof could be put to those witnesses. It also appears that the appellant acquitted himself quite well during his cross-examination.

[13] With regard to the crucial issue of identification, I have no doubt that the complainant identified the appellant as her rapist. The possibility of suggestibility on which Adv Van Zyl strongly relied is only based on what she testified in court and which passage was referred to earlier herein. However, at that stage of her evidence she had already identified the appellant in court. There is no dispute that the complainant had been raped. At the stage when he turned up at the aunt's house, the complainant had already been examined by her sisters or nieces, when the appellant arrived and asked for water the nieces with the knowledge of what they found when the complainant was examined posed the question whether this man was not the one who raped her. This was not done in isolation but also with the observation that the complainant was

suddenly uncomfortable, shifted her position and her face frozen. In that context and without disputing that observation, there cannot be any doubt that the appellant was the cause of that reaction. However, she identified the appellant for a second time on the same day at the police station. Even if she was aware that the appellant may be present, her reaction as testified by Sergeant Himalwa could not be regarded as faked. The complainant, an 8 year old girl, was clearly frightened. I reiterate that I have no doubt that she identified the appellant as the person who raped her. In respect of the appellant's contention that an identification parade should have been held, I agree with what Sergeant Himalwa said, namely that in the light of the complainant's identification of the appellant, such a parade would have served no purpose. The magistrate, in my opinion, correctly accepted the identification of the appellant by the complainant.

[14] The magistrate was also alive to the cautionary rule regarding a single witness. Although the evidence of children does not need to be scrutinized with the same caution, the magistrate did take her age into account. I am convinced that the magistrate correctly accepted the evidence of the complainant as credible and reliable. It should also not be forgotten that the appellant was medically examined by Dr Zeko on the same day of the incident and that the doctor's expert opinion, after finding injuries to the appellant's penis, was that he sustained those injuries on his penis by pressing it into a narrow opening such as the vagina of a child.

[15] Although there are some other discrepancies that cannot be explained, the material facts relied upon by the magistrate in finding that the State succeeded in proving the guilt of the accused beyond reasonable doubt cannot be faulted. On the evidence on the record the appellant was correctly convicted on the main charge.

[16] In respect of sentence Adv Van Zyl referred the court to several decisions regarding what the approach of a court of appeal should be before interfering with the sentence imposed by a lower court. He submitted that the magistrate misdirected himself, because, despite taking certain factors into consideration, he found same and that they did not amount to substantive and compelling circumstances. In this regard he referred to two such factors, namely the fact

that the appellant was a first offender and that he had been in custody for a period of 34 months before he was sentenced. He submitted that although the magistrate did consider these factors, he nevertheless wrongly decided they were not substantive and compelling circumstances to enable him to impose a lesser sentence and in particular that he did not attach proper weight to the age of the appellant at the time namely 32 years. According to him the magistrate imposed a sentence in excess of what the Act provides for as a minimum sentence in respect of a second offender. According to Adv Van Zyl the appellant was effectively sentenced to approximately 23 years imprisonment, because he had already spent 34 months in custody. Alternatively, even if the magistrate did not misdirect himself in this regard, Adv Van Zyl submitted that the sentence imposed creates a sense of shock and should accordingly be interfered with. He suggested that from a sentence of 20 years the magistrate should have deducted the 34 months that the appellant already spent in custody, as well as considering that he had a clean record at the age of 32 and was not a person who committed crimes.

[17] In respect of sentence Adv Nyoni referred the court to the judgment of the magistrate wherein he indicated that he took the factors referred to by Adv Van Zyl, namely the appellant's clean record and the fact that he had spent 34 months in custody, into consideration, but did not regard that as substantive and compelling circumstances why he should not impose a lesser sentence. She also submitted that the sentence imposed, considered against the circumstances of a rape of such a young child with violence and threats, does not induce a sense of shock in order to entitle this court to interfere with the sentence.

[18] In my opinion the magistrate did not misdirect himself by imposing a sentence in excess of the minimum sentence. The test is not whether this court would have imposed another sentence. It is only entitled to interfere if the magistrate did commit a misdirection in respect of the sentence or if the sentence is so shockingly inappropriate that it should not have been imposed. The sentence imposed by the magistrate may seem high for a first offender, but taking all these circumstances into consideration, as the magistrate did, this court cannot interfere with the sentence imposed by the magistrate.

[19] From the above it is clear that there is no merit in the appeal and consequently no prospects of success to entitle the appellant to condonation. However, because the merits have

been considered, the appeal has to be dismissed.

[20] In the result the appeal on both the conviction and sentence is dismissed.

MULLER, J

I concur

SWANEPOEL, J

On behalf of the Appellant: Mr Van Zyl

Instructed By: Amicus Curiae

On behalf of the Respondent: Ms Nyoni
Instructed By: Office of the Prosecutor-General