



CASE NO.: CR 56/2012

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION, HELD AT WINDHOEK

In the matter between:

THE STATE

and

SEBASTIAN HOAEB

HIGH COURT REVIEW CASE NO.: 1132/2012

CORAM: HOFF, J *et* SIBOLEKA, J

Delivered on: 25 June 2012

REVIEW JUDGMENT

HOFF, J: [1] The accused was convicted in the magistrate's court on a count of attempted rape and sentenced to twelve months imprisonment.

[2] The evidence of the complainant was that she, accompanied by her younger sister, was on her way home from town when the accused confronted them “near the bushes” and asked their names. Her sister refused to provide her name. The accused caught her on her arm but she managed to free herself and ran away. The complainant also ran but the accused managed to catch her. He pushed her to the ground. She tried to scream but the accused put his hand on her mouth. He said that he would rape her. She was laying on her back and the accused was laying on top of her. The accused tried to remove her pants. He managed to unzip his trousers. She was struggling with the accused, grabbed him by the throat and bit him. The accused released her and she managed to run away. It was 17h00. She reported the matter to the police. The police went with her looking for the accused. He was later found in the bushes and arrested. The sister of the witness corroborated her version in material respects. The police officer testified that the complainant reported that someone tried to rape her. She observed that the complainant’s clothes were full of dust and that her blouse was partly torn. The complainant appeared frightened and shocked. The complainant later identified the accused and he was arrested.

[3] The accused person, a 30 year old Namibian male person denied that he attempted to rape the complainant. He admitted having encountered the complainant but had passed her and was on his way home, walking along the tarred road, when he was arrested and accused of trying to rape someone.

[4] I directed the following query to the presiding magistrate:

“Could you please provide me with your reasons for convicting the accused of attempted rape in view of the fact that the public prosecutor did not dispute the version of the accused persona since not one single question was asked during cross-examination.”

[5] The following reply was received, quoted verbatim:

“The record reflect that after the state’s case were closed, the court explained the rights at the closure of the state’s case to the accused, accused elected to testify from the dock and not under oath and was also not sworn in as per the proceedings. I refer the Honourable Justice to Section 184(1) of the Criminal prosecutor act 51/1977 as amended, which read, no person may be examined as a witness in criminal proceedings unless that person is under oath or affirmation, which must be administered by the Presiding Magistrate. Thus the state prosecutor has waived that right to test the evidence of the accused as he elected to testify and not under oath.”

[6] The magistrate then gave his reasons for conviction by summarizing the evidence presented by the State, stating that he was satisfied the accused attempted to rape the complainant. The version of the accused person that he did not attempt to rape the complainant and was just passing by was rejected with the rhetorical question why would the complainant and her sister falsely incriminate the accused if he had not acted in the way described by the complainant.

[7] The reference to section 184(1) is erroneous since this section deals with a situation where a *witness* is about to abscond and where a *witness* evades service of a summons.

[8] After I have received the reply from the presiding magistrate I again perused the recorded court proceedings and found the following appears at page 7 of the record:

“PP: Defence case.

Court: Rights at the closure of the State’s case explained to accused.

Accused: I understood I will testify from the dock + no witnesses.”

[9] It further appears that the accused then made an unsworn statement denying the commission of the offence.

[10] Section 162(1) of Act 51 of 1977 provides as follows:

“Subject to the provisions of sections 163 and 164, no person shall be examined as witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form ...”

[11] The magistrate in his reply must have had this section in mind. This section appears to be a reply to my query why the public prosecutor did not at all cross-examine the accused person, but it cannot be a reason for convicting the accused person of attempted rape. I say this for the following reasons.

Firstly:

Section 196(3) of Act 51 of 1977 provides the following:

“An accused may not make an unsworn statement at his trial *in lieu of evidence* but shall if he wishes to give evidence, do so on oath or, as the case may be, by affirmation.”

(Emphasis provided).

[12] The language of this section is clear and unambiguous. The accused *must*, if he wishes to testify, do so on oath or by affirmation.

[13] The right of an accused person to make an unsworn statement at his trial in terms of the provisions of section 227(3) of Act 56 of 1955 (the old Criminal Procedure Act) has been abolished by section 196(3) of Act 51 of 1977.

[14] In *Hiemstra's Criminal Procedure* (Service Issue 4 May 2011) the author comments that section 196(3) is not concerned with the specific place from which the accused testifies. That it "is a matter of little importance and the presiding officer can in an appropriate case allow the accused to testify, from the dock or any other place in the courtroom".

[15] Secondly, it is clear that from the rights explained at the closure of the State's case that there was no provision (on the roneo form) that the accused has a right to make an unsworn statement. The accused was informed of his right to give evidence under oath, of his right to call witnesses to testify on his behalf, that he was not obliged to give evidence or to call witnesses, that he may choose to present no evidence and to remain silent. He was further informed that should he decide to give no evidence and to remain silent then the court will consider the case "solely on the evidence presented thus far".

[16] Thirdly, the magistrate in his reasons for conviction negated the provisions of sections 162(1) and 196(3) by not only allowing the accused to make an unsworn statement but failed to inform the accused beforehand that he would have regard to what would be said in the unsworn statement when considering the guilt or otherwise of the accused person. This was an irregularity.

[17] The magistrate should have informed the accused that he may not make an unsworn statement and that if he wished to say anything it should be said under oath or by affirmation irrespective of whether it is said from the witness box or from the dock.

[18] The accused person was in terms of the provisions of Article 12 of the Namibian Constitution entitled to a fair trial. This the accused never had since he must have been under the impression that some weight would be attached to his unsworn statement. This

must be the case in spite of the rights which had been explained to him and which appeared on the roneo form.

[19] The conviction cannot be allowed to stand in these circumstances.

[20] In the result the following orders are made:

1. The conviction and sentence are set aside.
2. The case must be heard *de novo* by a different magistrate.
3. The accused remains in custody.

HOFF, J

I agree

SIBOLEKA, J