CASE NO.: CA 108/2009

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

JEREMIA NDJABA MUZANIMA **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: LIEBENBERG, J *et* TOMMASI, J.

Heard on: 20.01.2012
Delivered on: 30.01.2012

APPEAL JUDGMENT

LIEBENBERG, J.: [1] The appellant, an adult male aged 40 years, appeared in the Regional Court sitting at Eenhana on two charges of rape,

read with the provisions of the Combating of Rape Act, 2000[1]. He pleaded not guilty on both charges but after evidence was heard, convicted and sentenced to eighteen (18) years' imprisonment on each count, ten (10) years of which ordered to be served concurrently. He now appeals against his conviction and sentence.

[2] Ms *Mainga,* appearing for the appellant, filed an Amended Notice of Appeal; the following grounds forming the basis of the appeal against conviction:

- Evidence of a sexual act committed with the complainant was lacking;
- The trial court failed to approach the single evidence of the complainant with caution;
- The court, when convicting, should not have relied on the medical examination report compiled in respect of the complainant which was handed in as evidence.

Regarding sentence, the grounds are:

- The sentence inducing a sense of shock;
- The appellant not being afforded a fair trial as the import of what constitutes "substantial and compelling circumstances" were not explained to the undefended appellant;
- At the stage of sentencing the appellant was declined legal representation;
- The court over-emphasised the seriousness of the offence at the expense of the appellant's personal circumstances.

[1] Act 8 of 2000

The grounds of appeal raised in the original Notice of Appeal by the appellant were abandoned. The respondent did not oppose the application for condonation of the non-compliance with the Rules of Court.[2]

[3] The Regional Court Magistrate in his response to the Amended Notice of Appeal conceded in respect of conviction on both charges, that penetration was not proved; and submitted that, on the totality of the evidence, the appellant ought to have been convicted of attempted rape. The learned magistrate further stated that in as much as the trial court in its brief judgment did not state that it approached the complainant's evidence with caution (giving single evidence on the alleged rapes), the trial court was indeed alive to the need for such caution. Also that it found corroboration for the complainant's evidence in the medical evidence and the evidence of other witnesses. On sentence it was said that, in view of the concession made regarding conviction, this Court should determine sentence (if the appellant were to be convicted of a lesser offence).

[4] In November 2006 the complainant (a boy aged 10 years) was staying with his grandmother at Okaonde Village No. 2 in the district of Eenhana. The appellant, a cousin to the complainant's biological mother, also resided with the family, albeit in a separate room in the homestead. Complainant was sharing a sleeping hut with other children of the house, amongst others, with Seblon Lucia Ndapandula ('Lucia'), who was about sixteen years old at the time.

[2] Magistrates' Court Rules (Rule 67 (5))

[5] The State called three witnesses being the complainant; his mother (to whom the first report was made); and Lucia. Appellant elected to remain silent and had no witnesses called in his defence.

[6] Complainant is the only witness testifying on the alleged sexual acts committed with him and according to his testimony there were two separate incidents on two consecutive days when the appellant had taken him into his sleeping room and *"slept with him in the buttocks"*. On the first day he was called to the appellant's room whereafter he had to apply Vaseline to, amongst others, his lips and male organ. On the second occasion the complainant was taken out of bed by the appellant who carried him outside and then directed him to his sleeping room where he lowered the boy's trousers and again *"slept with him in the buttocks"*. He said that appellant thereafter slapped him and ordered him back to his own sleeping hut saying that he would wet the appellant's bed. He explained that they were lying on their sides and that the appellant was behind him – also that he felt pain in his buttocks. When asked what caused him the pain, complainant said that it was because appellant was *"sleeping with me"* and that appellant had slept with his *"ka pip in his buttocks"*. Although the interpreter brought to the court's attention that the complainant was actually referring to his anus, he added by saying that the complainant was not specific and only referred to his buttocks. He (the interpreter) later conveyed to the court that *"traditionally when they say 'he sleep me in the buttocks' they mean sleeping in the anus, …"*. The prosecutor was at pains to clarify the situation but could get no further than

complainant repeating his earlier testimony i.e. that the appellant had slept with him in the buttocks. The complainant said that he had not reported these incidents to anyone as the appellant threatened to kill him, should he do so.

[7] In cross-examination[3] the complainant said the following: *"For <u>two days you used to lift me from the room</u> where we used to sleep with Ndapandula"*. In evidence in chief he said that although there were two distinctive incidents, he was only fetched from his room by the appellant *once*, not twice. On the first occasion he was called by the appellant to his room and was not fetched from his sleeping hut by the appellant. This discrepancy was not cleared up by the prosecutor in re-examination. Appellant disputed the evidence of the complainant, saying that it was fabricated in order to get rid of him and out of the house because he was HIV positive.

[8] When the complainant's mother came from Swakopmund where she resides on 15 December, she was told about the complainant not feeling well and that he was walking astride. Upon her asking the complainant what was wrong, he told her about him having been called to the appellant's room one day where he had to apply Vaseline to the appellant's body and male organ and thereafter told to return to his room as he would wet the appellant's bed. From her version no sexual intercourse had taken place on that day. Complainant explained to her that there were *two* incidents when the appellant had fetched him from his sleeping hut whereafter he had sexual intercourse with him in his sleeping room. The gist of this report thus is that

[3] Record p 30 line 3

there was *one* incident during which the complainant applied Vaseline to the appellant's body and *two* incidents of sexual intercourse on consecutive days.

[9] During cross-examination of this witness the appellant tried to make out a case that he was HIV positive and had he had sexual intercourse with the complainant as alleged, then he should have been infected; medical tests done on the complainant showing otherwise. He did not raise his earlier contention about the actual reason why the family wanted him out of the house with this witness.

[10] Lucia testified about an incident when the appellant said, without mentioning names, that *"one of the boys must come at his room for him to sleep with"* (sic) and that the complainant went, but during the night returned saying that the appellant said he would wet his bed. She was unaware of any subsequent incidents when the complainant was taken from his bed by the appellant at night. Regarding the complainant walking astride, she said that this happened in November (the same month as the alleged rapes) and that it had been reported by a certain Daniel and Weyulu that the complainant fell from a donkey when they were herding (cattle). Some discussion subsequently arose whether or not the complainant had to be massaged for the discomfort he was having, causing him to walk astride. However, according to Lucia, when the complainant was asked whether he had fallen from a donkey, he denied it.

[11] For reasons unknown the medical examination report compiled in respect of the complainant, despite having been handed in as evidence, does not form part of the appeal record and one has to rely on the contents of the report read into the record during the trial.[4] The report was compiled by a certain Dr Okundela after a medical examination was conducted on the complainant on the 19th of December 2006 and the only finding of significance is that the anus was *"painful to touch"*.

[12] The magistrate in his *ex tempore* judgment, after briefly summarising some aspects of the evidence and finding that the medical evidence supported the complainant's version, expressed satisfaction that the appellant's guilt was proved beyond reasonable doubt and convicted accordingly on the basis of age difference between the appellant and the complainant.[5] As conceded by the trial court, the judgment is silent on the approach followed by that court in its assessment of the evidence of the State witnesses, more so that of the complainant who gave single evidence on the alleged sexual acts committed with him. The corroboration found in the medical evidence contained in the report convinced the court *a quo* beyond reasonable doubt that the appellant was guilty of the offences he was charged with.

[13] It was submitted by Ms *Mainga* that the trial court misdirected itself by relying on the medical evidence as corroboration for the complainant's version, as there were other factors which the court ought to have taken into

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[4] Record p. 11- 12
[5] S 3 (1)(a)(iii)(bb) of Act 8 of 2000

consideration before coming to that conclusion i.e. the time period of at least three weeks that passed between the alleged sexual intercourse and the medical examination; and evidence about the complainant having fallen from a donkey during the same time period. She is of the view that although it is stated in the medical report as to the doctor's finding that sexual molestation was likely, this was not the only possibility in the circumstances mentioned above. I agree. If the State were to rely on the doctor's opinion expressed in the report to support or corroborate the complainant's version of an anal sexual act committed with him, then it was incumbent upon the prosecutor to call the doctor to explain what effect a time lapse of three weeks and longer might have had on injuries or discomfort suffered by the victim as a result of anal intercourse; and whether his opinion excludes the possibility that the pain felt by the complainant in his anal region could have been caused by donkey riding or his falling from a donkey. By not having the benefit of hearing the testimony of the doctor, to whom it was reported by the police that the complainant was the victim of sexual molestation, it seems impossible to determine whether the findings made in the medical report impacted on the doctor's opinion; and whether he still would have reached the same conclusion had he known about the complainant having fallen from a donkey some time prior to his examination. Also, whether it excludes all other possibilities.

[14] I am not persuaded that the *prima facie* statement contained in the medical report about the tenderness of the complainant's anus, *per se,* is supportive of the complainant's version; and the trial court's reliance on such

evidence as corroboration, in my view, is a misdirection, as it is clearly not the only reasonable inference that could be drawn from the proved facts.[6] The complainant's evidence is thus single and without any corroboration.

[15] It is trite law that the courts have to approach the evidence of a single witness with caution, and that the merits as a witness, must be weighed against factors which militate against the witness' credibility. When assessing the reliability and credibility of a single witness, this must be done within the totality of the evidence adduced at the trial and the court must guard against following a "compartmentalised approach" as referred to in *Stevens v S.*[7]

[16] In *S v Noble*[8] at 71G-I Maritz J (as he then was) says the following:

> *"Whether a judicial officer considers the evidence of a single witness with reference to that salutary guide or not, he or she must approach such evidence with caution. He or she should not merely pay lip-service to the existence of a cautionary rule in such cases, but it should be apparent from his or her reasoning that he or she, mindful of the inherent dangers of such evidence, treated it with circumspection."* (emphasis provided)

Although conceding that the judgment does not reflect any reasoning by the magistrate pertaining to his assessment of the complainant's single evidence, he, notwithstanding, claims that he was indeed alive to the need for such caution. Without doubting the learned magistrate's sincerity in this regard, it

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[6] *R v Blom*, 1939 AD 188
[7] [2005] 1 All SA 1 (SCA)
[8] 2002 NR 67 (HC)

seems to me that the trial court in its evaluation of the evidence gave insufficient weight to the complainant's self-contradicting evidence and the discrepancies between his evidence and the report made to his mother. These contradictions are material and must impact on the credibility of the complainant, at least to the extent where it casts some doubt as to whether he is a reliable witness.

[17] When considering the complainant's evidence pertaining to the sexual acts committed with him in isolation, it appears to be sufficiently credible to convict on. However, his evidence is self-contradicting and also differs from that of his mother pertaining to the number of times he had been with the appellant and what transpired on each occasion. Although the drift of the report made by the complainant to his mother is generally consistent with his evidence in court, there is doubt as to whether or not a sexual act took place on the first occasion (where Vaseline was applied to the appellant's body); and how many times thereafter was he taken out of bed by the appellant. At first complainant testified about him having been fetched from his room by the appellant only once, but under cross-examination changed this to twice. This is the same report that was made to his mother. However, to her it was not reported that the appellant had sexual intercourse with him on the first occasion; and to her he had said that the appellant sent him back after the application of the Vaseline. On the complainant's version he was told by the appellant that *he* must come to his room; contrary to Lucia's testimony that the appellant said *any of the boys* were to go and sleep in the appellant's room whereafter the complainant went. As stated, these are material

differences and in the absence of some satisfactory explanation it cannot, in my view, be said that the complainant gave reliable evidence. Whether his young age and the lapse of two years between the incidents and the trial were contributing factors, are unknown.

[18] In the light of the conclusion this Court has come to, the position would remain that the complainant's evidence would equally not sustain a conviction on any of the competent verdicts. There is also no need to consider the grounds of appeal against sentence.

[19] In the result, the Court makes the following order:

1. Condonation is granted for the late noting of the Amended Notice of Appeal.
2. The appeal against conviction on both charges is upheld and the convictions and sentences on counts 1 and 2 are set aside.

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LIEBENBERG, J

I concur.

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TOMMASI, J

ON BEHALF OF THE APPELLANT **Ms I Mainga**

Instructed by: **Inonge Mainga Attorneys**

ON BEHALF OF THE RESPONDENT **Mr D Lisulo**

Instructed by: **Office of the Prosecutor-General**