CASE NO.: CA 79/2010

Reportable

IN THE HIGH COURT OF NAMIBIA:
NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

In the matter between:

JOHNY JOROMIN NDETAPO KONDO **APPELLANT**

and

THE STATE **RESPONDENT**

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

Heard on: 23 March 2012
Delivered on: 30 March 2012

APPEAL JUDGMENT

LIEBENBERG, J.: [1] The appellant was legally represented when he appeared in the Regional Court sitting at Tsumeb on a charge of rape in

contravention of s 2 (1)(a) of the Combating of Rape Act.[1] He was convicted on his plea of guilty and sentenced to ten years' imprisonment. He now appeals against his sentence.

[2] Ms *Horn* represents the appellant *amicus curiae* and the Court is indebted for her assistance. Mr *Shileka* appears for the respondent.

[3] Appellant has withdrawn his original notice of appeal and has substituted it with a new notice filed on 16 March 2012, together with an application for condonation of the non-compliance with the rules.[2] The application is supported by an affidavit in which appellant sets out reasons as to why the appeal was filed out of time and the prospects of success on appeal. The gist of appellant's deposition is that he was unfamiliar with the procedure as to how an appeal must be launched and it was only when his present legal representative came to his assistance, that a proper notice of appeal was drawn in which valid grounds of appeal are set out. Respondent concedes that in the absence of proof on record showing that any explanation was given to the appellant at the end of the trial, either by the court or by his legal representative at the time, he should be given the benefit of doubt. We are in agreement and in the circumstances condonation will be granted.

[4] The magistrate's statement in terms of Rule 67 (5) addresses the grounds of appeal raised in the amended notice but for reasons, which will soon

[1] Act No 8 of 2000
[2] Rule 67 (1) of the Magistrates' Court Rules

become clear, there is no need to deal with the statement or additional reasons advanced in this judgment.

[5] The appeal is based on the following three grounds:

- The magistrate erred in not taking the appellant's personal circumstances and mitigating factors into account; alternatively, giving insufficient weight thereto;
- The magistrate over-emphasised the seriousness of the offence and the interests of society (at the expense of the appellant); and
- The sentence induces a sense of shock and is unreasonable.

[6] The Court during the appeal hearing *mero motu* raised with counsel the question whether, in the light of the admissions made by the appellant in the s 112 (2) statement, the conviction was proper; and invited oral submissions from counsel on that point. In addition, counsel were invited to file supplementary heads of argument and which were most helpful. Counsels' assistance in this regard is appreciated.

[7] Appellant, in terms of s 112 (2) of the Criminal Procedure Act[3] (herein referred to as 'the Act'), gave a plea explanation in which he admitted having had sexual intercourse with M, who was 7 years old, whilst he was 21 years of age, by inserting his penis into her vagina. Besides admitting the bare elements of the charge, no further information pertaining to the circumstances

[3]Act No 51 of 1977

under which the offence was committed, was placed before the court. This notwithstanding, the trial court proceeded in hearing oral submissions made in mitigation on behalf of the appellant by his legal representative; as well as the prosecutor's submissions in aggravation. During his submissions counsel for the defence stated that the appellant at the time of committing the offence was under the influence of liquor and therefore *"he was not thinking proper or there was no premeditation or planning on the part of the accused person to commit the offence*. *It happened spontaneously …".* The only other information disclosed to the court (during submissions) about the surrounding circumstances is that the appellant apparently came to the house in the evening where the victim resided, looking for "accommodation". On this scanty information the court pronounced itself on sentence after finding substantial and compelling circumstances to be present.

[8] In principle a written statement under s 112 (2) has to satisfy the court that the accused admits the *facts* which underlie the charge and therefore, should not be a simple regurgitation of what appears in the charge-sheet, for that would be insufficient.[4] In such an instance the presiding officer is then required to obtain the necessary elucidation by means of questions put to the accused. In this regard s 112 (2) specifically provides *"…, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such statement … Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement".* (emphasis added)

[4] *S v B*, 1991 SACR 405 (NPD) at 406b-c

[9] The Court in *S v B* (*supra*) at 406b-c (per Hugo, J) said:

> "Section 112(2) provides that where an accused or his legal adviser hands in a written statement by the accused in which the accused sets out the facts which he admits and upon which he has pleaded guilty the Court may, instead of questioning the accused, convict and sentence him. It is clear that this section also required not only a series of admissions but the facts upon which those admissions are based. In my view the magistrate was incorrect in allowing this statement to pass without further questioning and in my view the conviction of the accused upon this statement and this statement alone is improper."

[10] *S v B* was adopted in this jurisdiction with approval in *Elridge Christo Brussel v The State*[5] by Mainga, J (as he then was) and at p.3 the learned judge says:

> "The appeal is against sentence only but the convictions cannot be allowed to stand in their present form. Section 112 (2) does not only require a series of admissions but the facts upon which the admissions are based."

[11] I fully endorse the sentiments expressed by the learned judge and equally, deem same applicable to the present facts. I am furthermore in agreement with the remarks made in *S v Moya*[6] regarding the duty of legal practitioners when required to draw up statements under s 112 (2), and at 261b-c the following is said:

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[5] Unreported Case No CA 18/2004 delivered on 15.07.2004
[6] 2004 (2) SACR 257 (WLD)

> "Attorneys and counsel who prepare statements such as these should acquaint themselves fully with the law on this score and not leave it to others to find the deficiencies, if there are any. In particular, it should not be left to a busy magistrate to have to do so and, later on, to the High Court."

And further at 261c-e:

> "That the trial court should be fully appraised of the facts of the case has been iterated and reiterated time and time again. I intend to mention but a few of the host of cases on the subject: S v Ngobe 1978 (1) SA 309 (NC), especially at 310D - F; S v Nyambe 1978 (1) SA 311 (NC) at 312G et seq; S v Sikhindi 1978 (1) SA 1072 (N); S v Doud 1978 (2) SA 403 (O) at 404D - F; S v Lebokeng en 'n Ander 1978 (2) SA 674 (O); S v Witbooi and Others 1978 (3) SA 590 (T) at 594H - 595A; S v Balepile 1979 (1) SA 702 (NC) at 708H; Mkhize v The State and Another; Nene and Others v The State and Another 1981 (3) SA 585 (N) at 586E - 587B; S v Mokoena 1982 (3) SA 967 (T); S v Swarts 1983 (3) SA 261 (C); S v Sethole 1984 (3) SA 620 (O); S v Magabi en 'n Ander 1985 (3) SA 818 (T) at 822B - 823A."

It seems settled that a written statement under s 112 (2) has to satisfy the court that the accused admits the facts which underlie the charge and the court must be fully informed of the facts.

[12] In view of what has been stated above, it must be emphasised that the principle remains the same whether the accused is questioned by the court in terms of s 112 (1)(b) or whether a written statement is handed in to the court

under s 112 (2), namely, that the trial court must be satisfied that the accused admits the facts of the case which underlie the criminal charge. The presiding officer is not merely required to ascertain from the accused whether he admits the allegations in the charge but, whether or not the accused is guilty of the offence. In my view, the approach to s 112 (2) should not be any different simply because the accused is legally represented. Where the accused is unrepresented and pleads guilty to the charge, the court is required to question the accused in terms of s 112 (1)(b) with the view of being satisfied not only that an offence was committed, but that it was the accused who committed it.[7] It would neither be sufficient to ask the accused step by step to admit every allegation contained in the charge.[8]

[13] If the presiding officer under this subsection (112 (1)(b)) is required to do *more* than merely ask the unrepresented accused whether he or she admits the allegations in the charge, why then would it be any different simply because the accused is represented, or because such admission is contained in a written statement? Sight must not be lost of the purpose of s 112 where the court, through questioning, or when presented with a written statement, acts as a safety measure against unjustified convictions by satisfying itself that the offence contained in the charge was indeed committed by the accused. Section 112 (2) provides that the presiding officer has a discretion (and a duty) to clarify any ambiguity in the statement by questioning the

[7] *S v Combo and Another,* 2007 (2) NR 619 at 621G; *S v Nyambe,* 1978 (1) SA 311 (NCD) at 312H; *S v Philander,* 1977 (2) PH H214 (NC)
[8] *Hiemstra's Criminal Procedure* – Commentary under s 112 at 17-5; *Mkhize v The State and Another,* 1981 (3) SA 585 (NPD)

accused person on the same basis as it would be done under subsection (1) (b).

[14] In the present case the accused was facing a charge of rape, which is considered to be a very serious charge for which the Legislature, in these circumstances, enacted a mandatory sentence of not less than fifteen years' imprisonment, unless there are substantial and compelling circumstances present. The only facts placed before the court *a quo* and on which the guilty plea is based are, that the victim is a girl, 7 years of age; and that the appellant, who is 21 years old, had sexual intercourse with her. The circumstances under which this happened are unknown. Facts, for instance, regarding the manner in which the appellant went about when committing the act and the degree of force applied; whether injuries were sustained by the victim and the nature thereof if any; whether or not there was a trust relationship between the appellant and the victim; what were the sleeping arrangements in the house that night when the victim was raped; and whether the appellant was intoxicated during the commission of the offence (as he alleges), are all crucial, yet absent. It would have been important to get these facts on record, not only for the determination of the appellant's guilt, but also for the court in sentencing, who had to decide whether or not there are substantial and compelling circumstances present, justifying the imposition of a lesser sentence. It would also have clarified or shed more light on defence counsel's contention in mitigation that the appellant *"was not thinking properly"* because he was under the influence of liquor, the extent of which was important to determine even *before* conviction; furthermore, to know

based on which facts was the submission made that the rape *"happened spontaneously'*. Courts should at all times avoid situations where they are required to convict and sentence *in vacua* and play a more active role to see to it that justice is done – not only to the accused person, but also to the State. Prosecutors on the other hand, should not readily accept a plea of guilty if the facts and basis on which the plea is tendered, are not clearly set out in the accused's section 112 (2) statement.

[15] In this regard the following is stated in *Moya* (*supra*) at 261i – 262a:

> "A court cannot possibly even begin to determine whether any [substantial and compelling reasons] are present, without having the complete picture before it. Again I refer to *S v B* (supra at 406i), where Thirion J said:
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> > 'Before the principles relating to sentence can be properly applied, one must have the facts relevant to sentence, and where one is dealing with a crime of rape it is not only the facts personal to the criminal but also the facts personal to the complainant that are of relevance. . . .'"

[16] I am respectful of the view that, given the seriousness of the offence the appellant was facing and the carelessness of his legal representative when preparing the statement, the magistrate should not have allowed the s 112 (2) statement to have passed without further questioning the appellant in order to illicit from him those facts on which his plea of guilty is founded. Consequently, the conviction of the appellant on the statement as it stands is improper.

[17] I am mindful that the appeal is only against sentence, but in view of the defects in the plea referred to *supra,* the conviction, based solely on the insufficient admissions made in the s 112 (2) statement, cannot be permitted to stand[9].

[] Consequently, the following order is made:

1. Condonation is granted for appellant's non-compliance with the Rules.
2. The conviction and sentence are set aside.
3. The matter is remitted in terms of s 312 of Act 51 of 1977 to the Regional Court who convicted and sentenced the appellant with the directive to comply with the provisions of s 112 of Act 51 of 1977.
4. In the event of a conviction, the court in sentencing, must take into account the sentence already served by the appellant.
5. Pending such appearance in the Regional Court, the appellant is to remain in custody.

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[9]*Elridge Christo Brussel* (*supra*) at p.3

LIEBENBERG, J

I concur.

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TOMMASI, J

ON BEHALF OF THE APPELLANT **Ms W Horn**

Amicus curiae
LorentzAngula Inc

ON BEHALF OF THE RESPONDENT **Mr R Shileka**

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