REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 61/2013

In the matter between:

ISMAEL AMEB **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ameb v State* (CA 61/2013) [2013] NAHCMD 324 (8 November 2013)

Coram: HOFF J and SIBOLEKA J

Heard: **11 October 2013**
Delivered: **08 November 2013**

Summary: A trial judge or magistrate has advantages which an appellate court cannot have, namely seeing and hearing witnesses and being steeped in the atmosphere of the trial – The main advantage such a presiding officer has is not only the opportunity to observe the demeanour of the witnesses but also the appearance and the whole personality of a particular witness.

Where a court which heard a case was influenced by the demeanour of a witness and says so, the court of appeal is, as a rule, guided by the trial court, in the absence of irregularities or misdirections.

ORDER

(a) The appeal is dismissed.

(b) The convictions and sentences imposed by the trial court are confirmed.

JUDGMENT

HOFF J (SIBOLEKA J concurring):

[1] The appellant was convicted in the Regional Court in Tsumeb of the crimes of assault with intent to do grievous bodily harm and rape (in contravention of the provisions of s (2)(1)*(a)* or *(b)* of the Combating of Rape Act of 2000 read with the provisions of the Domestic Violence Act 4 of 2003) and sentenced to imprisonment for periods of five years and 16 years respectively. The period of five years imprisonment was ordered to run concurrently with that of 16 years imprisonment.

[2] In a notice of appeal the appellant stated that the appeal lies against both the conviction and the sentence.

[3] In respect of the charge of assault with intent to do grievous bodily harm it is alleged in the charge sheet that the incident occurred on 4 November 2006 at the farm Welgevonde and that the appellant assaulted the complainant by beating her with a clenched fist on the head and by burning her with ‘a fire-wood all over the body’. The accused in his plea explanation admitted burning the complainant only on her thigh with a piece of firewood but stated that he had been provoked by the complainant and that he had no intention to seriously injure her.

[4] In respect of the charge of rape the appellant explained that he had consensual sex with the complainant whom he referred to as his girlfriend or his wife, referring to a Friday on which he had sexual intercourse with the complainant. The appellant was not legally represented during the trial in the court *a quo*.

[5] This appeal was previously struck from the roll due to non-compliance with Rule 67 of the Magistrate's Court Rules and due to the fact that there was no condonation application for the late filing of the notice of appeal. Subsequently, the appellant filed an affidavit stating the reasons for the late filing of his notice of appeal but did not file an new notice of appeal.

[6] The appellant, as a layperson, drafted the notice of appeal and what can be discerned from the grounds of appeal was that the 'learned magistrate erred in law or on the facts in failing to accept appellant's version that the appellant did not rape the complainant ' and further stated that the magistrate erred in failing to request the State to bring 'technical evidence' to prove the offence of rape. The reference to 'technical evidence' in my view refers to medical evidence.

[7] The notice of appeal was filed about two weeks out of time and the appellant explained that he was ignorant as to where the notice of appeal should have been filed and blamed the personnel at the prison for not acting promptly in filing his notice of appeal.

[8] The grounds of appeal is an important document and serves a specific purpose namely to inform the trial magistrate in clear and specific terms which part of the judgment is appealed against, whether they relate to issues of fact or law or both, and it also serves to inform the respondent of the case it is required to meet.[1]

[9] However this Court has the discretion to condone the non-compliance with the Rules of Court. In *S v Zemburuka* 2008 (2) NR 737 at 738G-H this Court per Van Niekerk J stated as follows:

[1]S v Khoza 1979 (4) SA 757 (N) at 758; and S v Kakololo2004 NR 7 (HC).

'In this case, the letter was clearly written by a lay person without the assistance of the lawyer. I do not think that an overly fastidious and technical approach should be followed in the circumstances of this case in considering whether it is a notice of appeal. I think justice will be served if the court rather seeks, if possible, to interpret the letter in a manner upholding its validity as a notice of appeal so that the merits of the matter may be dealt with and the appeal may be disposed of.'

[10] I am of the view that we should take the same approach in this appeal.

[11] Mr Ipumbu who appeared on behalf of the appellant as *amicus curiae* did not take issue with either the conviction in respect of the first count of assault with intent to do grievous bodily harm or the sentence imposed in respect thereof but focused his submission in respect of the second count of rape.

[12] Before I deal with the questions whether or not the commission of the offence of rape had been proved by the State beyond reasonable doubt one should consider the extent of the injuries sustained by the complainant during the assault since these injuries are relevant also to decide the afore-mentioned question.

[13] One should also bear in mind that it appears from the charge sheets that the alleged rape was committed one day after the complainant had been assaulted.

[14] A medical report (J88) was handed in as an exhibit (A) with the consent of the appellant. It is evident from this document that the complainant was examined on 6 November 2006 (a day after the alleged rape) by a medical doctor who described the injuries sustained by the complainant as multiple burn wounds over the whole body (face, neck, head, legs, private part, buttocks) indicating not less than 20 burn wounds. The hands and face of the complainant were swollen and she also sustained a fracture of the 7th rib on the right side. The burn wound on the private part of the complainant was observed on the area known as *mons pubis*. The clothes of the complainant were observed to be bloodstained. The complainant also sustained a wound above the left eye indicated on the J88 with the word 'beaten'.

[15] The complainant during her testimony confirmed that the appellant was her former boyfriend and described how she was beaten and thereafter burnt with a piece of firewood which he had taken from the fireplace until she collapsed. When she regained consciousness she was taken into the house and put on a bed where she slept until the next morning when she saw that she was 'swollen'. The appellant then during the course of that evening wanted to have sex with her which she refused. The complainant testified that he was holding a knife in his hand and told her that he wanted to have sex with her or otherwise he would stab her. The appellant then told her to lay on her back and to remove her underwear which she did and thereafter he had sexual intercourse with her. It was against her will. The complainant testified that she submitted to intercourse with the appellant out of fear for further injuries.

[16] According to the complainant they were the previous evening at a party where both herself and the appellant had been drinking strong liquor (Clubman) and that afterwards the appellant wrongly accused her of having another boyfriend on another farm and that this was the reason for the assault on her.

[17] The complainant reported that she had been raped the next day to the personnel at the hospital where she was examined and treated for her injuries. She testified that the reason why she did not tell anyone on the farm about the rape was the likelihood that she would have been assaulted again by the appellant. She remained in hospital for a period of one week and also reported the incident to her father when she was discharged from hospital.

[18] During cross-examination it was put to her by the appellant that it was on Friday 3 November 2006 when they had sexual intercourse and appellant denied that he had sexual intercourse with her on 5 November 2006. The complainant however was adamant that the appellant had sexual intercourse with her against her will the day after the assault ie on Sunday 5 November 2006.

[19] Theresia Ochurus testified that she visited the hospital where the complainant had been admitted and was informed by the complainant that the appellant had sexual intercourse with her after he had assaulted her and whilst she was in pain.

[20] The appellant when he testified admitted assaulting the complainant because she allegedly told him that she had another boyfriend. The appellant denied raping the complainant on Sunday 3 November 2006.

[21] The magistrate called a witness whom he thought was the investigating officer but turned out to be the police officer who took a statement from the complainant. Catherine Guises testified that she took a statement from the complainant at the hospital on the Monday when the complainant informed her that the appellant (her boyfriend) had assaulted her and had sexual intercourse with her against her will.

[22] The appellant in his address to the court *a quo* emphasised the fact that the complainant testified that he had ejaculated in her during sexual intercourse with the complainant on the day in question.

[23] Mr Ipumbu submitted that since the complainant is a single witness in respect of the charge of rape that her evidence must be treated with caution. He critised the evidence of the complainant in a number of ways. Firstly it was submitted that when the complainant was asked during cross-examination why she had not reported to her grandmother or the husband of the grandmother (who lived on the same farm) that she had been raped, the complainant replied that she was not able to walk. It was in this regard submitted that immobility did not preclude the complainant from reporting that she had been raped. If one has regard to the surrounding circumstances it will be apparent that this criticism is not well-founded. The grandmother lives quite a distance from the complainant and complainant was in such a weakened state that she testified that when the police arrived on the farm they had to pick her up and loaded her in the police van and transported her to hospital.

[24] The complainant in any event testified that had she informed anyone on the farm that she had been raped by the appellant the appellant would have been confronted and that she feared that he would have assaulted her again. In this regard it was submitted by Mr Ipumbu that there is no evidence that the appellant threatened to assault the complainant should she inform other persons of the rape, adding that her fear was unfounded.

[25] It is indeed correct that there is no evidence that the appellant threatened her with assault should she report the rape, but I do not agree that her fear was unfounded in the circumstances. The magistrate observed the appellant was ‘visibly an emotional person’ and the way he looked at the complainant when he cross-examined her that anyone in the shoes of the complainant would have had good reason to be afraid since the appellant had demonstrated how brutal he could be by burning her with a log all over her body.

[26] Mr Ipumbu further submitted that the testimony of the complainant was that her vagina was swollen and that if this is correct then the swelling of the vagina would have made penetration difficult if not impossible. This in my view amounts to an opinion by counsel since there is no medical evidence (expert evidence) that penetration would have been difficult if not impossible.

[27] Mr Ipumbu criticised the State for not calling the doctor who had examined the complainant. Mr Ipumbu also ciriticised the magistrate in respect of a remark made after he had given judgment, when the appellant insisted on evidence which could prove that he had raped the complainant. The magistrate informed the appellant that ‘by the time the complainant talked about the rape when she was taken to hospital, it was already too late for them to get any sperms because she only mentioned this after the medical examination and that time she had already been examined’.

[28] I agree that this remark was factually incorrect and in contrast with the evidence of the complainant during cross-examination, when she was asked why she did not ask the doctor to take ‘urine’ in order to determine she had been raped or

not the complainant replied that she was in pain and ‘was not even thinking about those things’.

[29] The magistrate during his judgment remarked that there was ‘a glaring shortcoming’ in the State’s case namely the absence of medical evidence supporting the complainant’s allegations of rape. The magistrate observed that exhibit A seems to deal exclusively with physical assault and not sexual assault and that everyone at the farm was aware of the assault but did not hear the allegations of sexual assault.

[30] The reason why there was no examination in respect of the allegations of rape it appears to me was because the doctor had not been informed of such allegation.

[31] The magistrate during judgment however pointed out that the complainant did not mention that she had been raped on the farm out of fear of further assaults.

[32] The magistrate after he had given judgment and had convicted the accused at the stage when the appellant insisted on medical evidence, stated the following:

> ‘But the finding of this court is that her story was believable with or without sperms. Sperms were not material. Her evidence is convincing without the evidence of the doctor. And therefore the court came to the conclusion that even in the absence of that evidence, still the complainant’s story is true that she was forced to have sexual intercourse when she was in pain.’

[33] The magistrate during his judgment asked the rhetorical question namely, does the absence of medical evidence mean that the complainant was not raped?

[34] The magistrate in analyzing the evidence of the complainant stated that the complainant was ‘steadfast’ that the sexual intercourse occurred on Sunday night (ie after the assault) and that her demeanour in court was beyond reproach. The magistrate found that the complainant had no reason to lie since the accused was her sexual partner, and the complainant had asked the appellant (during cross-examination) why he did not wait until she had ‘healed’ (recovered from her injuries)

and then ask for intercourse and that the only reason for not wanting intercourse was that the complainant was in pain and 'swollen'. The magistrate further observed that the complainant was an illiterate girl from the San community and that she did not strike the court as a person who would fabricate such a story of being raped by her boyfriend. The magistrate further stated that the complainant's description of the rape struck him as genuine and truthful.

[35] The magistrate further remarked that what must have riled the complainant was the fact that the accused had assaulted her severely, including the burning of her vagina with a piece of burning wood and yet was intent on 'gratifying his sexual appetite . . .'

[36] In respect of the evidence of the appellant the magistrate referred to the s 119 proceedings in the district magistrate's court where the accused pleaded not guilty to the charge of rape and during his plea explanation stated that he had sexual intercourse with the complainant with her permission. The magistrate remarked that the material day when the rape was allegedly committed was reflected on the charge sheet as 5 November 2006.

[37] The magistrate further stated that the appellant during his plea (in the regional court) repeated the same response and that the version of the appellant that the sexual intercourse took place on the 3rd of November 2006 appears to be an afterthought.

[38] It must however be stated that the appellant during his plea explanation in the regional court stated that on 'that Friday night I asked her sex and she agreed then I have sex with her because she is my girlfriend'.

[39] The 3rd of November 2006 was on a Friday. However I agree with the magistrate that the appellant when he pleaded in the regional court never stated that he did not have sexual intercourse with the complainant on 5 November 2006 and

that the impression at that stage might have been created that only the allegation of lack of consent was in dispute.

[40] I agree with the magistrate that it was never the case of the appellant when he pleaded during the s 119 proceedings as well as when he pleaded in the regional court that he did not have sexual intercourse with the complainant on 5 November 2006. This only surfaced during cross-examination. It is not apparent from the record that the appellant could have been under the impression that the charge sheet referred to an incident on 3 November 2006.

[41] The only less than satisfactory part of the evidence of the complainant was that she did not report that she had been raped by the appellant to the doctor who examined her. It appears that the magistrate accepted her reason for failing to do so due to the fact that she was in pain and did not think to do so at that stage. Obviously, had the complainant informed the doctor about the rape the doctor would have done the required examination.

[42] The magistrate was however satisfied with the fact that the complainant informed the police officer who took down her statement two days after the event that she had been raped by the appellant and had also reported the rape to the second state witness about one week later.

[43] The approach by a Court of Appeal in considering a case is set out in *R v Dhlumayo* 1948 (2) SA 677 (A). One of the principles which must be borne in mind by a court of appeal is that the trial judge or magistrate has advantages which the appellate court cannot have, namely seeing and hearing the witnesses and being steeped in the atmosphere of the trial. The main advantage such a presiding officer has is not only the opportunity to observe the demeanour of the witnesses but also the appearance and whole personality of a particular witness.

[44] The question which the trial court needed to consider was whether it could safely accept the testimony of the complainant (in the absence of medical evidence) that she had been raped by the appellant.

[45] In this regard the magistrate made credibility findings in respect of the testimonies of the complainant and the appellant respectively which resulted in the acceptance of the testimony of the complainant and the rejection of the testimony of the appellant. In this regard the magistrate also considered the demeanour of these witnesses and the impression they have made upon the court who saw and heard them.

[46] A court of appeal in considering the findings of fact by the court a quo must give due consideration to the trial court's findings in respect of the credibility of witnesses where such findings are influenced by the demeanour of the witnesses.[2]

[47] In *Dlhumayo* the Court of Appeal referred with approval to *Mans v United Meat Co.* 1919 AD where it was stated at p 271 that where a court which heard a case was influenced by the demeanour of any witness and says so, the court of appeal is, as a rule, guided by the trial court.

[48] In *S v Slinger* 1994 NR 9 (HC) this court, in a full bench decision, as per O'Linn J at p 10D-E held as follows:

> 'Where no irregularities or misdirections are proved or apparent from the record, the court on appeal will normally not reject findings of credibility by the trial court and will usually proceed on the factual basis as found by the trial court.
> It is trite law that the function to decide on the acceptance, or rejection of evidence, falls primarily within the domain of the trial court.'

[49] Another principle mentioned in *Dhlumayo* is that it is impossible in an ex tempore judgment to deal exhaustively with every aspect of the evidence presented

[2]See S v Tshoko en 'n Ander 1988 (1) SA 139 (A) at 142I-J – 143A; Dhlumayo (supra)

to court, and that it would be ‘most unsafe invariably to conclude that everything that is not mentioned has been overlooked’.

[50] Another important factor which must be considered by a court of appeal is the trial court’s reasons in a criminal trial in convicting an accused person.

[51] I am of the view that having regard to the reasons provided, the magistrate did not commit any material misdirection in accepting the testimony of the complainant and rejecting that of the appellant and eventually convicting the accused of the crime of rape.

[52] Regarding the issue of sentence the appellant in his grounds of appeal referred to only one ground of appeal, namely that the ‘sentence is flatly unreasonable’. A court of appeal may interfere with the sentence imposed by the trial court where the trial court misdirected itself on the facts or on the law; where there was an irregularity which was material during the sentencing proceedings; where the trial court failed to take into account material facts or over emphasised the Importance of other facts; or where the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal.[3]

[53] The appellant did not point out any of the aforementioned factors which could have compelled this court to interfere with the sentence imposed by the trial court.

[54] In any event of the provisions of s 3(1)(*a)(iii)(ff)* of the Combating of Rape Act 8 of 2000 prescribes, in the case of a first conviction and in circumstances where a fire-arm or any other weapon was used for the purpose of the commission of the rape, a period of imprisonment of not less than fifteen years, in the absence of substantial and compelling circumstances.

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

[3]S v Tjiho 1991 NR 361 (HC) at 366A-B.

(a) The appeal is dismissed.

(b) The convictions and sentences imposed by the trial court are confirmed.

E P B HOFF

Judge

A SIBOLEKA

Judge

APPEARANCES

APPELLANT:	T Ipumbu *Amicus curiae*
RESPONDENT:	K Esterhuizen Office of the Prosecutor-General, Windhoek