REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK JUDGMENT

In the matter between: Case no: CA 39/2013

JOHANNES FLEERMUYS **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Fleermuys v The State* (CA 39/2013) [2013] NAHCMD 378 (21 October 2013)

Coram: GEIER J *et* PARKER, AJ

Heard: 21 October 2013 Delivered: 21 October 2013

Flynote: Criminal law - application for condonation for the late filing of an appeal - applicant had been sentenced to 17 years imprisonment on a charge of rape - in accordance with the provisions of Section 2(1)(a) of the Combating of Rape Act, Act 8 of 2000 - explantion for late noting of appeal held to be not reasonable - prospects of success on merits of appeal against conviction and sentence also not good - condonation refused - appeal dismissed.

Summary: The facts appear from the judgment.

ORDER

1. The appellant's application for condonation for the late noting of the appeal is hereby refused.

2. The appeal is dismissed.

RULING

GEIER J (PARKER AJ concurring):

[1] The appellant was arraigned on a charge of contravening Section 2(1)(a) of the Combating of Rape Act, Act 8 of 2000.

[2] He was convicted on 13 May 2011 and sentenced to 17 years imprisonment on 23 May 2011.

[3] A Notice of Appeal was filed only on 21 January 2013.

[4] An application for condonation in this regard was delivered on 7 October 2013.

THE EXPLANATION FOR DELAY

[5] In that application the appellant stated that he immediately, on 23 May 2011, instructed his legal representative Mr Coetzee, appointed by the Directorate of Legal Aid, to launch an appeal against his conviction and sentence.

[6] As the appellant was subsequently imprisoned at the Hardap Prison in Mariental, he had very little contact with the outside world. He thus only received occasional visits from his parents and his girlfriend.

[7] He had no contact with his lawyer since he was sentenced.

[8] His mother informed him however that the appeal had been noted and that she had made several visits in this regard to Mr Coetzee.

[9] Eventually and out of desperation his mother and sister went to see Mr McNally - that was on 7 November 2012 - who made enquiries and established that no Notice of Appeal had ever been filed.

[10] Appellant's mother apparently immediately instructed Mr McNally to note an appeal which so came to be filed on the 21st of January 2013.

[11] The sister of the appellant confirmed that Mr Coetzee had informed her that he had noted an appeal.

[12] She then went on to state that she, as well as her parents, had made enquiries to Mr Coetzee on almost a weekly basis. On each occasion they were informed that he was still awaiting a reply from Windhoek and that they had no reason to disbelieve Mr Coetzee.

[13] Eventually and out of desperation they went to see Mr McNally who was able to establish that no appeal had been noted. He was then instructed to do so.

[14] Mr Coetzee confirmed that he was instructed to note the appeal. He however explained that he had no authority to do so in terms of the procedure followed by the Directorate of Legal Aid and that all he could do, was to forward the record to his superiors, who would then decide whether there would be merits in the appeal.

[15] He thus couriered the record to Head Office on 24 May 2011.

[16] He acknowledged that he had received a letter from Mr Uirab, a colleague indicating that he could not read the record. He immediately arranged the record to be typed at his own expense, whereupon he forwarded it back to Mr Uirab.

[17] Mr Uirab from Legal Aid, in turn, confirms that Mr Coetzee wrote a letter to Head Office for a possible appeal sometime in May or the beginning of June 2011 as well as the receipt of the handwritten record of the matter which was forwarded to him for a decision. As he was unable to read the record he requested Mr Coetzee to have the record typed. This was apparently done, but the record, upon reaching the office of the Directorate of Legal Aid, was not given to him.

[18] During December 2012 he was contacted by Mr McNally, who informed him that he had received instructions to prosecute the appeal. When he thus started to look for the record he discovered that it had been misplaced/misfiled at the Legal Aid Office. Accordingly he only forwarded the record to Mr McNally in January 2013.

[19] When considering this application for condonation for the late noting of this appeal

against the applicable principles as set out for instances in S *v Ngombe*[1] or in S *v Nakale*[2] and thus the reasonableness of the explanation offered in this regard by the appellant the following shortcomings emerged:

(a) appellant failed to explain, whether or not, he, himself ever made any efforts from Hardap prison, through the available channels there, to ensure that his appeal had indeed been noted;

(b) from his affidavit it appears that he himself made no such efforts and that he left this task to his mother and sister who made several visits to Mr Coetzee;

(c) it took the appellant and his family some 18 months from May 2011 to November 2012 to become so desperate that they decided to see Mr McNally;

(d) it is unlikely that they went to see Mr Coetzee on an almost weekly basis for some 18 months in order to follow up and ensure that an appeal had actually being noted;

(e) no indication was given in regard to whether or not Mr Coetzee, who knew that he did not have the power to note an appeal, did in fact explain this to appellant or his family.

(f) it is unlikely that Mr Coetzee would not have informed the appellant and his family of this;

(g) it is also unlikely that Mr Coetzee, as Legal Aid counsel, would have miss- informed the appellant's family that an appeal had been noted, well- knowing that his superiors would first require the record to make a decision in this regard and in respect of which he was required to have the record transcribed;

(h) it is thus unlikely that the appellant or his family could have harboured or laboured under the misapprehension that an appeal was in fact noted;

(i) no dates or details are provided as to when the record was actually transcribed and sent to legal aid - Mr Coetzee says he arranged for the record to be typed at his own expense. Why then could he not provide some proof or other detail or a date in this regard;

(j) on the appellant's version Mr McNally was approached on 7 November 2012. Yet he only contacted Mr Uirab on an unspecified date in December 2013, informing him had received

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1 1990 NR 165 (HC) at page 166

2 2011(2) NR 599 (SC)

instructions to note an appeal. This delay of a further month is not explained;

(k) Mr Uirab then, on an unspecified date, says he started to look for the case record, which was forwarded to Mr McNally in January 2013. Mr Uirab does not say when he started to look for the record, how long it took to find the record, when the record was found and when it was sent to Mr McNally;

(l) we are not informed when Mr McNally received the record and how long it took him to formulate the Notice of Appeal, which was delivered on 21 January 2013;

(m) the application for condonation for the late noting of the appeal was only filed on 7 October 2012. No explanation for the delay in filing the application for condonation from January to October 2013 was provided in the application;
(n) at the hearing Mr McNally explained that he considered it best to launch the application at the same time as his Heads of Argument.

[20] Although one would, on a first reading of the explanation, for the extraordinary delay in noting this appeal, have felt that there was some reasonableness in the explanation, it however becomes clear, on closer analysis - and with reference to the above listed factors - that the explanation offered was very superficial and might even be untruthful in certain respects and that it did not really account for the inactivity of the relevant parties during long stretches of time.

[21] A court is obviously dependant on the explanation offered by a party seeking condonation. In order to determine the reasonableness of the excuse offered, the absence of a full, honest and detailed disclosure will obviously detract from the veracity of any explanation offered. In this case - and with reference to all the shortcomings in the explanation offered for the long delay - the conclusion cannot be made that such explanation is reasonable. The appellant thus fails to overcome this hurdle of the enquiry.

[22] In addition it is also clear that the particular degree of lateness - (and were it took one year and ten months for the filing of the Notice of the Appeal - in circumstances where a 14 day period is prescribed) - is severe.

AD THE MERITS

[23] The appellant also submits that he has reasonable prospects of success on appeal.

[24] In this regarded is correct to say that it is always the duty of the State to prove its case beyond reasonable doubt. The evidence of the State is that there was sexual intercourse between the accused and the complainant but that the complainant did not consent to have sexual intercourse. The appellant does not deny that he had sexual intercourse with the complainant but his position is that the sexual intercourse was consensual. While no onus rests on the appellant to prove his innocence, he still has an evidential onus on a charge of rape if he puts forward the defence that he had the consent of the complainant to have sexual intercourse with her, which she denies and that the State has adduced insufficient evidence to ultimately prove that there was no such consent.

[25] As the learned magistrate in the court below stated, consent can be by conduct. It can also be given expressly. The learned magistrate did not find any evidence tending to show any basis for the appellant's belief that the complainant did consent to the sexual intercourse. He also did not find her untruthful. In any case the complainant's un-contradicted evidence was that accused tried to lie on her but she pushed him away and folded her legs to her chest - *'but he straightened them, removed my underwear with his hands and he put his penis into my vagina '.*

[26] Apart from this direct evidence, the evidence of the surrounding circumstances after the sexual intercourse are equally weighty. The complainant immediately informed her friend that the appellant had raped him and that friend told the complainant's aunt who in turn told the complainant's mother. It is not a case where, after consensual sex, the victim awaits until she is questioned by a parent or husband and then, in order to cover up what was consensual sex with another, person, incriminates the accused person. The fact that the complainant pushed the appellant away and folded her legs to her chest ought to have put the appellant on notice that the complainant was saying 'no' to the appellant wanting to have sexual intercourse with her.

[27] From the totality of the evidence it would seem that appellant was of the unjustified view that the complainant wanted to have sexual intercourse with him. If that was indeed the case, why would the complainant push the appellant away and fold her legs to her chest, necessitating, the appellant straightening the complainant's legs in order to insert his penis into the vagina by moving the legs and her underwear to the side.

[28] Furthermore, on the appellant's version, the complainant did not ask or tell him to stop. The complainant's response was that she stopped him because I told him it was hurting but he just said: *'it is natural just lie (down). It will be over in a second'.*

[29] In general, an appellate court will not easily interfere with credibility findings and actual findings of the trial court unless an irregularity or misdirection by the trial court is established. Additionally what should guide an appellate court in an appeal, and where there has been no misdirection on law or fact by the trial court, the assumption is that trial court's conclusion is correct. The Appellate court will only reve4rse a decision were it is convinced that it is wrong.[3]

[30] Upon the authorities and on the facts we are not persuaded that the finding of the court below - that the complainant did not consent to sexual intercourse with appellant - can be faulted, or that there are reasonable prospects of success in this appeal on the merits.

[31] The appellant also states that the complainant did not contend, on her own version, that he tried to violently subdue her.

[32] There is no merit in this submission. The following appears from the record:

'Mr Alexander: Yes, - 'He tried to push me to the room but I loosen myself out of his hands.

Yes -

Then I went to sit on the couch again.

Yes -

He put me in a lying position and tried to pull down my trouser.

Yes -

Then I pulled it up and said 'please stop it'.

Yes -

Then he pulled out the trouser till the feet.

Yes -

I tried to turn myself to lie on the stomach.

Yes -

Then he turned me around again to lie on the back.

Yes -

He lied between my legs trying to kiss me.

Yes -

But I moved my face to the side.

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3 See for instance *R v Dlumayo & Ano* 1948 (2) SA 677 AD at 678

Yes -

He started opening his trouser.

Yes -

He removed my underwear with his hand.

Yes -

And put in his hands again in the vagina.

Yes -

I asked what are you trying to do?

Yes -

He said ‘just relax it is natural’.

Yes -

Then he took out his penis from the underwear.

Yes -

He just removed my underwear again with his hands.

Before you proceed you said he took out his penis from his underwear, then he removed again his underwear with his hands - No, he removed my underwear.

Okay, he took out his penis from his underwear.

Yes -

And then he removed my underwear with his hands,

Yes -

I was asking ‘what are we trying to do?’

Yes -

He did not answer me.

Yes -

I tried to lie on him.

Sorry?

He tried to lie on me but I pushed him away and folded my legs to the chest.

Yes -

But he straightened them.

Yes -

He removed my underwear again with his hands,

Yes -

He put in his penis into my vagina.

Yes -

I was trying to push him away but I was too weak to get that right.

Yes -

The time when I was about to cry he stood up, closed his trouser.

Yes -

And said I must not be angry with him, we will continue another day.

Yes -

Then he went out then he went home.'

[33] This extract from the record shows that the appellant - contrary to the appellant's contentions - used some degree of force to subdue the complainant.

[34] It shows a struggle until the appellant had achieved his aim.

[35] Appellant goes on to aver that on complainant's own version he did not subject her to violence, assault or threats of assault.

[36] The above quoted passage however shows the degree of force used by appellant to overcome the complainant's resistance. That evidence shows that there was a degree of force in the form of coercion. It is true that there was no violent assault or threats to that effect, but rather, and in addition, that the appellant tried to achieve this object by pacifying the complainant by stating:

'Relax it is natural.'

[37] In this regard sight should also not be lost of the fact that the appellant here tried to induce a 14 year old girl to succumb to his advances through trickery. Such course of conduct is just as despicable as if violence would have been utilized to overcome the resistance of a young girl.

[38] Also the fact that the complainant came to sit alongside the appellant before the incident and that she easily evaded his attempt to take her to her parents room do not enhance the appellant's prospects of success:

a) Firstly, the complainant and appellant were familiar with each other. Their families had been in regular contact with each other for a couple of years.

b) Secondly, the complainant was also quite unsuspecting and did not immediately cotton on to the appellant's intentions.

[39] Her unsuspecting actions, seen in this light, thus cannot exonerate the appellant.

[40] All the factors and arguments advanced in the application for condonation - in support of the appellant's submissions that he has good prospects of success on the merits of his appeal - are therefore exposed to be lacking.

AD SENTENCE

[41] The appellant was sentenced with reference to the minimum sentence prescribed by Section 3(1)(a)(iii)(cc) of the Combating of Rape Act 2000[4], which prescribes a minimum sentence of not less than 15 years, unless the existence of 'substantial and compelling circumstances' would justify the imposition of a lesser sentence.[5]

[42] In this regard the following factors were advanced in the application:

> '(a) I am a first offender.
>
> (b) I was the sole breadwinner of my family,
>
> (c) I was gainfully employed at the time of this incident.
>
> (d) It took some 5 years for the matter to go on trial and on top of that I received the sentence of 17 years imprisonment.'
>
> (e) The expert could not establish a link between complainant's allegations that she was traumatized as a result of the alleged incident.'

[43] The first three of these grounds, although relevant to sentence, clearly do not constitute 'substantial and compelling reasons' justifying any departure from the prescribed minimum sentence, even if cumulatively viewed.[6]

[44] The fourth ground would have carried significant weight if the appellant would have found himself in 'trial- awaiting- custody' for a period of some years. This did however not occur and the mere fact that he most probably felt some anxiety or stress, awaiting his trial,

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4(1) Any person who is convicted of rape under this Act shall, subject to the provisions of subsections (2), (3) and (4), be liable-

(a) in the case of a first conviction- (i)

(")

(iii) where- (aa)

(bb) ...

(cc) the complainant is under the age of eighteen years and the perpetrator is the complainant's parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant;

(dd)to (ff)

to imprisonment for a period of not less than fifteen years;

5 See: section 3(2)

6 See for instance : S *v Lopez* 2003 NR 162 (HC) (2004 (4) NCLR 95 at 116, S *v Limbare* 2006 (2) NR 505 (HC) at [9}

(while on bail), during that period, and although a factor, surely can also not be regarded as ‘substantial and compelling’.

[45] It is correct, as pointed out by appellant, that both Dr Hoffman and Mr Manfred Jannik, could not link the complainant’s panic disorder to the incident. This was because of the simple fact that no previous medical/psychological records were available (for comparison).

[46] However this does not mean that the direct evidence - given by the complainant - in regard to the effects felt by her - since the incident - and the impact that the incident - according to her - had on her life - could just simply be ignored.

[47] In this regard she testified that she underwent counselling subsequently and that she started to play with dolls. She complained that even at the time of the trial, when she was 19 already, she could not sleep without a doll in her hands. The thought of the upcoming trial also caused her stress. She described how she would get sick when she would dream about the incident. She was given ‘Leponex 50’, an anti-depressant, in addition to ‘Paxil’.

[48] These effects (on the complainant’s life) - in our view - would rather impact, on the Appellant’s sentence, in an aggravating fashion, rather than justifying a lesser sentence.

[49] In the sum total - the conclusion must be drawn - that the appellant also was not able to show good prospects of success on appeal in regard to sentence in the application for condonation.

[50] During oral argument Mr McNally also tried to push home the point that the complainant’s evidence, as a single witness, was not corroborated in material respects and that, particularly, the almost immediate complaint by the victim, after the incident did not amount to corroboration in a material respect of her version on the merits and that there was no reason why the appellant’s version should be rejected.

[51] It should immediately be stated, as was pointed out by my brother, that this submission would hinge on the enquiry of what is material.

[52] Obviously the admissibility of the complaint - after the incident - as allowed by Section 6 of the Combating Rape Act 2000 - would amount to a relevant fact. Whether such fact amounts to a material fact is normally determined with reference to all the other facts - also taking into account the delay between the commission of the offence and the delaying of a

complaint. The taking into account of the delay between the commission of the offence and the complaint can however not form the only basis for any inference to be drawn there from.

[53] When viewed against this background it emerges that the complainant resisted the advances of appellant. Objectively speaking it is also unlikely - and contrary to the appellant's evidence given in this regard - that he was able to penetrate the complainant fully. Not only is such a finding commensurate with the evidence of resistance offered in this regard but the appellant's version would also be in conflict with Exhibit H, which directly contradicts the appellant on this score.

[54] The medico- legal report recorded semen on the *vulva* and the *labia minora.* Although the hymen was open, the vagina - as would be commensurate with complainant's age - was *'one little finger, which, on examination, was painful'.*

[55] Importantly bruising of the *fourchette* was also noted.

[56] The medical evidence thus proves, in our view, that there was no full penetration.

[57] The only reason for the appellant to misrepresent this central part of his evidence - and thus of his defence - must be for the reason that a tale a full penetration would perfectly fit into the picture of the alleged full consensual intercourse. The medical evidence however does not strengthen the probabilities of the appellant's case in this regard - on the contrary - it rather destroys this central facet of his case.

[58] On the other hand, the medical evidence materially enhances and corroborates the complainant's version in a material respect.

[59] If one thus considers, in addition, that the appellant also admitted - during the plea explanation - that he understood that he had hurt the complainant - it becomes clear that this aspect of the appellant's case just simply cannot be reasonably possibly be true.

[60] If one then views the proximity of the complaint to her friend and the fact that the complainant was crying, at the time, identifying the appellant as the perpetrator without waiver, then a negative inference from this evidence can also be legitimately be drawn against the appellant, which inference at the same time affords some material corroboration for the complainant's evidence given as a single witness.

[61] In addition - and also on the merits of the sentence and although a substantial period of imprisonment was imposed, we cannot - in the circumstances of this case - find that it induces a sense of shock. In this regard the minimum sentencing regime of the Combating of Rape Act - in the absence of any ‘substantial and compelling circumstances’ - and - which would then not permit a departure from the prescribed 15 year minimum sentence - cannot be disregarded. The magistrate in the court a quo imposed two years over and above that statutory minimum sentence. The relationship of the complainant and the appellant was correctly found to be an aggravating factor, given also the age discrepancy and the fact that they knew each other and also had some knowledge of each other’s the domestic circumstances. We also cannot say that the learned magistrate was not entitled to take into account the evidence tendered in regard to the effect that the incident had on the complainant. I again refer to what has been stated in this regard above. In any event it is unlikely that the incident would have left no emotional scars on the complainant. This impact on the psychological well-being of the complainant would always have been a relevant aggravating factor in the imposition of any sentence.

[62] It is further important to keep in mind that the appellant never testified in mitigation and that also - all the other factors - advanced in mitigation - do not amount - and do not render the ultimate sentence imposed on appellant startlingly inappropriate in the circumstances of this case.

[63] As the appellant therefore, in the final equation, has failed to provide a reasonable explanation for his default and was also not able to show good prospects of success on the merits of this appeal, we refuse to grant the condonation sought and also deem it appropriate to dismiss this appeal.

H GEIER

Judge

C PARKER Acting Judg

eAPPEARANCES

APPELLANT:	P McNally c/o Delport Attorneys, Windhoek
RESPONDENT:	K Esterhuizen, Office of the Prosecutor-General, Windhoek