

REPUBLIC OF NAMIBIA

NOT REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT**

CASE NO.: CA 29/2015

In the matter between:

SAGARIA GOWASEB

APPELLANT

And

THE STATE

RESPONDENT

Neutral citation: *Gowaseb v State* (CA 29/2015) [2016] NAHCMD 124 (21 April 2016)

CORAM: SIBOLEKA J AND USIKU J

Heard on: 11 March 2016

Delivered on: 21 April 2016

Flynote: Criminal Law – A Legally represented appellant in the Court *a quo* filed

appeal five months out of time – Reason for being illiterate is misplaced – Rules are generally applicable to everybody alike.

Summary: During May 2011 the then 44 years old appellant sexually assaulted an eleven year old complainant.

Held: Evidence that appellant committed the crime is solid, sentence is also in order.

Held: In the result the appeal against conviction and sentence is dismissed.

ORDER

In the result the appeal against conviction and sentence is dismissed.

APPEAL JUDGMENT

SIBOLEKA J, (USIKU J concurring):

[1] This is an appeal against conviction and sentence.

[2] At the hearing the appellant was on his own and Mr Lutibezi appeared for the respondent. The court appreciates counsel's arguments in this regard.

[3] On 5 July 2013 the appellant was convicted of rape, read with the provisions of the Combating of Rape Act 8 of 2000 in The Regional Court, Otjiwarongo and sentenced to 18 years imprisonment. Notice of Appeal and application for condonation was filed on 2 December 2013, five months out of time.

[4] Mr Lutibezi correctly in my view raised a point *in limine* at the start of the

proceedings that the reasons he relied on being 'illiterate'; does not have knowledge of legal terms; he was still looking for people with knowledge to assist him, were not satisfactory.

[5] Rules are generally promulgated to apply to everybody alike in order to avoid the abuse of process. In this case the appellant has not been truthful because he was legally represented during the trial of the matter in the Court *a quo*.

[6] It follows therefore that the appellant has failed to provide a reasonable and acceptable explanation for the late filing of his notice of appeal. His appeal stands to be dismissed on this reason alone, but for the sake of clarity and completeness I will examine whether there is merit in the appeal.

[6.1] The appellant has mitigated instead of setting out clearly and specifically the grounds on which the trial Court has misdirected itself regarding conviction and sentence, as required by Rule 67(1) of the Magistrate's Court Rules.

[6.2] I will now briefly look at the evidence placed before the trial Court during trial.

[7] Engelhardine Gowases testified that the then eleven years complainant is her stepdaughter. The appellant is her brother-in-law and is known by the name Obeb. They all reside at Nanibe Plot 3 in Kamanjab. The appellant was also working there. In May 2011 she noticed that the complainant did not sit straight on her buttocks but more to her thigh and to the side. She looked on her panty and found a discharge. She asked her what happened. She was told the appellant took her along to go and look for firewood. It was there that he had sexual intercourse with her. According to Gowases the complainant told her that the accused sexually assaulted her twice.

[7.1] For fear that she may fall pregnant or contract sickness she related the

incident to her boyfriend (the victim's father) and he confirmed that in his evidence. They took the complainant to the hospital where the doctor examined her. The police were also informed and the appellant was arrested. Gowases was already staying with the complainant for three years at the time of the incident. The complainant did not tell her anything before being asked because the accused said he will beat her if she did so.

[7.2] During cross-examination Gowases testified she also saw the accused taking the complainant to Ou Blom's house where he got an axe and could see them leaving to go and look for firewood. She again saw them when they returned. Gowases conceded that she acted stupid when she allowed the complainant to take a bath and to wash her panty before examination.

[8] Dr. Kambungu testified he examined the genitals of the complainant and found that there was no hymen, two fingers were used during examination, meaning there was already sexual penetration. There was a skin discoloration (bruising) of both labia minora and majora. No HIV or pregnancy was detected. He concluded that the complainant was sexually assaulted.

[9] Annamarie Namaro Dawid is the complainant. She testified that the appellant sent her to collect an axe, and told her they must go into the veld to look for firewood which they did. It was there that the appellant put his shirt on the ground and had sexual intercourse with her twice. The appellant was residing at Uncle Drom's house at the farm.

[10] Springbok testified he was a sergeant in the police, stationed at Kamanjab. He is the investigator in the matter. Upon receiving the report of rape he went to Nanibe Post. He found the complainant and her parents. The interview he conducted showed that the appellant sexually assaulted the complainant in the veld where he took her to look for firewood. The complainant took the officer and her parents to the second scene of the crime of rape.

[10.1] At the scene of crime between the rocks she told the officer that before the intercourse the appellant took off his T-shirt, put it on the ground and told her to lay on it, which she did and it was there that they had sexual intercourse. The officer found sense and connection between the sexual report and the scene of crime itself. While at the scene she also pointed out the wood the appellant was chopping. The officer caused the scenes to be photo taken. These photos were handed in the Court *a quo* during the trial.

[10.2] As to who raped her she told the officer it was Obeb, the other name of the appellant. On 29 June 2011 the officer took the appellant and the complainant 'to Outjo State Hospital' for examination by the doctor. Almost a month had gone by since the rape on 23 May 2011. Dr. Kambungu said a rape kit examination was no longer possible, and only the J88 examination was conducted on the complainant.

[11] Sakarias Gowaseb is the appellant. He confirmed he worked at Nanibe Plot from 11 May 2011. He was arrested on 29 June 2011 for the rape. He contends that the case was made against him because of problems between him and the father of the complainant, his brother. This contention was displaced when he was cross-examined by the prosecution counsel. It surfaced it was in fact the complainant's father who secured work for him, and he stayed at his house. The appellant's contention of maliciously being framed were found to be untruthful.

[12] In its reasons for conviction the trial Magistrate stated that in Court during the complainant's evidence in chief she appeared to be a bit of a slow child of a very vulnerable age (eleven years). She seemed to be very scared, very uncomfortable and hesitant to testify. The trial Court then asked all male police officers to leave the court room, and the appellant to move a bit and sit where the complainant did not see him. After this arrangement the complainant became relaxed and gave a proper account of what happened to her on the day of the incident. She testified that the appellant was her uncle, and that it was him 'who

took her to veld to look for firewood and raped her'. The trial Court found that her story was satisfactory and convicted the appellant for rape.

[13] From the above it is very clear that the appellant was properly convicted.

[14] On sentence the trial Court took into account the personal circumstances of the appellant, the crime, and in particular the fact that the victim was only eleven years old at the time of the incident. Also considered was the fact that the appellant was not remorseful of what had happened; he was her uncle entrusted with a duty to protect her but instead, he sexually assaulted her.

[14.1] Section 3 of the Combating of Rape Act, 8 of 2000 states the following:

“Penalties

3. (i) ...

(a) ...

(ii) ...

(iii) where –

(aa) ...

(bb) the complainant –

(A) is under the age of thirteen years; or

(B) is by reason of age exceptionally vulnerable;

...

To imprisonment for a period of not less than fifteen years”.

[14.2] It is therefore my considered view that the trial Court did not misdirect itself on sentence.

[15] The decision of the trial Court regarding conviction and sentence cannot be interfered with.

[16] In the result the appeal against conviction is dismissed.

A M SIBOLEKA
Judge

D N USIKU
Judge

APPEARANCES

APPELLANT : In Person

RESPONDENT : Mr C. K. Lutibezi
Office of the Prosecutor-General, Windhoek