



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: CA 121/2016

In the matter between:

**FERDINAND HEI-GAUSEB**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Hei-Gauseb v S* (CA 19/2017) [2017] NAHCMD 294 (16 October 2017)

**Coram:** SIBOLEKA J and USIKU J

**Heard:** 23 August 2017

**Delivered:** 16 October 2017

**Flynote:** Criminal law – Appeal against conviction and sentence on one count of rape – Appellant sentenced to 10 years imprisonment – No substantial and compelling circumstances to allow the court to deviate from the minimum sentence in terms of the Combating of Rape Act 8 of 2000 – Conviction and sentence in order.

**Summary:** The appellant appeared in the Regional Court at Swakopmund facing three charges of Rape in contravention of section 2 as read with section 1, 3, 4, 5, 6 and 7 of the Combating of Rape Act 8 of 2000. After the trial he was convicted on one count whereafter he was sentenced to 10 years imprisonment. He was acquitted on the two counts as there was no proof beyond reasonable doubt that the complainant had been raped three times on the date of the incident.

Held: There was corroboration by the state witnesses to whom the complainant had made a report of being raped by the appellant immediately after the incident.

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### ORDER

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The appeal against both conviction and sentence is dismissed.

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### APPEAL JUDGMENT

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**USIKU J, (SIBOLEKA J concurring)**

#### INTRODUCTION

[1] The appellant was charged with the crime of Rape in contravention of the Combating of Rape Act 8 of 2000. After a trial, he was convicted on one count of Rape but acquitted on the two other charges as there was no sufficient evidence to prove that the complainant was raped on three occasions by the appellant. The appellant was thereafter sentenced to 10 years imprisonment.

[2] Aggrieved by the conviction and the sentence he now appeals against both. The appellant appeared *in person* while the respondent was represented by Mr Kumalo.

[3] At the outset the respondent raised a point in limine to the effect that the notice of appeal was filed out of time. In terms of the Magistrates Court Rules a notice of appeal must be filed with the clerk of the court within 14 days of the date, of sentence or order. It is evident from the record of the proceedings that the appellant only filed his notice of appeal some 8 months later, after his sentence conviction on the 6<sup>th</sup> of March 2015.

[4] The appellant has failed to comply with the rules of the court and could not give a reasonable explanation. Therefore on that score alone the matter stands to be struck from the roll.

[5] However for the purposes of completeness the court allowed the matter to be argued on merit.

## **THE GROUNDS**

[6] Four grounds of appeal are as follows:

That the court erred in rejecting the appellant's evidence as being untruthful and failed to have regard to the testimony of the medical doctor;

That the court had misdirected itself by convicting the appellant when the state had failed to discharge the onus beyond reasonable doubt that there was a lawful charge made and presented to the court of an unlawful sexual act;

The conviction is based on his legal representative's conclusions.

[7] I will now look at the evidence presented before the court a quo by state witnesses.

Vistorine Ngairo is the complainant's mother. She knows the appellant, a relative to her husband. He has been visiting at their home. Whilst busy making fire on the 30<sup>th</sup> March 2013, the complainant approached her and informed her that the appellant

has raped her. She further informed her that she was cut by a wire and her top was torn at the he grabbed her. The complainant specifically mentioned the appellant name as the person who sexually violated her. She further explained that the appellant had taken her to his house and raped her there. The witness observed her torn blouse and she appeared to be in a state of shock. She decided to take the complainant to the police station where she reported the matter and opened the case. From the police station they were taken to the hospital for an examination.

[8] Complainant's mother further testified that the appellant had approached her to ask for an apology for the wrong he has done. After the alleged incident.

[9] During cross-examination the defence of consensual sex was denied.

[10] Fransiska Ngairo is the complainant in this case. She knows the appellant through her stepfather. He had been assisting them on the farm. The appellant is not related to her at all. On the 30<sup>th</sup> March 2013 she was in the company of her two friends when the appellant offered to escort her home. She agreed because she knew him well. They went towards an uncle's place and as they reached the yard, the appellant changed his attitude towards her and started to touch her and push her down.

[11] As she tried to jump over the fence in order to go to the opposite side, the appellant pulled her down and she got hurt on her left hand by the wire fence. The appellant then managed to pull her back to the ghetto room, and she struggled with him to free herself. In the process she again got hurt on her right hand by the wire fence. The appellant managed to get her into the ghetto, which he then locked up from the inside.

[12] Inside the ghetto the appellant succeeded to pull down her trouser and placed her on the bed opened her legs, put his penis into her vagina and started to have sexual intercourse with her. He started to make up and down movements, while she continued to struggle in protest. When he was done he threatened to kill her if she talked about what had transpired. He opened the door to the ghetto. The complainant walked out holding her trouser in her hands. She put it on while

confronting the appellant about the incident. She run straight to her house, where she informed her mother about what had happened.

[13] They left for the police station to report the rape. She was then taken to the hospital where she was examined by a doctor. The complainant identified the place where the incident occurred. She denied that she consented to the sexual intercourse.

[14] Simson Nderura confirmed to have met the complainant as she went to his auntie's home. She only wore an underwear. The complainant informed him that she was raped. She then entered the ghetto and dressed herself in jeans.

[15] Dr Sebastian a medical officer at the Omaruru state hospital testified that on 30<sup>th</sup> March 2013 he attended to a rape victim.

[16] The complainant was stable. He observed some injuries on her both hands which measured 3 centimetres on the right and left hands. He also observed lacerations on the right palm of her foot. There were fresh lacerations. During examination he noticed fresh blood from the vagina, and the hymen was not in place. He could not rule out that the bleeding may have occurred after sexual intercourse.

[17] Ferdinand Hei-Gauseb is the appellant in this case. His testimony is that on the 30<sup>th</sup> March 2013 the complainant was involved in a fight with somebody. He helped in separating them and he took her away, but her assailants still followed them. As they walked home, the complainant to entered the yard by climbing on the fence despite being warned about the barbed wire. In the meantime people who followed them started throwing bottles at them.

[18] According to the appellant they went into the yard to drink water, after which they went to a ghetto where the complainant asked that they should sleep there and cuddle. The appellant could however not do as requested because his body was tired. The complainant accused him of being a bad men and said if he failed to do as requested, she would report him for rape. She further said also told him that when after leaving the place she will inform any person she met that she was raped.

[19] The appellant denied to have had sexual intercourse with the complainant as alleged. His version is that the complainant got injured when she was running away from a group of people who were chasing after them as he escorted her from the pub. She lied about being raped.

[20] It is common cause that the appellant was at the pub where he met the complainant on the night of the 30<sup>th</sup> March 2013. It is also not in dispute that during that evening the complainant was drinking with friends when a certain Charles approached her and attempted to grab her by the hands in order to get her out of the pub. That was the reason the appellant intervened, offering to escort her home.

[21] The appellant, spent night in the shack with the complainant. He only denies he had sexual intercourse with her during that evening. After being, set free in the early morning hours of the morning she immediately reported to Ndrerura that she was raped by the appellant. At the time she only wore an underwear and was crying.

[22] The trial court relied on the evidence of the complainant, her mother and that of Nderura to whom the complainant had made the first report of being raped. There is evidence that the appellant had offered to apologise for his wrong doing. The evidence of the complainant that at the time she left the shack her clothing was torn and that she only had her underwear on, is not in accord with the appellant's version that they had consensual sexual intercourse. At the same time the appellant denied to have had sexual intercourse with the complainant at all, thereby contradicting his earlier admission that they had sexual intercourse that night.

[23] The doctor, could not specifically state that the bleeding he had observed on the complainants' vagina was as a result of forceful sexual intercourse but he could also not rule that out. The trial court in my considered view correctly concluded that the state has proved its case beyond reasonable doubt. It follows therefore that there is no reason for this court to come to a different conclusion. I am accordingly not persuaded to accept that the learned magistrate misdirected herself either on the facts or the law when she rejected the appellant's version.

[24] Coming to the ground that the learned magistrate over-emphasised and gave more weight to the seriousness of the offence and the interest of justice, in sentencing the appellant, the trial court took into account his personal circumstances that at the time of the crime he was 22 years old, he was single and had no dependants. He was also not employed.

[25] In terms of the Combating of Rape Act 8 of 2000, where the rape is committed under any of the coercive circumstances referred to in paragraph (a) (b) or (c) of subsection 2, the penalty provided is a term of imprisonment for a period of not less than 10 years. In the instant case the complainant was sexually assaulted and the sentence imposed is in accordance with the law.

[26] Accordingly the trial court did not misdirect itself when it convicted and sentenced the appellant to a term of imprisonment of 10 years.

[27] As a result the appeal against both conviction and sentence is dismissed.

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D N USIKU  
Judge

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A SIBOLEKA

APPEARANCES

RESPONDENT: Mr Kumalo  
Of the Office of the Prosecutor-General, Windhoek

APPELLANT: In Person  
Ferdinand Hei-Gauseb  
Windhoek Correctional Facility