REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CRI-APP-CAL-2018/00058

In the matter between:

GERMANS VENOMUINJO JERZURURA **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Jerzurura v S* (HC-MD-CRI-APP-CAL-2018/00058) [2019] NAHCMD 124 (29 April 2019)

Coram: LIEBENBERG J and D USIKU J
Heard: **05 April 2019**
Delivered: **29 April 2019**

Flynote: Criminal Procedure – Appeal – Witness statement drafted by police officers – Witness statements drafted by police officers not all-inclusive – Material deviation by witness from the police statement where no satisfactory explanation can be provided – Adverse inference to be drawn.

Criminal procedure — Appeal — Appeal based on question of fact — Approach of appeal court – Trial court having advantages which court of appeal cannot have, namely seeing and hearing witnesses and being steeped in atmosphere of trial — Court of appeal slow to interfere with trial courts findings – However court of appeal permitted to disregard trial court's finding on credibility where other facts or probabilities have been overlooked.

Summary: The appellant was charged and convicted in the court *a quo* on two counts of rape and another count of assault with intent to do grievous bodily harm. The trial court was faced with two mutually destructive versions. The trial court accepted the complainant's version on the basis that it was corroborated by the medical evidence and the evidence of two security guards who witnessed the assault. The appellant did not dispute assaulting the complainant but claimed that it happened consequential to an attack on him by the complainant. The thrust of the attack against the appellant's conviction is directed at the trial court's evaluation of the evidence and finding that the complainant was a credible witness, despite material contradictions in her evidence.

Held, that witness statements drafted by police officers are often not all-inclusive, which does not in itself mean that certain events excluded from the statement did not take place. The witness can give an acceptable explanation, not gainsaid by anyone.

Held, further that, instances where the court would be entitled to draw an adverse inference is a material deviation by the witness from the police statement for which no satisfactory explanation could be provided.

Held, further that, the trial court has advantages which the appeal court cannot have, namely seeing and hearing the witnesses and being steeped in the atmosphere of the trial. Thus a court of appeal will be slow to upset the findings of the trial court.

Held, further that, appeal court permitted to interfere where trial court overlooked certain facts and probabilities.

ORDER

1. The application for condonation is granted.
2. The appeal against conviction on counts 1 and 2 is upheld.
3. The appeal against conviction on count 3 is dismissed.

JUDGMENT

LIEBENBERG J (D USIKU J concurring):

[1] The appellant was arraigned in the Regional Court sitting at Katima Mulilo on two counts of rape in contravention of s 2(1)*(a)* of the Combating of Rape Act, 2000[1] and one count of assault with intent to do grievous bodily harm. He pleaded not guilty to all counts but after evidence was heard, he was convicted as charged and sentenced effectively to 26 years' imprisonment. Aggrieved by the conviction, the appellant lodged an appeal.

[2] The appellant was sentenced on the 5th October 2012 but only filed the notice of appeal with the Officer in Charge at Oluno Correctional Facility on the 15th October 2015, just short of three years out of time. Appellant simultaneously filed an application for condonation of the late filing of his appeal in which he explains the delay in noting the appeal.

Amended notice of appeal and condonation

[3] Subsequent thereto the appellant has also filed an amended notice of appeal on the 21st February 2019, a further four years after lodging the appeal. Annexed thereto is the same application for condonation earlier filed

[1] Act 8 of 2000.

and again relied upon to explain the late filing of the amended appeal. The latter obviously relate to different time frames and reasons than what he was required to explain for the period 2015 to 2019. In response, the respondent raised a point *in limine* taking issue with the condonation applications which, it was argued, clearly fell short of providing a reasonable and acceptable explanation for the appellant's failure to comply with the rules of court. Moreover, no dates or any specific explanation of issues that arose during the relevant periods were set out or explained, and how it precluded the appellant from filing a notice timeously.[2]

[4] Mr *van Vuuren,* for the appellant, countered by arguing that from the record it is evident that the appellant from the outset intended appealing against conviction and instructed a legal practitioner to note an appeal. The appellant was thereafter informed by his erstwhile legal representative that a notice of appeal had been filed of which a copy was faxed to the appellant on 12 June 2014. He then waited to be informed of the hearing date of the appeal. Upon further inquiry with the High and Regional Courts, he was informed that no notice of appeal had been filed. Being a layperson and with the assistance of a fellow inmate, he then drafted the notice before court in August 2015, and handed it to the Officer in Charge at Oluno Correctional Facility.

[5] It was argued on the appellant's behalf that, given the circumstances of the appellant, he gave a reasonable and acceptable explanation for his non-compliance on oath in the accompanying affidavit. Furthermore, regard being had to the evidence adduced, the grounds relied upon in the notice of appeal, in itself, constitute reasonable prospects of success on appeal.

[6] As for the amended notice of appeal, this was merely a condensed format of the grounds already set out in the notice of appeal without any addition of new or further grounds having been made thereto. This much Mr *van Vuuren* conceded and in light of the defects in the accompanying

[2] See *Iyambo v S* (CA 25/2012) [2013] NAHCNLD 42 (02 May 2013).

condonation application having been pointed out to him, appellant decided to abandon the amended notice of appeal.

[7] In order to consider the second requirement of the application for condonation, namely, the prospects of success on appeal, the court reserved its ruling on the application and invited counsel to argue the matter on the merits.

Grounds of appeal

[8] The thrust of the attack against the appellant's conviction is primarily directed at the trial court's evaluation of the evidence and finding that the complainant was a credible witnesses, despite contradictions in her testimony and the lack of material, independent evidence in support thereof. In view of the complainant's evidence being single, it was said that the court should have followed a more cautious approach, given the material differences between her police statement and her testimony in court. Appellant was also of the view that the trial court should have given more weight to the complainant's failure or unwillingness to attempt to get away from the appellant in circumstances when this was possible, and even allowed him to drive her home after she had been raped. Lastly, appellant contends that the trial court committed a misdirection by finding corroboration in the evidence of the medical doctor for the alleged rape perpetrated against the complainant.

The trial court's findings

[9] The trial court delivered a reasoned judgment in which it made certain findings and concluded that the complainant gave credible evidence, corroborated by the evidence of two security guards who witnessed an assault perpetrated on the complainant and the medical evidence of Dr Sanjovo. The appellant's evidence was accordingly found to be false beyond reasonable doubt, and rejected.

The evidence: Two mutually destructive versions

[10] It is common cause that the appellant and the complainant only met on the night of 28 September 2007 at Desert Inn Lodge, Katima Mulilo, where she was employed as a cashier and the appellant being a customer who arrived from Rundu that same day. At the close of business around midnight, the appellant offered the complainant and her colleagues a lift home and she got into the front seat with the appellant. After the others had been dropped off only the complainant remained with the appellant and according to her, he wanted to show her where he was accommodated. Although she informed the appellant that she did not want to go with him, she remained seated when they reached the RCC premises where the appellant was accommodated in one of the mobile park homes (caravans) during his stay in Katima Mulilo. The place was guarded by security guards at the gate who allowed them access. What happened thereafter between the appellant and the complainant resulted in the laying of charges against the appellant, and his subsequent arrest.

[11] From the complainant's evidence it is not entirely clear as to why they ended up inside the RCC camp, while it is the appellant's version that she was willing to spend the night with him and they willingly entered the caravan together. According to the appellant it was whilst undressing that the complainant remarked that he had to pay her N$1 000, upon which he enquired whether she was a prostitute. She hit him with a bottle on the side of his head and he then pushed her outside the caravan. In the process his finger ended up in her mouth and she bit him. He struggled to take his finger out of her mouth and when not succeeding, he hit her in the face with an open hand and also kicked her. It was at this stage that the security guards arrived and the fighting stopped. While he was cleaning the blood from the wound on his head the complainant was talking to the security guards. She turned back to him and they went to the tap where she cleaned the blood from his finger and apologised for injuring him on the finger. They then fetched her bag and shoes from the caravan and he dropped her off. It was then that she said she would make a report of rape against him. Appellant therefore maintains that there was no sexual act committed with the complainant.

[12] The complainant's version of events preceding the fight and what followed thereafter are remarkably different. In her evidence in chief she said that after the appellant alighted from the vehicle he told her to disembark but that she refused. He then mentioned about him having given N$20 to her brother Kareb so that the complainant could accompany the appellant. She eventually disembarked from the vehicle and proceeded to walk home, going in the direction of the gate they had just entered through. The appellant followed and tried to hold her back on her shirt and pulled her. He then hit her with the fist in the mouth, tearing her lip open. She fell onto her stomach and he then stepped with his foot on her back. Her screaming and shouting alarmed the security guards who still found the appellant 'stamping his feet' on her back while holding her on the shoulder. He continued to twist her arm. While twisting her neck his finger entered her mouth and she bit him. She asked the security guards for help but they refused, claiming that they did not know the circumstances that brought her there. According to the complainant the appellant informed the security guards that he had paid her money, to which they suggested she go with him so that they could talk it through. She refused to go with him but he forced her to go with him. The appellant led her to a tap nearby where she cleaned the blood from her face before they entered the caravan.

[13] There the appellant complained about the injury to his finger and slapped the complainant. He told her to undress and threatened to shoot her; she did not see a firearm on him. He then had sexual intercourse with her lasting several hours where after they moved to another caravan and he again had sexual intercourse with her. Both occasions were without her consent. At around 05h00 the appellant dropped her off at home and she immediately phoned her uncle Tshoomwe and one Masule.

[14] During cross-examination the complainant changed her version on material aspects of her evidence which was left unexplained.

[15] In her statement to the police – which was not disputed – the complainant stated that when they stopped at his place, the appellant first entered the caravan while she remained seated in the car. When questioned

as to why she did not use the opportunity to disembark and leave, she explained that she could not, as the car was parked right next to the caravan. The complainant was confronted with a further discrepancy in that her statement reads that the appellant (forcefully) pulled her out of the vehicle and told her to accompany him into the caravan, to which she responded that she was not pulled from the vehicle, but inside the caravan at a later stage. However, she did not testify about such incident and neither did any of the security guards give evidence to that effect. On this point she also testified that the appellant, whilst still outside and during the assault, threatened to shoot her if she did not enter, while in her main evidence the threat was only made inside the caravan when instructed to undress.

[16] There are also marked differences in the nature and extent of the assault. Opposed to the complainant disembarking from the vehicle and walking towards the gate when pulled on her clothes and knocked down by a fist blow, she testified under cross-examination that she tried to run away when the appellant blocked her way and she fell down. He started kicking her. In chief she said that while she was down lying on her stomach, the appellant was ‘stamping his feet’ on her back and held her by the shoulder. It was when he twisted her head that his finger ended up in her mouth and she bit him. In cross-examination she changed her version to say that the biting took place inside the caravan, which is rather consistent with the appellant’s version of the fight between them.

[17] As regards to the second incident of rape, the statement made to the police makes no mention of them having moved to the second caravan as the complainant testified in court. It only reads that a short while after the first sexual intercourse, the appellant got on top of her and penetrated her for a second time. She replied that she mentioned everything in her statement.

The trial court’s approach

[18] In its assessment of the evidence, the court *a quo* was mindful of the onus of proof lying with the state and that a cautious approach had to be followed when evaluating the single evidence of the complainant. The court was further satisfied that the complainant stuck to her version of the events

that night throughout and that her evidence was supported by the independent testimony of other witnesses in all material respects. Heavy reliance was placed on the evidence of the two security guards, particularly them having witnessed the assault and that the complainant wanted to leave which lent credence to her not wanting to accompany the appellant in the first instance.

[19] From a reading of the record it is evident that there are contradictions between the state witnesses and that of the complainant. Discrepancies between the complainant's evidence and the contents of her witness statement to the police were in particular identified during cross-examination. This is not unusual, neither surprising. When dealing with the police statement the approach to be adopted was described in *S v Mafaladiso en Andere.*[3] It is the experience of the court that witness statements drafted by police officers are often not all-inclusive, but does not in itself mean that certain events excluded from the statement did not take place, or is a recent invention by the witness. The witness could give an acceptable explanation, not gainsaid by anyone. There are however instances where the court would be entitled to draw an adverse inference from a deviation from the previous statement. This would be where there is a material deviation by the witness from the police statement for which no satisfactory explanation could be provided.[4]

[20] Except for the court's bold finding that the complainant stuck to her version, there is nothing in the judgment showing that the court even identified or considered the discrepancies in her evidence as pointed out above. Not only did the complainant contradict herself on aspects directly bearing on the alleged rape incidents, but was also unable to satisfactorily explain her earlier version reflected in her statement made to the police. In its evaluation of the evidence the contradictions and discrepancies between the complainant's evidence and her earlier statement to the police were clearly not taken into account when finding her a credible witness. It would thus appear that the court simply accepted that because there was evidence of an assault perpetrated on the complainant and witnessed by independent witnesses, that

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[3] 2003(1) SACR 583 (SCA).
[4] *S v Bruiners en 'n Ander* 1998(2) SACR 433 (SECPD).

this in itself, supports her evidence of having been raped by the appellant. Sight was clearly lost of the possibility that the assault could equally have taken place in the circumstances as testified by the appellant.

[21] The trial court clearly did not follow the approach to first evaluate the complainant's evidence, applying the required caution when doing so, and rather relied on the evidence of witnesses testifying about the assault and then drew inferences from that to decide her credibility. The discrepancies and contradictions in the complainant's version were material and should not have been ignored. These shortcomings in the evidence of a single witness are likely to adversely impact on the credibility of the witness and there is no reason why it should not have been the case with the complainant's evidence in this instance.

Corroborating evidence found by the trial court

[22] It is common cause that two security guards on the premises reacted to someone screaming and came across the appellant assaulting the complainant. Their versions as to the extent of the assault however not only differ from one another, but also differ from that of the complainant. Whilst Silumbu said the complainant's arm was twisted from behind and that she was kicked when they were both standing, Muyumbano said the appellant was on her back and was beating her in the face. Complainant never said she was hit in the face whilst down on her stomach. The one saw the complainant washing the appellant's finger while the other only makes mention of the appellant washing the complainant's face. Both these versions differ from that of the complainant who said she (only) washed the blood from her own face.

[23] I pause here to consider the evidence that the appellant was dressed in a vest which was blood stained. According to the complainant the appellant at this stage took off his torn and bloodstained vest and wrapped it around his injured finger. On her version there is no explanation why the appellant was dressed in his vest and why it was blood stained. On his version he was busy undressing when the fight started inside the caravan and was struck in the

head with a bottle causing an open wound which bled. Whilst at the tap later on, he then used the vest to wipe the blood from his face, explaining the blood observed on it by the complainant. This clearly fits in with his evidence that he was injured inside the caravan. This aspect of the evidence was however not further explored during the trial, but tends to give credence to the appellant's evidence.

[24] As mentioned, the trial court took into account the evidence that the appellant refused the complainant to leave which is indeed inconsistent with his version. The reason given to the security guards was that she willingly accompanied him there and that they had reached some agreement. The fact that the guards refused to come to the complainant's assistance could only be explained by them either believing the appellant, or that the complainant in their view showed some willingness to remain with the appellant. The latter seems the more likely as they saw her assisting the appellant and thereafter holding hands while both acted normal. To this end it refutes the complainant's version that she was adamant to get away from the appellant, but was prevented from leaving.

[25] Regarding the assault perpetrated on the complainant, the evidence of the security guards partly corroborates but also partly contradicts the complainant's version. There are also self-contradicting aspects of the complainant's evidence. Furthermore, the appellant admitted having assaulted the complainant after he came under attack. When considered in context, it would in my view be wrong to conclude that the cumulative effect of the assault, and the complainant wanting to leave at that stage, served as corroboration that she was brought there against her will and supportive of her having been raped thereafter. It was the appellant's testimony that after the complainant had cleaned her face, they entered the caravan together in order for the complainant to collect her belongings where after they left. The complainant's evidence that they only departed at around 05h00 was however corroborated by the one security guard (Silumbu).

[26] The trial court further found that the medical evidence corroborated the complainant's evidence of her having been raped. This is based on the

evidence of the doctor who examined the complainant the next morning and found two superficial bruises on the left labia minora which, in his view, would be consistent with penetration by a sexual organ. These were not very serious injuries. When confronted with the complainant's evidence that the duration of the sexual acts lasted for about two hours (in relation to the minor injuries), the doctor referred to other factors that could play a role and never actually expressed an opinion on the facts put to him.

[27] It was further argued on the appellant's behalf that it was not the doctor's evidence that these bruises were fresh; neither was any semen observed in the complainant's genitalia as could be expected. Though the argument is not without merit, it was not raised with the doctor and no opinion expressed in that regard.

[28] In the end, however, the court was satisfied that the injuries to the genitalia were, at face value, indicative of a sexual act committed with the complainant and found that the accused had raped the complainant.

[29] Lastly, although evidence was led about the appellant having admitted the next morning when confronted that he had made a mistake and was sorry, the trial court, correctly in my view, did not give any weight thereto. Neither the appellant's admission that he had raped the complainant when he was attacked and assaulted by a group before the police arrived.

Approach by Court of Appeal

[30] The approach by a court of appeal in considering a case is succinctly laid down by the court in *R v Dhlumayo and Another.*[5] The principles which should guide an appeal court in an appeal based purely on a question of fact, are those principles in the main being matters of common sense, flexibility and such as not to hamper the appeal court in doing justice in the particular case before it. Another principle that was applied in *S v Ameb*[6] is that the trial court has advantages which the appeal 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

[5] 1948 (2) SA 677 (A).
[6] 2014 (4) NR 1134 (HC).

observe the demeanour of the witnesses, but also the appearance and whole personality of a particular witness. Thus a court of appeal will be slow to upset the findings of the trial court. Although the trial court may be in a better position than the court of appeal to draw inferences, the appellate court may be in as good a position as the trial court to draw inferences where they are drawn from admitted or established facts.

[31] There may be a misdirection on fact by the trial court where the reasons at face value are either unsatisfactory or where the record shows them to be such. Also where, though the reasons, as far as they go are satisfactory, other facts or probabilities have been overlooked by the trial court. The court of appeal is then permitted to disregard the trial courts findings on fact, even though based on credibility, in whole or in part, according to the nature of the misdirection and the circumstances of the particular case, and to come to its own conclusion on the matter.

Conclusion

[32] When applying the above stated principles to the present facts, it seems to me that the trial court unjustifiably accepted the complainant's evidence as the truth and overlooked shortcomings in her version, whilst ignoring or giving insufficient attention to those probabilities raised by the appellant in his defence. Though there are indeed corroboration in some respects for the complainant's version, there are also unexplained contradictions. The same applies to the appellant's version. The reasons advanced for the assault by the complainant as well as the appellant are equally convincing. The medical evidence on its own is not conclusive of rape, though consistent with a sexual act. Evidence is lacking as to the bruises being fresh and the absence of semen casts further doubt on the rape incidents as testified by the complainant. The actual reason why the complainant ended up with the appellant and her complacency in the circumstances raise more questions than answers. In short, one still does not know what actually transpired that night between the complainant and the appellant.

[33] In the circumstances the question the trial court should have asked itself in the end is whether the evidence, holistically viewed, established the appellant's guilt beyond reasonable doubt. In my view it fell well short of the bench mark of proof beyond reasonable doubt and as far as the rape charges are concerned, he should have been given the benefit of the doubt. As for the charge of assault with intent to cause grievous bodily harm, there was sufficient evidence to show that the attack was unlawful and that he acted with the required intent. On his own admission, he kicked the complainant in retaliation for hitting him with a bottle in the head and biting him on the finger. To this end his actions were unjustified and unlawful.

[34] In the result, for the foregoing reasons it is evident that there are indeed prospects of success on appeal as regards the rape convictions and that the appellant's application for condonation should succeed.

[35] It is then ordered:

1. The application for condonation is granted.
2. The appeal against conviction on counts 1 and 2 is upheld.
3. The appeal against conviction on count 3 is dismissed.

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JC LIEBENBERG

JUDGE

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D USIKU

JUDGE

APPEARANCES:

APPELLANT	J van Vuuren Of Kruger Van Vuuren & Co, Windhoek.
RESPONDENT	P S Kumalo Of the Office of the Prosecutor-General, Windhoek.