

<b>Case Title:</b> <i>Adriano Both v The State</i>	<b>Case No:</b> CA 83 /2016
<b>Application for leave to appeal</b>	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Mr Justice Liebenberg <i>et</i> Lady Justice Shivute	<b>Delivered on:</b> 19 July 2019
<b>Neutral citation:</b> <i>S v Both</i> (CA 83/2016) [2019] NAHCMD 250 (19 July 2019)	
<b>The order:</b>  <ul style="list-style-type: none"> <li>(a) The condonation application is refused.</li> <li>(b) The matter is struck from the roll.</li> </ul>	
<b>Reasons for order:</b>	
LIEBENBERG J (concurring SHIVUTE J)  <ol style="list-style-type: none"> <li>1. The applicant was convicted in the Regional Court of Otjiwarongo on two counts of rape for contravening section 2 of the Combating of Rape Act, 8 of 2000. He was sentenced to 15 years' imprisonment on each count, ordered to run concurrently.</li> <li>2. He appealed against his conviction. On 10 August 2018 the applicant's appeal partially succeeded in that on appeal the court found that there was a duplication of convictions, setting aside count 1. However, in respect of count 2 the appeal was dismissed.</li> <li>3. The applicant then filed an application for leave to appeal on 30 August 2018. The application was struck from the roll on 03 December 2018 due to the fact that whereas the application was filed out of time, the applicant failed to simultaneously file an application for condonation due to non-compliance of the provisions of section 316(1) of the Criminal Procedure Act 51 of 1977 (the CPA).</li> </ol>	

4. On 6 May 2018 the applicant re-enrolled the matter for hearing. In support of an application for condonation accompanying the application for leave to appeal, he deposed to an affidavit where he stated that he was under the mistaken impression that the 14 days in which he had to file the application for leave to appeal as set out in section 316(1) the Criminal Procedure Act 51 of 1971, had to be computed in the same manner applicable to the Rules of the High Court. The applicant's legal practitioner filed a confirmatory affidavit confirming having advised the applicant wrongly.
5. In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the granting of condonation and will also consider the litigant's prospects of success on the merits, unless there has been a blatant non-compliance with the rules which demonstrate a glaring and inexplicable disregard for the processes of the court (See *Beukes and Another v Swabou and Other* (SA 10-2006) [2010] NASC 14 (05 November 2010) at para 20). Furthermore, it has been held that an attorney instructed to note an appeal is duty bound to acquaint himself with the Rules of the Court (*Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others*<sup>1</sup>). The same would obviously apply to section 316(1) of the Criminal Procedure Act 51 of 1977 requiring of an applicant to file his or her application for leave to appeal within the prescribed period of 14 days.
6. The explanation advanced by the applicant, supported by his legal representative, therefore falls short from being reasonable and acceptable. For this reason alone, the application for condonation should fail.
7. The second leg of the condonation application requires a consideration of the prospects of success on appeal. To this end the grounds of appeal enumerated in the applicant's application for leave to appeal will be considered.
8. The test when dealing with an application of this nature is to determine whether or not the applicant

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<sup>1</sup> 2013 (4) NR 1029 at 1031D-F.

enjoys prospects of success on appeal (*S v Nowaseb* 2007 (2) NR 640 at 640F-641A).

9. The applicant's grounds of appeal as reflected in his notice for leave to appeal are as follows:

- '1. The court erred in law and or fact by finding that the complainant's evidence was clear and satisfactory to support the conviction on rape.
2. The court erred in law by finding that the lack of medical evidence to support the allegation of rape was a neutral factor.
3. The court erred in law by not giving the benefit of doubt which exists due to lack of direct evidence to the appellant.'

10. Coming to the arguments advanced by the respective counsel, applicant contended that the evidence of the complainant was not clear and satisfactory as her explanation of the rape incident was not plausible. With regards to the second ground of appeal the applicant contended that in light of the Supreme Court case of *S v Gariseb*<sup>2</sup> the court should have given the applicant the benefit of the doubt

in respect of the absence of medical evidence supporting the complainant's claim of having been raped.

11. Counsel for the State countered by arguing that from the evidence adduced, there was sufficient proof that the complainant had been raped.

12. With regards to the first ground, namely that the court erred by finding the complainant's evidence to be clear and satisfactory, the court of appeal at paras 19 – 24 of the judgment discussed and considered the court's approach to single evidence. It concluded that the trial court's finding that the evidence of the complainant was clear, coherent and supported by the facts, which could not be faulted. Complainant's evidence had the full details as to what transpired on the night in question and was consistent with the testimony of the complainant's mother and the doctor who examined her later in the day. On appeal the court was satisfied that there was no reason to interfere with the trial court's findings of fact and credibility and that there was no misdirection by the trial court in its assessment of the evidence. It followed a holistic approach in its assessment of the evidence and

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<sup>2</sup> Unreported judgment SA 36/2017.

correctly applied the principles applicable to the evaluation of evidence when the court is confronted with two mutually

destructive or irreconcilable versions. We are thus of the view that this ground has no prospects of success on appeal.

13. The second ground of appeal turns on the court's finding that the lack of medical evidence is a neutral factor. This issue was extensively dealt with in the judgment (paras 8 – 14). Accordingly, there is no need to rehash what was discussed and found on appeal as that is apparent from the judgment. The applicant, as before, relied on *Willem v The State*<sup>3</sup>. It should be emphasised (once more), that the facts of this case are distinguishable from the *Willem* matter. In *Willem* with regards to the medical evidence adduced the difference between the two cases lies in the fact that the complainant in the said case was four years younger than the complainant in the present case. The medical evidence further establish that her hymen was still intact. On appeal it was found that the medical evidence did not support the version of the State witnesses who testified about a protracted and prolonged rape incident. In view thereof the evidence of State witnesses was found unreliable. Contrarily thereto, the complainant's evidence in the present instance was found credible. Furthermore, it was common cause that she was sexually active before the incident and when considered together with the circumstances preceding the sexual act, the doctor's evidence was that it would not be uncommon to find that the complainant did not suffer any injuries.
14. The presence of injuries on the body and genitalia of the victim is not a requirement to prove the offence of rape. Neither would the absence of any injury refute the direct evidence of the complainant who, in this instance, was found to be a credible witness. Thus, in the present circumstances, the absence of any injury inflicted on the complainant does not serve as corroboration for the applicant's contention that no sexual act was committed with the complainant. Hence, this ground is equally without merit and falls significantly short of showing on a balance of probabilities that it has prospects of success on appeal.

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<sup>3</sup> (Unreported) Case No CA 2/2016 [2016] NAHCMD 174 (17 June 2016).

15. Lastly, the applicant stated that he should have been given the benefit of the doubt in light of the absence of direct evidence. This ground ties in with the first ground raised by the applicant as set out

supra in para 7. Suffice it to say that the evidence of the accused/applicant was not considered in isolation but evaluated together with the evidence as a whole, regard being had to the merits and demerits of the state witnesses and the defence, as well as the probabilities. As stated, on appeal the court was satisfied that the trial court adopted a holistic approach in its assessment of the evidence and that the conclusion reached was supported by the facts and is sound in law. The trial court could therefore not be faulted in its evaluation of the evidence and there was no other conclusion the court could come to on appeal. We are therefore unpersuaded that this ground has prospects of success on appeal.

16. For the aforesaid reasons, it is this court's considered opinion that the application for condonation should not be granted.

17. In the premises, it is ordered:

- (a) The condonation application is refused.
- (b) The matter is struck from the roll.

**J C LIEBENBERG**  
**JUDGE**

**N N SHIVUTE**  
**JUDGE**

## APPEARANCES

## APPLICANT

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## RESPONDENT

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