

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case No: HC-MD-CRI-APP-CAL-2019/00067

IN THE MATTER BETWEEN:

NATANGWE SHISHIVENI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Shishiveni v S* (HC-MD-CRI-APP-CAL-2019/00067) [2020]
NAHCMD 395 (4 September 2020)

Coram: SHIVUTE, J et CLAASEN J

Heard: 6 July 2020

Delivered: 4 September 2020

Flynote: Criminal Procedure – Condonation – Late filing of notice of appeal – Appeal filed beyond prescribed 14 days after sentence – Appellant failed to give

reasonable explanation for the delay and to establish prospects of success –
Application for condonation refused –

Criminal Procedure – Appeal – Test for bias two fold – Whether a reasonable objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case – Justice must not merely be done but must also be seen to be done – No cogent evidence that magistrate was biased to vitiate the proceedings.

ORDER

(a) The application for condonation is refused.

(b) The matter is struck from the roll and is regarded as finalised.

APPEAL JUDGMENT

SHIVUTE J (CLAASEN J concurring):

Introduction

[1] The appellant was convicted on one count of Rape – contravening section 2 (1) (a) of the Combating of Rape Act 8 of 2000 read with sections 1,2,3 and 21 of Act 4 of 2003 . He was sentenced to 12 years' imprisonment. He has appealed against the conviction and sentence. However, the appeal against sentence was abandoned at the hearing. We are now only seized with the appeal against conviction.

[2] The appellant was sentenced on 13 July 2017. However, his notice of appeal dated 4 August 2017 was only received at Otjiwarongo Magistrate's court on 22 August 2017. When the appellant lodged his initial notice of appeal, he was acting in person.

However, a legal representative was appointed on his behalf by the Directorate of Legal Aid. His counsel withdrew the initial grounds of appeal and replaced them with new ones. The amended notice of appeal was filed on 12 November 2019.

Point in limine

[3] Counsel for the respondent raised a point in limine that the notice of appeal was filed out of the prescribed time limit of 14 days.

[4] Rule 67(5) of the Magistrate's Court Rules provides as follows:

'... Within 14 days after the person who noted the appeal has been so informed, the appellant may by notice to the clerk of the court, amend his notice of appeal and the judicial officer may, in his discretion, within 7 days thereafter, furnish to the clerk of the court a further or amended statements of his findings of fact and reasons for judgment.

[5] Counsel for the appellant was appointed by Legal Aid on 15 October 2019. In his application for condonation, the appellant gave reasons for the delay in filing the amended notice of grounds of appeal by stating that he is a serving prisoner; he waited too long for counsel to be appointed by Legal Aid and that his counsel only came on record on 29 October 2019. Furthermore, the appeal record and documents took long to be made available to him.

[6] In considering an application for the late filing of a notice of appeal, the court will take into consideration the degree of the delay, the reasonableness of the explanation and the prospects of success. *S v Nakale* 2011 (2) NR 599 at 603E.

[7] Counsel for the appellant argued that Rule 2(2) of the Magistrate's Court Rules read with Rule 67(1) rescued the appellant regarding the computation of the period within which the notice of appeal should have been filed. Therefore, it cannot be said that the notice of appeal was lodged out of the prescribed time limit.

[8] Rule 2(2) provides as follows:

‘A Saturday, Sunday or public holiday shall not, unless the contrary appears be reckoned as part of any period calculated in terms of these rules.’

[9] According to the document filed before court, the appellant’s notice of appeal was filed out of time. This court is alive to the principles regarding the computation of the period within which the notice of appeal should be filed. It is correct that this excludes the first day, Saturday, Sunday and public holidays but includes the last day. However, the appellant’s notice of appeal was only received by the clerk of court at Otjiwarongo on 22 August 2017. The same date appeared on the date stamp of the Correctional Facility where the appellant is incarcerated. This is an indication that although the appellant wrote his notice on 4 August 2017, he never presented it to the officials in whose custody he was. He only gave the notice of appeal to the Correctional Facility officials on 22 August 2017 and they delivered it to the clerk of the court the same day. In this regard, the appellant has failed to give a reasonable and acceptable explanation concerning the cause for the delay.

[10] Concerning the prospects of success, the appellant in his affidavit accompanying the application for condonation, boldly stated that he had prospects of success without giving any grounds upon which the contention was based.

[11] In determining whether or not there are prospects of success on the merits, since the court allowed the parties to argue the merits as well, I will first deal with the grounds of appeal.

Grounds of appeal

[12] The grounds of appeal against conviction criticise the trial court's findings on the basis that it erred in fact and/or in law by finding that the appellant was guilty of rape. It was contended that the State had failed to discharge its onus beyond reasonable doubt in finding that it was indeed only the appellant who had caused injuries noted on the complainant's private parts. It was also argued that the trial court erred by rejecting the appellant's version without it being demonstrated that it was false or inherently improbable and that the inference made by the court *a quo* that the reluctance by the accused and his mother to inform the police about the whereabouts of his brother, Ben, raises further suspicion. Thus, so it was contended, the learned magistrate placed a reverse onus on the accused. Other grounds are that the court erred by convicting the appellant on the evidence of a single witness that was not clear and satisfactory; that the learned magistrate was biased in remarking that "this fact leads the court to the reasonable deduction that whatever he, Ben, would have come to testify to would have corroborated the victim's version." It was argued that without any basis; the learned magistrate rejected the appellant's version that the complainant falsely implicated him because she was afraid of the appellant's threats to report the complainant's absence from home to the appellant's mother. It was contended that this was done despite the complainant having confirmed that she reported the appellant because he threatened to report her to his mother.

Brief Background

[13] As mentioned earlier, the appellant was charged with one count of rape in contravention of section 2(1) (a) read with sections 1, 3, 4, 5, 6 and 7 of the Combating of Rape Act 8 of 2000, read with sections 1, 2, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003. It is alleged that between 27 and 28 January 2014, at or near Otjiwarongo in the Regional Division of Namibia, the accused wrongfully unlawfully, intentionally and under coercive circumstances committed a sexual act with the complainant, a 12 year old female. This, the appellant allegedly did by applying physical

force to the body of the complainant and by strangling her throat, while the complainant was under the age of 14 years and the appellant was more than 3 years older than the complainant. The sexual act consisted of the accused inserting his penis into the vagina of the complainant while there existed a domestic relationship between them, in that the appellant is the complainant's uncle. He pleaded not guilty and did not disclose the basis of his defence.

[14] The first State witness was the appellant's mother who was also the complainant's guardian. Her testimony was that when the incident happened, she was a nurse and she worked a night shift that day. She only came back in the morning at about 07h30. Upon her arrival at home, she was approached by three police officers who were in the company of the complainant. The police told the complainant to tell her what happened the previous night. The complainant then reported to her that the appellant raped her. The witness further testified that she and the complainant's father were related. Upon hearing what transpired, the witness phoned the appellant and the appellant told him that he would report himself to the police. The second witness testified that she was a teacher at the complainant's school. Whilst she was on the way to the class, she found the complainant crying. She was in the company of her friends. She inquired from the complainant why she was crying. The complainant did not respond. Instead, she just shook her head. The witness asked if she could talk to the complainant. She agreed and her friends left them alone. Complainant reported to the witness that her brother entered the room where she was sleeping strangled her and raped her. The complainant at that stage was in Grade 6.

[15] The issue of the appellant being an uncle to the complainant was challenged through cross-examination. The appellant's mother changed her version and stated that there was no blood relationship between her and the complainant's grandmother. There was further no proof of the complainant's age.

[16] The principal of the school where the complainant was schooling testified that he was approached by a teacher who was accompanied by the complainant. The

complainant was crying and the teacher reported that the complainant was crying because she was allegedly raped by someone who was residing with her. He did not ask the complainant what happened. Instead, he took her to the police station. The evidence of the principal corroborated that of the teacher that the complainant was indeed crying at school.

[17] The State further called the medical officer who examined the complainant and compiled the medical report. He testified that the complainant was 13 years old. The complainant had not started having her periods. She was not sexually active before the incident. According to the doctor's findings, the complainant had some fresh tears on the posterior fouchette, some bruises in the vaginal area and the hymen was broken. The tears were on the hymen, which signified that there was penetration. According to the doctor, if the hymen is absent and there are fresh tears, it meant that the penetration occurred recently. The examination was done on 28 January 2014. The doctor further testified that he would classify the penetration as resistance penetration. The doctor was asked through cross-examination whether he had observed marks on the throat to which he answered in the negative.

[18] The complainant testified that she went to bed around 21h00. Around 24h00, the appellant came home and he was asking for food. The complainant told him to go and check in the kitchen. From there, the appellant went to the room where the complainant was sleeping. The complainant was sleeping in the bedroom of the appellant's mother. He jumped on the bed and grabbed the complainant on the throat or neck. The complainant told the appellant to leave her but he did not leave her. The appellant undressed the complainant. He wanted to put his penis into her vagina and held her by the mouth. She wrestled with him and the appellant overpowered her. When the complainant told him to leave her, he told her that if she screamed he would go to the kitchen, take a knife and stab her. The appellant forced his penis into her vagina and she was feeling pain. After a while, he fell asleep next to her. When she realised that he was asleep, she went to the bathroom. From there, she went to the sitting room. Around 02h00 in the morning Ben, the appellant's brother, came and inquired why the

complainant was sleeping in the sitting room. She did not tell him what happened because she was afraid. She just said she was sleeping in the sitting room because she wanted to sleep there. Ben went to his mother's room and found the appellant sleeping there. Ben woke the appellant up and told him to go and sleep in his room. The appellant then went to his room.

[19] Complainant further corroborated the teacher's testimony that she found her crying and that after the teacher had requested to talk to her and inquired what happened she reported to her what happened. She further confirmed that she was taken to the principal's office and the teacher informed the principal what happened. However, on the way to the police station, the complainant told the principal what happened. It was put to the complainant that she reported that the appellant raped her because the appellant threatened to report her to his mother that she came home late. Although the complainant had admitted that the appellant had threatened to report her, she never conceded that she reported the appellant because of the threats he made against her. According to the teacher, the complainant did not volunteer to tell her why she was crying. She only told her after she inquired what happened to her. Therefore, it cannot be said that the complainant reported the appellant because she was afraid of the appellant he would report her to his mother. The complainant categorically stated that she did not create a story to falsely implicate the appellant. It was again put to the complainant that it was not the appellant who had sexual intercourse with her, but some other people. The complainant was adamant that it was the appellant. The complainant was staying with the appellant. Therefore, she could not have been mistaken about the appellant's identity.

[20] The last witness called by the state was the police officer who investigated the case. He testified that he went to the appellant's house to look for him several times but that he did not find him there. He only arrested him in Windhoek on 18 August 2015 after he received information from his source. The appellant was only arrested after one year and six months as he had vanished from Otjiwarongo. Furthermore, the police officer informed the court that he was looking for one Ben who is a witness, but that he

was told by a lawyer that Ben was in Swakopmund. It transpired that this Ben was not traced by the investigating officer.

[21] The appellant testified in his defence. He denied having had sexual intercourse with the complainant. He said that on 27 January 2014, the complainant came home late. The appellant threatened to report her to his mother, but the complainant did not respond. From there, the appellant received a telephone call from his boss who informed him that they would be going to work in Windhoek the following day. From there he did not speak to the complainant again. The morning of 28 January 2014 he left for Windhoek to go and work there. The accused denied that he undressed the complainant. He disputed that he strangled her. He denied that he was in his mother's room. He said he did not fall asleep in his mother's room. He disputed having been woken up by his brother from his mother's room. He further testified that when his mother phoned him on 28 January, around 12h00, he told her that they had just arrived in Windhoek and his boss would not allow him to go back to Otjiwarongo. The appellant further testified that he only learnt about the rape during 2015 in August when he was arrested. It is worth noting that when the appellant's mother testified that she phoned the appellant and informed him that the police were looking for him, the appellant told her that he was going to report himself to the police. This piece of evidence was not challenged by the defence.

[22] I will now deal with grounds of appeal. With regards to count 1, the court was criticised for convicting the appellant whilst the State had not discharged its burden beyond reasonable doubt that the appellant was the only one who had caused the injuries observed on the complainant's private parts.

[23] The appellant reported that she was sexual assaulted. Upon medical examination, the doctor observed fresh tears on her private parts. The complainant testified that the person who sexual assaulted her was the appellant. The appellant put it to the witness that she was sexually assaulted by unknown persons. The appellant and the complainant were not strangers to each other as they were staying in the same

house. It is highly unlikely that the complainant would mistake the appellant for other unknown people.

[24] It is a point of contention that the court rejected the version of the appellant without it being demonstrated that it was false or inherently improbable. The court was further criticised for convicting on evidence of a single witness.

[25] It is obvious in this case that the State rested its case on the evidence of a single witness who is also a young child. There is no statutory requirement that the evidence of a young child must be corroborated before it is accepted in court. It is, however, a trite principle that such evidence should be treated with caution. The trial court in its judgment when dealing with the evidence of the complainant had this to say:

‘The court must treat the testimony of the complainant with caution on both grounds that she was a single witness and the fact that she was a youthful witness. If the court accepts for purposes of assessing her testimony that she was twelve years old when the incident occurred, it would mean that when she testified she must have been about 15 years old. The degree of caution with which child witnesses’ testimony should be treated can be described as a sliding scale with the greatest caution applied to the youngest witnesses and vice versa.’ *Minister of Basic Education, Sport and Culture v Vivier No and Another 2012 (2) NR 613 (SC)* at paragraph 16. The complainant was already of a tender age when this incident happened and when she testified she is on her way to adulthood. Her testimony did not waiver and remained constant... Corroboration of a single witness’ evidence is, in the mind of this court, one of the best ways in which to satisfy the cautionary rule applicable to such witnesses.’

[26] From the reading of the above, it is evident that the court was alive to the correct approach to the evidence of a single and youthful witness. The learned magistrate gave reasons why she believed the complainant’s evidence as opposed to that of the appellant. The learned magistrate also gave reasons why she did not accept the appellant’s version. I do not wish to repeat the reasons given by the court a quo as they are contained in its judgment. It is trite that an appeal court may only interfere with the findings of the trial court in respect of conviction in the following circumstances:

- (i) where there is a misdirection of facts or law.
- (ii) where reasons for its findings are shown by the record to be unsatisfactory or though satisfactory it is shown that the learned judge overlooked other facts or probabilities.
- (iii) Further, the misdirection must be shown to be material and not every misdirection will enable the court of appeal to disregard the findings of the trial court.

R v Dlumayo and Another 1948 (2) SA 677 at 701 to 703 *Wouter Otto Karel Labuschagne v State* Case No. SA 1/2001.

This court will follow these principles in deciding whether there was a misdirection on the part of the court *a quo*.

[27] The learned magistrate was further criticised that she placed a reverse onus on the accused when she made the following remarks in the judgment.

‘The clear reluctance of both his [accused’s] mother and his brother to assist the police to trace his brother [Ben’s] whereabouts raises further suspicion.’

[28] It is evident from the record that the above sentence was not put in its correct perspective. I would like to state verbatim what the learned magistrate said in her judgment in relation to the above remark. She first stated the following:

‘The court also wanted to call Ben but was informed by Sergeant Haraeb the investigating officer in this case that except for the information that he is currently in Swakopmund , his exact whereabouts are unknown by both his mother and the accused. The accused also became visibly uncomfortable when asked whether he knows where his brother is and stated that he does not know and that he lost the phone in which the cell phone number of his brother was saved... the continued absence of Ben and clear reluctance of both his mother

and his brother being the accused to assist the police to trace his whereabouts raises further suspicion as to the good will of the accused and the veracity of his version.’

[29] Counsel for the appellant argued that such remarks offended the letter and spirit of Article 12(1) (d) (f) of the Namibian Constitution as there was no legal obligation on the accused to assist the State to bring Ben to court.

[30] In my opinion, the remarks that were made by the learned magistrate did not amount to placing the appellant on reverse onus. The magistrate merely stated his observation concerning the whereabouts of the accused’s brother. I do not wish to indulge into the discussion of incidents that give rise to reverse onus. Counsel also did not argue the point in detail.

[31] The learned magistrate was also criticised for being biased and having erred by allegedly stating the following:

‘This fact leads the court to the unreasonable deduction that whatever Ben would have come to testify to would in fact have corroborated the version of the victim’

This court had the opportunity to peruse the judgment of the court a quo. The learned magistrate did not say ‘the unreasonable deduction’. Instead, she said ‘the not unreasonable deduction.’

[32] Counsel for the appellant argued that the approach by the learned magistrate was ‘clearly’ biased contrary to the provisions of Article 12(1)(a) that reads as follows:

‘In determining of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair trial and public hearing by an independent impartial and competent court or Tribunal established by law...

[33] The test for bias is an objective one that is twofold, namely;

(a) Whether a reasonable objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case.

(b) Justice must not merely be done but must also be seen to be done.

Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others 2008 (2) NR 753 (SC) 769 at para 32.

[34] Judicial officers have taken the oath of office. Therefore, the reasonableness of the apprehension of bias must be assessed in light of the oath they have taken to administer justice without fear or favour affection or ill will. Judicial officers are impartial and independent and they are expected by members of society to act independently and impartially in the execution of their duties. For a judicial officer to be said to be biased, there should not be a mere possibility of bias but there should be evidence showing actual bias. When the assessment of probable or actual bias is made, it must be tested in light of the opinion of the informed and fair minded observer.

Whether apprehension of bias has been established

[35] In the present matter the learned magistrate had assessed and evaluated the evidence as a whole, applied the law to the facts and gave reasons for her findings. Although the learned magistrate made a speculative remark, the proposition that she was biased is not rested on legitimate assumption. There is no evidence showing that the court a quo was biased. The remarks she made did not result in an unfair trial that infringes the appellant's right to a fair trial as envisaged by Article 12 of the Namibian Constitution. There is further, no cogent evidence that the learned magistrate was biased to vitiate the proceedings.

[36] As mentioned before, the appellant had also appealed against sentence but the appeal was expressly abandoned during the hearing of the appeal.

[37] As to the appeal against conviction, I am persuaded that the appellant has failed to establish that he has prospects of success on appeal. It follows that the application for condonation cannot succeed.

[38] In the result, it is ordered:

(a) The application for condonation is refused.

(b) The matter is struck from the roll and is regarded as finalised.

NN Shivute
Judge

CM Claasen
Judge

APPEARANCES:

APPELLANT:

Mr M Siambango
Instructed by the Directorate of Legal Aid
Windhoek

RESPONDENT:

Mr T Iitula
Office of the Prosecutor General
Windhoek