

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CRI-APP-CAL-2019/00046

IN THE MATTER BETWEEN:

IMMANUEL NOWASEB

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Nowaseb v State* (HC-MD-CRI-APP-CAL-2019/00046) [2020]
NAHCMD 78 (6 March 2020)

Coram: SHIVUTE, J

Heard: 4 NOVEMBER 2019

Delivered: 6 MARCH 2020

Fly note: Constitutional Law – Human Rights – Right to legal representation – Fundamental right – Right not absolute – Imposing limits only in exceptional circumstances – where reasonable to limit such rights.

Constitutional Law – Human Rights – Right to fair trial – Article 12 (1) (e) Namibia Constitution – Accused to be afforded time and necessary facilities - Facilities including disclosure to witness statements and other documentary evidence – Such right essential to a fair trial – Court’s failure to order state to provide disclosure – Amounts to ignorance of notions of justice and basic fairness.

Summary: The appellant sought a postponement to secure the presence of his legal representative to attend trial. The right to legal representation is a fundamental right. The court refused a postponement on the grounds that the matter has been on the roll for a long time and it has been postponed several times to afford the appellant to get a legal representative. Furthermore, the court ruled that counsel for the appellant undertook to be in court but he failed to do so. The court proceeded in the absence of the appellant and his legal representative. Although the right to legal representation is not absolute as it is subject to certain limitations, such limitations should only be imposed in exceptional circumstances where it is reasonable to limit such rights. The limitation of such right was not reasonable in the circumstances.

Right to a fair trial. The appellant informed the court that he could not proceed with the case in the absence of his legal representative because he had paid him to represent him. Furthermore, the appellant argued that he was not able to proceed with the trial because he was not in a position to cross-examine witnesses as he was not provided with a disclosure. The right to a disclosure is essential for proper enforcement of appellant’s right to a fair trial. Article 12 (1) (e) that provides for accused to be afforded adequate time and facilities, not only refers to physical facilities but includes access to witness statements and other documentary evidence. By not ordering the state to provide the appellant with disclosure, the court ignored the notions of justice and basic fairness. There has been a misdirection on the part of the court. The appellant was deprived of a fair trial. The nature of the irregularly vitiates the proceedings.

APPEAL JUDGMENT

- (a) The application for condonation is granted.
- (b) The appeal is upheld.
- (c) The conviction and sentence are set aside.
- (d) The matter is remitted to the Regional Court Swakopmund for a hearing *de novo* before a *different* magistrate.

JUDGMENT

SHIVUTE J (LIEBENBERG J concurring):

[1] This is an appeal against the conviction and sentence of the appellant on two counts of rape in the Regional Court in contravention of s 2 (1) (a) of the Combating of Rape Act, 8 of 2000.

[2] The appellant raised several grounds of appeal that may be summarised as follows:

(a) It was contended that the court erred by allowing the complainant who was under the age of 13 years to be cross-examined directly and not through the presiding officer as mandated by s 166 (4) of the Criminal Procedure Act 51 of 1977.

(b) The appellant argued that the court erred by failing to conduct a competency test on the minor complainant who was under the age of 14 years.

(c) It was submitted that the court erred by failing to inform and warn the appellant of the consequence of the trial proceeding in his absence.

(d) Another contention was that the learned magistrate erred by convicting the appellant and sentencing him in his absence.

(e) It was alleged that the conviction of the appellant on both counts amounted to duplication of charges.

(f) It was furthermore a ground of appeal that the learned magistrate misdirected herself when she refused to afford the appellant the opportunity to obtain a legal representative of his choice in order to have a fair trial.

(g) It was alleged that the court erred by descending into the arena and restricted the cross-examination of the complainant.

(h) It was alleged that the learned magistrate relied on fabricated evidence.

With regards to the sentence it is contended as follows:

- (i) The learned magistrate erred by not considering substantial and compelling circumstances that allegedly existed so as to impose a lesser sentence.
- (ii) The court overemphasised the seriousness of the offences and the interests of society by ordering the two sentences to run consecutively.
- (iii) The court misdirected itself by not taking into account adequately the personal circumstances of the appellant and by sentencing him without him mitigating.
- (iv) The court erred by considering the evidence of psychological effects of the rape from the mother of the child victim who is not an expert.
- (v) The court erred by sentencing the appellant on duplication of convictions.

[3] It is common cause that the amended notice of appeal was filed late. The record of proceedings, the magistrate's reasons and the certificate of accuracy were filed on the e-justice system on 23 May 2019 whilst the amended notice of appeal was only filed on 13 August 2019. Rule 67 (5) of the Magistrates' 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.'

From the rule above, the appellant was supposed to have filed his amended notice within 14 days of having received the record and the magistrate's reply thereto, so counsel for the respondent argued.

[4] The applicant in his affidavit accompanying the condonation application explained that he was only informed by his counsel during July 2019 that the grounds of appeal he stated in his notice of appeal were improper. The applicant did not explain his delay from May 2019 to August 2019. It should be noted that counsel for the applicant was instructed by the Directorate of Legal Aid to represent the appellant during July 2019. An applicant must explain the reason why he or she did not comply with the rule in the affidavit that accompanies the condonation application. This explanation must not only be reasonable but it must be *bona fide* as well.

[5] Turning to the second leg of the requirements of whether or not the application for condonation should be granted, namely whether there are reasonable prospects of success on appeal on the merits, counsel for the applicant argued that in light of what transpired in court, the applicant has good prospects of success on the merits of this matter. Therefore the application for condonation should be granted, so counsel for the appellant concluded his submissions on this aspect. On the other hand, counsel for the respondent argued that there are no prospects of success on the merits as there was no misdirection on the part of the trial court.

[6] In determining whether there are prospects of success on the merits or not, this court needs to consider the evidence presented in the court *a quo* and what transpired in court.

[7] I find it necessary to consider first grounds of appeal (c) and (d) which deal with the trial proceeding in the absence of the accused as well as ground (f) where it is contended that the appellant did not receive a fair trial because he was not afforded the opportunity to have a legal representative present in court during his trial. By first dealing with the above mentioned grounds, if the court finds that there was a misdirection on the part of the trial court, this finding may dispose of the other grounds as well.

[8] With regard to the above 3 grounds, counsel for the respondent argued that it was not correct that the appellant was not warned of the consequences of the trial proceeding in his absence, because the appellant had previously refused to come to court and his previous legal counsel indicated to the court that he had explained to the appellant the provisions of the Criminal Procedure Act 51 of 1977. The court *a quo* was entitled to rely on counsel's advice, because counsel is an officer of the court. Furthermore, on 16 January 2019 the court explained to the appellant of the consequences of his legal representative not being at court and that the court could proceed even in the absence of the appellant himself. The accused was however difficult and disruptive. In view of these, counsel argued that, the appellant was aware of the consequences of his actions when walking out of court. Counsel further argued that, although section 159 of the Criminal Procedure Act gives the power to the court to remove an accused from the criminal proceedings who conducts himself in a manner which makes the continuation of the proceedings in his presence impracticable, the court did not exercise this discretion. The appellant instead removed himself from the proceedings.

[9] In connection with legal representation, counsel for the respondent argued that it was evident from the record that the appellant had no fewer than seven legal

representatives. The appellant terminated their mandates at will and the court always afforded him postponements to get a legal representative. The right to a fair trial did not mean that the trial should only be fair to the accused. It must be fair to the victim and the state as well. Furthermore, the court should also bear in mind other constitutional rights such as the right to trial within a reasonable time. Again counsel argued that it must be borne in mind that the right to legal representation was not an absolute right as it is subject to reasonable limitations.

[10] On the other hand, counsel for the appellant argued that the learned magistrate failed to warn the appellant of the prejudice he would suffer if he refused to partake in the trial proceedings and that he would be sentenced in absentia upon being convicted of the offences. The court only informed the appellant that the trial would proceed in his absence. The court hastily decided to continue with the trial and lacked the patience to assist the appellant. Counsel further contended that there was no extreme lack of cooperation from the appellant to warrant a trial in his absence. The appellant in relation to the absence of his lawyer only said 'I will not proceed because I paid the lawyer. The state can proceed and I can go in the cells I will not proceed.' It was further argued that the learned magistrate misdirected herself when she delivered the verdict in the absence of the appellant without the accused being brought before the court for the trial to be concluded in his presence.

[11] Both counsel referred us to several authorities which we have considered. Before I decide the question whether the appellant did or did not have a fair trial, I would like to consider the issues that led to the trial proceeding in the absence of the appellant and his legal representative.

[12] On 16 January 2019 when the appellant appeared before court, his legal representative was not present. The appellant informed the court that his legal representative told him that he had a matter before a High Court Judge 'on the 16th.' His legal representative further told him that he was going to communicate to a Ms Faith. The appellant further said that he was unable to communicate with his legal

representative because he had no access to a phone as he was incarcerated. The morning he came to court, he had asked one of the police officers to assist him to make a phone call. He was informed by the police officer that they were no longer allowed to assist inmates to make phone calls.

[13] Counsel for the state made an application to the court for the matter to stand down to enable the appellant to get in touch with his lawyer. The court explained to the appellant that in terms of the Criminal Procedure Act, if the accused prefers not to be present or if he makes the court impracticable to proceed and the appellant's lawyer is not present, the court can remove the accused from court and the trial will proceed in his absence.

[14] The prosecutor addressed the court that he did not receive any communication from the appellant's legal representative as he had expected. However, the last time he spoke to him he indicated that he was not placed in funds. After the prosecutor addressed the court, the court adjourned.

[15] When the court resumed, the appellant informed the court that he had phoned his legal representative four times but he did not pick up his phone. He further informed the court that during December he spoke to his lawyer whilst he, the appellant, was attending court in Windhoek. His lawyer informed him that he would be available for the trial on 16 January. However, on 11 January his lawyer informed him that he had to appear in the High Court on 16 January but he would see what he could do. The appellant further said if he had to defend himself he did not even have disclosure of the docket. He was never given a disclosure to conduct his trial fairly. If the trial proceeded, he was not going to be able to cross-examine witnesses. He insisted that he had paid for his lawyer who was going to represent him and as far as he was concerned, the lawyer did not withdraw as a legal representative of record.

[16] The prosecutor addressed the court that as a private practitioner who was representing the appellant, the lawyer was supposed to communicate to the court why

he was not before court. It was also the duty of the appellant to make sure that his legal representative was before court. The appellant had sufficient time to bring his legal representative before court. He went on to argue that the matter had been on the roll for a long time and it was due for trial since 5 March 2013. However, it had been postponed several times to enable the appellant to get a legal representative from the Directorate of Legal Aid. It was also postponed several times because the appellant had been terminating the mandates of the lawyers appointed for him by the Directorate of Legal Aid. The prosecutor urged the court to proceed.

[17] The court in its ruling stated that counsel for the appellant made a commitment to proceed with the trial, however, he was not before court. The court stated that the matter had been on the roll since 5 March 2013. She mentioned several dates how it was postponed at the instance of the appellant to get a legal representative. She mentioned several lawyers who were instructed by Legal Aid to represent the appellant and the appellant terminated their mandates. She went on to say that although the appellant had a right to a legal representative of his choice, this right was not absolute. The court had bent over backwards to accommodate the appellant. It was the appellant's duty to see to it that his counsel appeared before court given the history of the case. She again said that the appellant had a history of delaying tactics. It was further the court's ruling that the appellant did not advance proper reasons to warrant the matter to be postponed and that the matter would proceed in the absence of the legal practitioner. After the ruling, the appellant left the dock and the court proceeded with the trial.

Applicable Law

[18] Article 12 (1) (e) of the Namibian Constitution reads as follows:

'The fundamental rights provided by the above article are there to ensure that all the offenders who stand trial on criminal charges are afforded a fair trial in the Criminal Court. Article 12(1) (e) provides for adequate time and facilities.'

In *S v Nassar* 1994 NR 233 (Nm) at 258 the word 'facility' was interpreted as follows:

'The word 'facility; particularly when used in the plural, can mean facilitating or making easier the performance of an action and when the word is liberally and purposively construed, as I think it should be, then, in my opinion, it must be taken to include providing an accused with all relevant information in the possession of the state, including copies of witness statements and relevant evidential documents. This also includes an opportunity to view any material video recording and to listen to any material audio recordings.'

I associate myself with the above interpretation.

[19] Although this court is in agreement with the proposition that the right to choose a legal representative is a fundamental right that is not absolute, the limitations that may be imposed on such a right should only be applied in exceptional circumstances where it is reasonable to do so.

In the present matter the court did not direct the appellant to be removed but he left the dock after the court made a ruling that it will proceed in the absence of the appellant's legal representative. The frustrations of the trial court are understandable because the case had been on the roll for a long period pending trial and it had been postponed several times to afford the appellant an opportunity to get a legal representative. The appellant also had a retrogressive tendency, as it appears from the record, to terminate the mandate of his legal representatives.

[20] It should be mentioned that not every breach of the constitutional right or constitutional irregularities committed by the trial court justify the setting aside of the conviction.

In *S v Kandovazu* 1998 NR 1 (SC) at 9 it was stated that before the appeal court sets aside the conviction it should consider the following:

'What has to be looked at, as the learned Chief Justice observes is "the nature of the irregularity and its effect". If the irregularity is of such a fundamental nature that the accused has not been afforded a fair trial then a failure of justice *per se* has occurred

and the accused person is entitled to an acquittal for there has not been a trial, therefore there is no need to go into the merits of the case at all.'

[21] Whether the failure of the appellant to be afforded the opportunity to be represented results in the failure of justice is a question of fact which depends on the circumstances of each case. In the present matter, although the appellant was afforded the opportunity to get a legal representative, the appellant said he had placed his legal representative in funds but the lawyer failed to attend court. The appellant had also informed the court that he could not proceed with the trial because he was not in a position to cross-examine witnesses as he was not furnished with disclosure of the docket. The prosecutor upon hearing what the appellant said, never provided disclosure and the court did nothing to assist the appellant to get disclosure. Instead, the court said the appellant had not advanced good reasons for the matter to be postponed. By reasoning that the appellant failed to do so and that he was employing delaying tactics, the trial court ignored the notions of justice and basic fairness. There cannot be a fair trial if the appellant is unable to cross-examine witnesses because he was not in possession of the content of the docket. The least the court could have done was to afford the appellant a postponement and to order the prosecutor to make a disclosure to the appellant so that if the appellant's legal representative did not turn up at the next trial date, the appellant would be in a position to cross-examine witnesses and to conduct his defence properly.

[22] Again, although the appellant was afforded several opportunities to get a legal representative, the unexplained failure of the legal practitioner to appear before court should not be held against the appellant in the circumstances of this case. A legal practitioner has a legal duty to present his client and if for any reason he is unable to come to court, he should inform the court accordingly. Furthermore, if he terminates his mandate he must file a withdrawal statement. In this case there was no withdrawal statement filed. The legal practitioner's unexplained absence from court has contributed to an unfair trial of the appellant. To compound the appellant's predicament, the court failed to order the prosecutor to make a disclosure to the appellant. As a result, he was

not afforded adequate facilities by the court. As mentioned earlier, adequate facilities include copies of witness statements and other evidential documents.

[23] We are therefore of the view that there has been a serious misdirection on the part of the trial court as a result of which the appellant was deprived of a fair trial. The nature of the irregularity vitiates the proceedings. Turning to the question whether the application for condonation should be granted, although we are not entirely satisfied with the explanation given for the delay in the filing of the amended notice of appeal, the prospects of success on the ground of a fair trial are such that the application should be granted. It follows that the conviction and sentence cannot be allowed to stand. As to the other grounds of appeal, it is not necessary to deal with them as the matter has been disposed of on the above ground.

[24] In the premises the following order is made:

- (a) The application for condonation is granted.
- (b) The appeal is upheld.
- (c) The conviction and sentence are set aside.
- (d) The matter is remitted to the Regional Court Swakopmund for a hearing *de novo* before a *different* magistrate.

NN Shivute
Judge

