REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

REPORTABLE

CASE NO: CA 54/ 2016

In the matter between:

MICHAEL GAWISEB **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Gawiseb v S* (CA 54/2016) [2022] NAHCMD 231 (10 May 2022)

Coram: JANUARY J et D USIKU J
Heard: **01 April 2022**
Delivered: **10 May 2022**

Flynote: Criminal Procedure – Appeal – Convictions and sentences - 4 charges of Rape – Single witness – Incomplete record – Made out the crux of the case and what evidence was about – Complainant credible – Corroboration on facts soon after incidents - Appellant's version rejected on justifiable grounds – Magistrate's finding of facts cannot

be disturbed – No misdirection – Minimum sentences mandatory – Cumulative effect not considered – Ameliorated by taking charges together for purposes of sentence and order sentences to run concurrently.

Summary: The appellant stood charged with a co-accused on 4 charges of rape, assault with intent to do grievous bodily harm and assault by threat. He pleaded not guilty, denying all the allegations levelled against him and put the State to the proof of all allegations. The complainant was a single witness in relation to the incidents of rape. She was however corroborated on what happened immediately after the incidents and was found to be a reliable witness. The appellant was convicted as charged and sentenced to a cumulative sentence of 60 years' imprisonment. The convictions are confirmed.

The appellant grabbed the complainant in the presence of his co-accused and instructed the co-accused to hold her. The appellant then raped her. Thereafter he instructed the co-accused to rape her. They thereafter dragged her to a toilet and again had sexual intercourse with her in turn. They took her to a service station where they wanted to eat. The co-accused in the meantime disappeared. The complainant reported the incidents of rape to a security guard. The appellant pulled her away from the security guard and took her to the side of a railway line. He produced a knife, threatened her and thereafter raped her for the third time.

The complainant was a single witness. Her evidence was found to be clear and reliable on all material aspects. Appellant was convicted as charged and sentenced to a cumulative sentence of 60 years imprisonment. A minimum sentence of 15 years' imprisonment on each of the three charges where he raped the complainant and a minimum sentence of 15 years' imprisonment on the charge where he instructed and assisted his co-accused to rape the complainant. The convictions on assault with intent to do grievous bodily harm and assault by threat were taken together with the first charge of rape for the purposes of sentence. The sentences are competent however, considering the cumulative effect thereof it is harsh and needs to be ameliorated. It is

ordered that the sentences on count 1, 2, 6 and 7 are to be served concurrently and the sentences on counts 4 and 5 likewise, are to be served concurrently.

ORDER

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1. The convictions on all charges are confirmed;
2. The sentences are confirmed;
3. It is ordered that the sentences on counts 1, 2, 6 and 7 are to be served concurrently; and
4. The sentences on counts 4 and 5 are, likewise to be served concurrently.

APPEAL JUDGMENT

JANUARY J (D USIKU J concurring):

Introduction

[1] The appeal is against the convictions and sentences on 4 counts of rape in contravention of sections 2(1) (a), 2(1) *(b)* of the Combating of Rape Act 8 of 2000, assault with intent to do grievous bodily harm and assault by threat. The case was heard in the Regional Magistrate's Court held at Otjiwarongo. The appellant was arraigned with a co-accused who did not file an appeal.

[2] The counts in relation to the appellant were as follows; Count 1-Contravening section 2(1) *(a)* of the Combating of Rape Act 8 of 2000- Rape read with the provisions of the Combating of Rape Act 8 off 2000; Count 2- Contravening section 2(1) *(b)* of the Combating of Rape Act 8 of 2000- Rape read with the provisions of the Combating of Rape Act 8 of 2000; Count 4- Contravening section 2(1) *(a)* of the Combating of Rape Act 8 of 2000- Rape read with the provisions of the Combating of Rape Act 8 of 2000 Rape read with the provisions of the Combating of Rape Act 8 off 2000; Count 5- Contravening section 2(1) *(a)* of the Combating of Rape Act 8 of 2000- Rape read with

the provisions of the Combating of Rape Act 8 of 2000; Count 6 - Assault with intent to do grievous bodily harm; Count 7- Assault by threat. The appellant was sentenced on count 2, 4 and 5 to 15 years' imprisonment on each count. Counts 1, 6 and 7 were taken together for the purposes of sentencing and the appellant was sentenced to 15 years imprisonment. The cumulative sentence is 60 years' imprisonment.

[3] The appellant was represented in the court *a quo* by *Mr. Siambango*. He is represented in this appeal by *Mr. Muchali* and the respondent by *Mr. Muhongo.*

The particulars of the charges and background

[4] The particulars of the charge are; on count 1: In that on or about the 14th day of November 2010 and at or near Otavi in the Regional Division of Namibia, the accused person, hereafter called the perpetrator, did wrongfully, unlawfully and intentionally and under coercive circumstances, namely:

a) Grabbed the complainant on the neck;
b) Pulled the complainant;
c) Held the complainant on the mouth;
d) Applied physical force to the body of the complainant where,

Accused one then instructed accused two to have sexual intercourse with the complainant and accused two inserted his penis into the complainant's vagina. Thus the perpetrators commit or continue to commit a sexual act with another person, namely Constansia Gamgabes, a 37 year old female, the sexual act consisted of; accused two inserting his penis into the complainant's vagina.

[5] On count 2: In that on or about the 14th day of November 2010 and at or near Otavi in the Regional Division of Namibia, the accused person, hereafter called the perpetrator, did wrongfully, unlawfully and intentionally and under coercive circumstances, namely:

a) Grabbed the complainant on the neck;
b) Pulled the complainant;
c) Held the complainant on the mouth;
d) Applied physical force to the body of the complainant,

commit or continue to commit a sexual act with another person, namely Constansia Gamgabes, a 37 year old female, the sexual act consisted of; the accused inserting his penis into the complainant's vagina.

[6] On count 4: In that on or about the 14th day of November 2010 and at or near Otavi in the Regional Division of Namibia, the accused person, hereafter called the perpetrator did wrongfully, unlawfully and intentionally and under coercive circumstances, namely:

a) Grabbed the complainant on the neck;
b) Pulled the complainant;
c) Held the complainant on the mouth;
d) Applied physical force to the body of the complainant where,

Accused 1 commit or continue to commit a sexual act with another person, namely Constansia Gamgabes, a 37 year old female, the sexual act consisted of; the accused two inserting his penis into the complainant's vagina.

[7] On count 5: In that on or about the 14th day of November 2010 and at or near Otavi in the Regional Division of Namibia, the accused person, hereafter called the perpetrator, did wrongfully, unlawfully and intentionally and under coercive circumstances, namely:

a) Grabbed the complainant on the neck;
b) Pulled the complainant;
c) Held the complainant on the mouth;
d) Applied physical force to the body of the complainant where,

accused one commit or continue to commit a sexual act with another person, namely Constansia Gamgabes, a 37 year old female, the sexual act consisted of; the accused inserting his penis into the complainant's vagina.

[8] On count 6: Assault with intent to do grievous bodily harm; In that the on or about 14th November 2010 and at or near Otavi in the Regional Division of Namibia, the accused persons jointly and severally did wrongfully, unlawfully and maliciously assault Constansia Gamgabes by beating/kicking her with booted feet on her head and on the

ribs, and thereby inflicting certain wounds, injuries or hurts with intent to do the said Constansia Gamgabes grievous bodily harm.

[9] On count 7: In that on or about 14th November 2010 and at or near Otavi in the Regional Division of Namibia, the said accused did unlawfully and intentionally assault Constansia Gamgabes by threatening to kill her, thereby causing the said Constansia Gamgabes to believe that the said accused intended and had the means forthwith to carry out his threat.

[10] The appellant pleaded not guilty on all counts. He denied all the allegations levelled against him. He admitted that he was at some stage with the complainant and his co accused. He denied that he had sexual intercourse with the victim and denied that he assaulted or threatened to assault the complainant.

The history of the appeal

[11] The appeal has a history from the date on which the accused was sentenced and the case was finalized. The appellant was sentenced on 29th July 2014. He filed a notice of appeal in person on 11 March 2015. It is dated 15th February 2015 and it was received by the Mariental Correctional Facility on 17th February 2015. No application for condonation for the late filing was filed then.

[12] The matter was enrolled for hearing on 19th August 2016. On this date it was postponed to 07th October 2016 for hearing. The appellant in the meantime applied for legal aid. On 07th October 2016, his counsel who was appointed, was not available due to other commitments. The matter was then postponed to 13th February 2017 for hearing. It is not clear what happened to the matter thereafter but on 08th July 2019, it was struck from the roll because there was no proper notice of appeal and no application for condonation.

[13] On 1st December 2020 the matter was re-enrolled. On this date, however, the appellant was not brought to court from the Hardap Correctional facility. In addition, the matter was previously struck from the roll for the record to be re-constructed as it was

incomplete. From documents filed, it appears that the matter was thereafter re-enrolled on various occasions but struck from the roll due to the incomplete record. The appeal was eventually heard on 01st April 2022.

The grounds of appeal

[14] The grounds of appeal are as follows:

AD CONVICTION

1. 'The learned magistrate erred and/or misdirected herself in law and facts when she convicted Appellant on count 1 (Contravening section 2(1) (b) of the Combating Rape Act 8 of 2000 without any evidence from the complainant that the Appellant compelled accused 2 to have sexual intercourse with her.

2. The learned magistrate erred in law and facts when she convicted Appellant on count 6 (Assault with intent to do grievous bodily harm) because it resulted in duplication of convictions in terms of the same evidence test and/or single evidence (intent) test.

3. The learned magistrate erred in law and facts when she convicted the Appellant on count 7 (Assault by threat) without any evidence from the complainant that the Appellant threatened to kill her.

4. The learned magistrate erred in law and facts when she convicted the Appellant on count 6 (Assault with intent to do grievous bodily harm) without any evidence that the Appellant assaulted the complainant with booted feet which caused her grievous bodily harm.

5. The learned magistrate erred and/or misdirected herself in law by paying lip service and failing to apply the cautionary rule to the uncorroborated evidence of the complainant (single witness) in terms of section 208 of the Criminal Procedure Act 51 of 19777 as amended.

6. The learned magistrate erred and/or misdirected herself in law when she convicted the Appellant of count 6 (Assault with intent to do grievous bodily harm) without amending the charge in terms of section 86 of the Criminal Procedure Act 51 of 1977 as amended.

7. The learned magistrate erred in law when she convicted the Appellant of contravening section 2(1) (b) of the Combating of Rape Act 8 of 2000 in respects of counts 2, 4. and 5, while the allegations in the 3 counts are that the Appellant inserted his penis in the vagina of the complainant.

8. The learned magistrate erred in law and facts when she convicted the Appellant without any medical evidence beyond a reasonable doubt proving any rape and the assault with intent to do grievous bodily harm to the complainant.

9. Alternatively in law, all the convictions to be quashed because material evidence of the case record cannot be reconstructed by the clerks of the criminal court.

AD SENTENCES

1. The collective sentence of 60 years imprisonment imposed on the Appellant by the learned magistrate is unconstitutional in law.

2. The learned magistrate erred and/or misdirected herself in law when she imposed the mandatory sentence of 15 years imprisonment each on count 2, 4, and 5 when appellant had substantial and compelling circumstances that existed at the time of sentencing.

3. The learned magistrate erred and/or misdirected herself by overemphasizing the seriousness of the offences and the interest of society by ordering the sentences on counts 2, 4, 5, and 1, 6 and 7 (taken together) to run consecutively.

4. The learned magistrate erred and/or misdirected herself in law when she failed to solicit substantial and compelling circumstances from the Appellant before sentencing him to 60 years direct imprisonment.

5. The learned magistrate erred and/or misdirected herself in law when she considered evidence of psychological effects (mental scars) of the rape without any evidence testified by any person or expert in psychology.

6. The learned magistrate erred and/or misdirected herself when she failed to genuinely apply the principle of mercy and ordered the sentences to be served consecutively.

7. The learned magistrate erred and/or misdirected herself when she sentenced the Appellant on a duplicate conviction on count 6 of Assault with intent to do grievous bodily harm.'

Points in limine

[15] The respondent raised three points *in limine,* submitting as follows:

i. The fact that the appeal was re-enrolled without a complete record disregarding previous Court orders and ;

ii. That there is no explanation and satisfactory reason for the delay in lodging this current appeal after it was struck off the court roll 0n 08 July 2019 and;

iii. Lastly, the fact that there is lack of prospects on appeal demonstrated in the appellant's condonation application.

[16] Rule 67(1) of the magistrate's court rules stipulates in peremptory terms that an accused, 'shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based.' Otherwise an application for condonation must be lodged.

[17] The respondent filed a notice of motion with supporting affidavits and a notice of appeal on 01st November 2021 applying for condonation for the late filing of the appeal. The appellant, in his supporting affidavit stated that on the date of sentencing on 29th July 2014, he was transported to Omaruru Correctional Facility about 140 km from Otjiwarongo. He was consequently not given the opportunity to request for assistance from the clerk of court to draft a notice of appeal within 14 days as stipulated by rule 67. He is a lay person and needed assistance.

[18] After three days at Omaruru, the appellant was transported to Walvis Bay Correctional Facility. He drafted a notice of appeal, date stamped by the Prison Services on 06th August 2014 and well within the 14 days period. He handed it to a correctional officer because he was an inmate without the privilege to file it himself. The appellant

cannot explain why this notice of appeal was not filed and is not attached to the record of proceedings.

[19] The appellant further stated that he was incarcerated in Walvis Bay Correctional Facility for 2 months and 3 weeks where after he was transferred on 07th November 2014 to Hardap Correctional Facility. On the 17th of February 2015 he drafted another notice of appeal. This notice is attached to the record of proceedings and date stamped 11 March 2015. He in the meantime started calling the Otjiwarongo magistrate court and enquired about his appeal. He was told that the case record was sent for transcription. He continued calling until his high court appearance in October 2016. He received the case record on 16 June 2016.

[20] The appellant stated that he applied for legal aid, whereupon Mr Ipumbu was appointed. On the 13 February 2017, he appeared in court but the matter was struck from the roll because the record was incomplete. He contacted the clerk of court in Otjiwarongo to obtain the complete reconstructed record. Eventually, according to him, the missing parts were reconstructed. He again successfully applied for legal aid. The matter was re-enrolled on the 2nd of July 2018 but was again struck from the roll because the sentencing part of the record was missing.

[21] The matter was again re-enrolled on 08th July 2019 but was once more struck from the roll because there was no proper notice of appeal or an amended notice of appeal and no application for condonation. The appellant's legal representative in the meantime withdrew. Mr. Muchali was then appointed. He wrote letters to the clerk of court at Otjiwarongo for the reconstruction of the record as it was still incomplete. In a copy of one of the letters, it is indicated that reconstruction was needed on; a) The evidence and cross-examination of the appellant; b) Aggravation before sentencing.

[22] The clerk of court replied on 20 July 2021 that the record cannot be reconstructed due to missing tape recordings and the fact that the magistrate passed away, as well as the legal aid lawyers' and the public prosecutor's inability to assist. The matter was then

re-enrolled. The appellant submits that the delay was not because of wanton or willful delay on his part.

[23] The appellant stated that he has prospects of success on appeal. He conceded that the record of proceedings is still incomplete but prays that the appeal should be heard otherwise it will be prejudicial to him.

[24] I find the explanations for the delay to be reasonable. The incomplete record is certainly not due to the fault of the applicant. It is evident that the incomplete record cannot ever be reconstructed. In the interest of justice and the accused, the matter needs to be finalized. I find that, although incomplete, one can make out what the evidence in the case was and what the crux of the case is about. In my view, there are at least prospects of success in respect of the sentence. In the circumstances, the points *in limine* stand to be dismissed.

The evidence/facts
(I consider it necessary in the circumstances of the incomplete record to give a detailed summary of the evidence available).

[25] Ernst Kambonde testified that he knows the appellant and the co-accused. He testified that on the 14th of November 2010, he was escorting the complainant from a certain club because he observed that she was drunk. The complainant was the witness's uncle's wife. He escorted the complainant up to a certain point where she indicated that she will go home. The witness saw the appellant and his co-accused not knowing from where they came. The appellant conversed with him, enquiring about the complainant and telling the witness to go home. The appellant scared and threatened the witness with an empty beer bottle. The witness, thereafter ran away and went home. He only heard the following day that the complainant was raped.

[26] Ignatius Kambonde is the investigating officer in the matter. His evidence is that the complainant reported the incident to him on 14th November 2010. She reported that she was raped and pointed out the appellant who at the time was outside the police

station. The witness approached the appellant, warned him of his constitutional right to legal representation including the right to apply for legal aid, bail and the right to silence. The appellant opted to make a statement. The appellant stated that he observed his friend, the co-accused having sexual intercourse with the complainant in a toilet. The statement was received without objection as an exhibit. In the statement the appellant stated, amongst others, that the complainant approached the co-accused at Khoaeb Inn/bar and they had a discussion. When the bar closed, the appellant, complainant and the co-accused went to the Single Quarters. The co-accused and complainant went to a toilet and had sexual intercourse. According to the statement, the complainant enquired if the co-accused had a condom. Thereafter the three of them left for Four Way Service Station and thereafter to the location. He stated that he was walking behind his co-accused and the complainant. He heard the complainant informing her neighbors that she was raped.

[27] The witness testified that he arrested the co-accused on information from the appellant. He transported the complainant, appellant and the co-accused to Otjiwarongo State Hospital for medical examination.

[28] Sakarias /Gui-Da-Oab is a security officer at Four Ways Service Station in Otavi. On the day of the incident he was working night shift at the service station. Between about 3h00 and 4h00 he observed the complainant approaching him walking slowly. The complainant grabbed him, asked for help and informed him that she was raped. A panty fell from her hands. The appellant approached, grabbed the complainant on her hands and swore at the security saying; ‘security’s mother’s vagina!’ twice. The appellant pulled the complainant and walked away with her into the darkness.

[29] Hans Garosab is the brother of the complainant. On 14th November 2010, at about 6h00 he heard loud talking and people making noise at the house of his neighbors. He went there and found the complainant and the appellant quarrelling. The complainant informed him that she was raped by two guys. The appellant pushed the complainant saying that he did not rape her. He insulted the complainant by referring to her vagina. A quarrel and altercation as a result ensued between the witness and the appellant. The

complainant ran away to a house of a certain Pokkie. The witness eventually went to the house of the boyfriend of the complainant and enquired about her whereabouts. He also reported the allegation of rape to the boyfriend. He thereafter went to the police station where he found the appellant. He went with the police to the Single quarters where the co-accused was eventually also arrested.

[30] David Witbooi is the boyfriend of the accused. He testified that the brother of the complainant on the day of the incident came to him and enquired about the whereabouts of the complainant. The brother reported to him that the complainant was raped by two guys. The complainant was not at his place. When the brother left, the witness went to a certain Pokkie's place and found the complainant there. She informed him that she was raped. The witness accompanied the complainant to the police station to report the incident. The appellant followed them to the police station. The complainant identified the appellant as a perpetrator at the police station. The police thereafter went and arrested the co-accused on information from the appellant.

[31] Johanna Katiti is a police officer attached to the Scene of Crime Unit. The complainant pointed out scenes to her. She photographed it and compiled a photo plan.

[32] Joseph Joshua David Mbulayo is a medical practitioner at Otjiwarongo State Hospital. He conducted the medico-legal examination on the complainant and reported his findings in a J88 form. He found her with a panty full of blood. The complainant had bruises on the left shoulder and an abrasion on the right back. The breasts were intact. There were no bruises or wounds on the labia majora. The labia minora and other parts of the vagina were normal. The hymen was absent. The examination was painful and there was blood discharge from the vagina. He opined that the blood could be as a result of forceful sexual intercourse.

[33] The witness also examined the appellant and found one abrasion at his back. No abrasions were found on the genetalia.

[34] The complainant is a single witness in as far as the actual rape and assault allegations are concerned. The complainant is a resident of Otavi and the accused persons also resided in Otavi. On the night of the incident she was coming from a certain hall accompanied by a certain Ernst up to a certain point. After Ernst left her, the appellant approach her from behind and grabbed her on the neck. She tried to scream but the appellant held her on the mouth. The appellant instructed his co-accused to hold her. The co-accused held her on the arm. The two of them held her and took her to Single quarters into a toilet. The appellant held her on the arms and told the co-accused to remove her panties. The appellant then had sexual intercourse with her without her consent and against her will. Thereafter the co-accused had sexual intercourse with her against her will. Both accused persons inserted their penises into her vagina.

[35] After the sexual intercourse, the appellant used his hand and beat the complainant when she pleaded that the perpetrators should leave her alone. She lost a tooth as a result of the beating. She also fell down. The appellant instructed her to get up and again instructed the co-accused to hold her. The appellant and co-accused took the complainant to a second toilet and in turn again had sexual intercourse with her against her will by inserting their penises into her vagina. After the second incident the perpetrators suggested to go to a certain Four Way Service Station to buy food as they were hungry.

[36] When they arrived at the service station, the complainant saw a security guard, Sagaria, and reported to him that the two perpetrators had raped her. The appellant held her on her dress and stated that she was lying. He pulled her away from the security guard towards the other side of a road up to a railway line. The co-accused in the meantime walked away or disappeared. The appellant then took out a knife, showed it to the complainant and threatened that he could have killed her. He again had sexual intercourse with her by inserting his penis into her vagina without her consent.

[37] Thereafter the complainant came to the house of a certain Mr. Kavetu where she reported the incidences of rape. Her brother also arrived at this house and she reported to him as well. The appellant started to fight with her brother whereafter the complainant

ran to the house of a certain Mr. Paul where she met with Mr. Paul and his wife. The complainant's boyfriend also joined them. They all together went to the complainant's house while the appellant was standing with a panga under a tree. The complainant thereafter went with her companions to the police station and reported the incidences to a certain Neumbo. The appellant followed them to the police station. After a report to the police, the complainant was taken to Otjiwarongo State Hospital for medical attention.

[38] In cross-examination the complainant confirmed her evidence. She testified that there was nobody around when she was pulled to the Single Quarters. She was at the time crying but nobody could hear her as the people were sleeping.

[39] When confronted with her witness statement, the complainant confirmed it in essence but stated that some of the facts like being taken to hospital, being taken to people of Gender Base Violence and photos being taken do not appear in her statement. The witness testified that she was not drunk but in her statement she stated that she consumed alcohol and was a little bit drunk. Because of that, she requested the assistance of Ernst to escort her. In cross-examination she stated that she requested Ernst to escort her for safety.

[40] The complainant denied that she was in the company of the co-accused and/or was talking to him. She denied having requested a jacket from the appellant and stated that she was only wearing her dress. She stated that she was examined by a doctor. She showed him a swollen cheek and scratch marks on her body. She however, does not know if the doctor noted down the injuries.

[41] The complainant further stated in cross-examination that she told the security guard that she was raped by two men or guys. She pointed out the appellant but at the time the co-accused was not present. She does not know where the co-accused was or disappeared to. She denied having had any discussion with the co-accused and thereafter willingly going into a toilet where they had sexual intercourse. She further denied any discussion about the use or possession of any condom. The witness stated that the appellant told his co-accused to have sexual intercourse with her.

[42] After the close of the State's case, the appellant testified in his defense. His testimony in chief does not reflect on the record of proceedings. The initial part of cross-examination by the legal representative of the co-accused also does not reflect in the record.

[43] One can gather from the cross-examination by counsel for accused 2 that the appellant on the day of the incident, was drinking around. At that time, he was not in the company of his co-accused (accused 2). He firstly met accused 2 at around 11h00 at a club. He left accused 2 there and left with two friends. He thereafter again met the co-accused around 2h00 at Damaseb-club before it closed. A certain Monica was also at the place where he bought two beers. The appellant was with accused 2 from that time until early morning hours. Accused 2 was at that time with the complainant. He went with accused 2 and the complainant to the Single quarters. Accused 2 and the complainant went into a toilet at Single quarters where they had sexual intercourse. Thereafter they went to Four Ways service station.

[44] The appellant confirmed that he followed the complainant to the house of a certain Pokkie. According to the appellant, Pokkie knew him and advised that he should go to the police station. The appellant testified that the complainant was lying about the absence of accused 2 from the service station.

[45] It emerged during cross-examination by the State that the appellant had been drinking before he met accused 2 and the complainant. He was drunk and did not really mind what was going on around him although, he very well knew what was going on around him. Accused 2 was also drunk. Accused 2 was walking and asked for a condom at some stage. The appellant, accused 2 and the complainant did appreciate what they were doing at the time. The appellant denied that the complainant was walking with Ernst Kambonde at the time that he met her.

[46] The appellant confirmed that he saw the complainant with accused 2 but did not pay much attention. He again saw her at the police station after she reported the

incident. The appellant further confirmed that from the pub to Four-Way service station, he was in the presence of accused 2. He stated that he was further in continuous contact with accused 2 until 6h00 except for certain minutes that accused 2 went away from him.

[47] He confirmed that the complainant approached the security guard and told him that she was raped. He further stated that from there he, the complainant and accused two left although accused 2 was walking behind. He stated that he approached the complainant and took his jacket, later a jersey, from her while she was holding on to the security guard. They left to the location crossing a railway line whilst accused two was behind. He stated that he was angry and wanted to go home. At that time the complainant was walking behind him. At some stage, the complainant informed his neighbor that she was raped. The neighbor then confronted him.

[48] The appellant closed his case after his testimony and did not call any witnesses.

Evaluation of the evidence by the magistrate

[49] The magistrate was aware that the complainant is a single witness on the rape and assault charges. She considered that she was dealing with two mutually destructive versions in relation to the evidence of the complainant and that of the appellant. She considered and applied the principles applicable in accordance with case law in both scenarios.

[50] In the scenario of mutually destructive versions; 'It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case.'[1]

[51] In relation to the evidence of a single witness, it is required that the testimony should be clear and satisfactory in all material aspects. Caution must be exercised, however, caution must not be allowed to displace the exercise of common sense. The

[1] See: *S v Diergaardt* 2019(2) NR 471 (HC) Headnote 471 I to 472 A.

court must consider the merits and demerits, shortcomings on the facts and contradictions and must be certain that the truth was told.[2]

[52] The appellant admitted that on the day of the incident he was in the company of the complainant. He, however denied that he raped and assaulted her.

[53] The magistrate found the complainant to be a credible witness, despite minor and immaterial discrepancies and contradictions. Although the complainant consumed alcohol on the day of the incident, her evidence was found to be clear and detailed. The inconsistencies were found to be immaterial. In addition, the magistrate found witnesses who testified on facts soon after the incident to have corroborated the complainant. These witnesses were found to be reliable and credible. She found the evidence of the appellant to be false on material aspects and rejected his defense.

[54] I have considered the evidence and the reasons in the judgment and do not find any error or misdirection in relation to the convictions. The appeal against conviction therefore falls to be dismissed.

AD SENTENCE

[55] The record of proceedings is also incomplete in relation to sentence. The reasons for sentence are not part of the record of proceedings. The only document that appears is one indicating that the magistrate did not have any additional reasons on her *ex tempore* conviction and sentence. In the circumstances, it is difficult to determine what the magistrate considered or ignored, for that matter. It is a fact that the record in this regard cannot be reconstructed because the magistrate has since passed away. The personal circumstances of the appellant were placed before court and appears in the available record. In the circumstances, I find it in the interest of justice to consider sentence afresh.

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[2] See: *S v Esterhuizen* and another 1990 NR 283 (HC); *S v HN* 2010 (2) NR 429 (HC).

[56] It is trite that a court of appeal's powers are limited to interfere with a sentence and it can only do so in certain circumstances as it was stated in *S v Tjiho* 1991 NR 361 HC at 366 A-B, where Levy J stated that:

> 'The appeal court is entitled to interfere with a sentence if:
>
> *(i) the trial court misdirected itself on the facts or on the law;*
>
> *(ii) an irregularity which was material occurred during the sentencing proceedings;*
>
> *(iii) the trial court failed to take into account material facts or overemphasized the importance of other facts;*
>
> *iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by any court of appeal.'*[3]

[57] I find the sentence, cumulatively, harsh and it induces a sense of shock considering that the different incidences of rape were committed in a continued transaction on the same date. It seems that the magistrate did not consider the cumulative effect of the sentences and felt bound by the penalty provisions in the Act. In my view, the appellant could also have been charged with rape on diverse occasions on the same day and place. In that case, the sentence would have been different as the appellant would only have faced one count of rape. Be that as it may, I will consider the sentence afresh taking into account the material facts.

[58] The personal circumstances of the appellant are: that he was 31 years old on the date of sentencing; he was not married but had a life partner for 5 years; he has 4 children, three of whom were living with the appellant and are now with his grandmother; he was employed as a builder before his arrest; he attended school to grade 7; he is a first offender.

[59] On the available facts, I do not find any substantial and compelling circumstances. It is evident from the facts that the appellant acted in common purpose with his co-accused as far as counts 1 and 2, where both had sexual intercourse with her against

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[3] See: See: *S v Tjiho* 1991 361 (HC) at 366 A-B

her will, are concerned. The actions of the two accused most certainly must have been intimidating to the complainant. The appellant wielded a knife on the third occasion, threatened the complainant and thereafter again had sexual intercourse with her. The different rapes were under coercive circumstances without substantial and compelling circumstances. In the circumstances the minimum sentence of 15 years' imprisonment on each of the statutory rape charges is applicable and mandatory.

[60] This court was referred to *S v Gaingob and others* 2018 (1) NR 211 (SC) where it was held that where sentences exceed the normal life expectancy of an offender by effectively removing all realistic hope of release during his/her lifetime to be unconstitutional. It was submitted by the respondent that the *Gaingob* matter dealt with common law crimes and not statutory crimes and thus, does not find application. The appellant submitted that the collective sentence of 60 years' imprisonment is unconstitutional, unreasonable, unfair and excessive in nature. In my view, it matters not whether it is a statutory or common law crime. The principle remains the same that sentences that exceed the lifespan of an offender and removing any hope of release, are unconstitutional.

[61] The minimum penalties in the Combating of Rape Act were not declared unconstitutional and it is thus, compatible to sentence an offender who for instance committed multiple rapes to the minimum sentence for each of the crimes. The court however, should consider the cumulative effect of the sentences and has the judicial discretion to ameliorate the effect by taking charges together for purposes of sentence or order the concurrent serving of those sentences.

[62] Section 3(4) of the Combating of Rape Act 8 of 2000 stipulates that:

'(4) If a minimum sentence prescribed in subsection (1) is applicable in respect of a convicted person, the convicted person shall, notwithstanding anything to the contrary in any other law contained, not be dealt with under section 297(4) of the Criminal Procedure Act, 1977 (Act 51 of 1977): Provided that, if the sentence imposed upon the convicted person exceeds such minimum sentence, the convicted person may be so dealt with in regard to that part of the sentence that is in excess of such minimum sentence.'

[63] Section 297(4) of the CPA provides for the suspension of or part of a sentence. In terms of section 3(4) of the Combating of Rape Act 8 of 2000, quoted above, the minimum sentence of 15 years cannot be suspended. However, in terms of section 280 (2) the court may direct that the sentences may be served concurrently. Although the CPA does not specifically provide for it, counts may also be taken together for purposes of sentence. In my view, the sentences of 15 years' imprisonment on each of the rape charges are competent. One should however consider the cumulative effect of the sentences and ameliorate it by taking charges together for purposes of sentence, as the magistrate did on counts 1, 6 and 7, and order some of the sentences to run concurrently instead of consecutively.

[64] It is a settled rule of practice that punishment falls within the discretion of the trial court. As long as that discretion is judicially, properly or reasonably exercised, an appellate court ought not to interfere with the sentence imposed. This principle emerges from a chain of authorities, but for purposes of this judgment it suffices to refer only to two of them.

In *S v Rabie*[4] there occurs the following passage:

'In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal - should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court'"; and

(b) should be careful not to erode such discretion; hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised.'

Conclusion

[65] In the final analysis, considering the cumulative effect of the sentences, the personal circumstances of the appellant and the circumstances of the crime this court ought to interfere with the cumulative sentences passed by the trial Court. To this end, although I have earlier held that the individual punishments were not inappropriate, there is need to interfere with them in order to impose cumulative sentences.

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[4] *S v Rabie* 1975 (4) SA 855 (A) at 857D

[66] In the result:

1. The convictions on all charges are confirmed;
2. The sentences are confirmed;
3. It is ordered that the sentences on counts 1, 2, 6 and 7 are to be served concurrently; and
4. The sentences on counts 4 and 5 are to be served concurrently.

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H C JANUARY

JUDGE

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D USIKU

JUDGE

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