REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CRI-APP-CAL-2018/00042

In the matter between:

FILLEMON MBASHE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mbashe v S* (HC-MD-CRI-APP-CAL-2018/00042) [2022] NAHCMD 80 (1 March 2022)

Coram: USIKU J AND CLAASEN J
Heard: 21 January 2022
Delivered: 1 March 2022

Flynote: Criminal Procedure – Appeal – Rape read with the provisions of the Combating of Rape Act 8 of 2000 – Sentence –Single witness – Principles and approach – Onus to prove beyond reasonable doubt – Principle to put defence and disputed facts to witnesses – victim credible and reliable witness.

Summary: The appellant was convicted in the regional court on two counts of rape read with the provisions of the Combating of Rape Act 8 of 2000. The victim, a minor who at the time of the first rape was nine years old, was the only witness to testify in relation to the acts of rape. She kept the rape a secret from both her mother and guardian for a period of time from 2007 until she revealed the rape to her mother and guardian in May 2008. She testified that the appellant raped her on various occasions since 2007 and threatened her not to mention the sexual acts to anyone or he would beat her. Having been vigorously cross-examined, on the delay in reporting her explanation was plausible and she was found to be an honest, reliable and credible witness.

The appellant pleaded not guilty and gave no plea explanation. He testified in his own defence and further called his nephew who at the time of the rape incidences was eight years old. At the time of this testimony before court he was aged 16. The appellant insisted that the trial court should not rely on the testimony of a single witness who contradicted herself. The court however found the appellants' version not to be probable and rejected it as false.

The appellant was sentenced to 20 years imprisonment after the court found that there were no substantial and compelling circumstances, having considered his personal circumstances weighed against the seriousness of the charges he faced.

The court found no error or misdirection by the magistrate. The appeal against conviction and sentence is dismissed.

ORDER

The appeal against conviction and sentence is dismissed.

APPEAL JUDGMENT

USIKU J (CLAASEN J concurring)

[1] The appeal is against the sentence by the Regional Court Magistrate, Swakopmund. The appellant was convicted of two counts of rape in contravention of section 2(1)(a) read with the provisions of sections 1, 2(3), 3, 4, 5, 6 and 7 of the Combating of Rape Act 8 of 2000.

[2] The appellant was represented by Mr. Dube in the court *a quo*. During this appeal the appellant was represented by Mr. Siyomunji who instructed Mr. Mwakondange to make submissions on his behalf. The state was represented by Ms. Shikerete.

[3] The appellant was charged with two counts of rape in contravention of section 2(1)(a), read with sections 2(2) of the Combating of Rape Act, 2000 (Act 8 of 2000) in the Swakopmund Regional Court. It was alleged that on unknown dates in the year 2007 and 2008 the appellant did wrongfully, unlawfully, intentionally at or near Arandis commit and continue to commit sexual acts with a minor by inserting his penis into the victims vagina. It was further alleged that the acts of rape were committed on diverse occasions on the victim at the age of nine and ten respectively.

[4] The appellant pleaded not guilty and gave no plea explanation. However he testified in his own defence and further called his nephew who at the time of the rape incidences was eight years old. The trial commenced on 18 March 2015. Where after the appellant was convicted and subsequently sentenced to 20 years imprisonment on 21 January 2016.

[5] The grounds of appeal as per the amended notice of appeal are as follows:

1. ‘The learned Magistrate erred in law and/or fact by not properly considering that the complainant was a single witness and that there was no corroboration of her version.
2. The learned Magistrate misdirected herself in law and/or fact by not taking into consideration that the complainant was forcefully taken to the Police station to make her report and as such it was made under duress and undue influence.
3. The learned Magistrate erred by in law and/ or fact by not considering that there was no rape kit taken to confirm DNA evidence and that the J88 only suggestive of some previous sexual activity but not necessarily rape.
4. The learned Magistrate erred in law and/or fact by not considering that there was never any alarm or report made against these allegations of rape despite the fact that there were many other people staying at the residence in question.’

[6] The victim was nine years old when the appellant started to rape her. At the time of giving her testimony in court she was 17 years old. The sexual abuse carried on over multiple occasions in February 2007 and February 2008. The appellant at the time of perpetrating the acts of rape was 29 and 30 years respectively. The victim did not require a guardian or support person to assist her during her testimony. She knew the appellant since she was seven years old as she had been living with him and her guardian Ms. Tresia Negongo, the appellant’s girlfriend in Arandis.

[7] She testified that whenever her guardian Ms. Tresia Negongo left Arandis and go to the northern parts of the country, the appellant would enter the bedroom she was sleeping in with a boy who was one year younger than her, one Mr. Albertus Mushongo also known as Ngilokwa. The appellant would enter the bedroom and ask Ngilokwa to leave the bedroom where after the appellant would proceed to have sexual intercourse with the victim by inserting his penis into her vagina. She testified that this happened on various occasions during the month of February 2007 and February 2008.

[8] During cross examination in the court *a quo*, counsel for the appellant questioned the victim why she had not informed her mother that she was enduring sexual abuse while living in Arandis with her guardian. The victim stated that she did not know how to

start. Counsel further asked the victim why she did not inform her teachers at school whereby the victim responded that she did not trust her teachers.

[9] The victim further testified that she took a hike from Arandis to Walvis Bay where her mother lived. She decided that she did not want to go back to Arandis. When asked by her mother why she did not want to return to Arandis, the victim merely stated that she was unwell. Her mother insisted that she must return to Arandis because she was attending her schooling. She then began to cry and her mother came to realise that something was wrong. After many attempts by the victim's mother to find out why she was crying because of her return to Arandis, the victim's mother and her guardian took her to the police station.

[10] It was at the Arandis police station where the victim, in the presence of the police officers, revealed the events that would unfold at their home whenever her guardian left for the northern part of the country. During cross-examination counsel for the defence put it to the victim that her medical report indicated that there was indeed proof of sexual abuse but that abuse occurred to her at the hands of another male who rented a room at the same premises or whilst she had gone to watch television at the neighbor's home. She insisted that it was the appellant who had persistently raped her.

[11] The rape was reported to the police and a case of rape was subsequently opened against the appellant. Ms. Tresia Negongo testified that the appellant left for his work and never returned, disserting his home, his two minor children and his job. He was only arrested four years later.

[12] Dr. Moses Ayoade, though not having been the doctor that performed the examination on the victim, as the doctor who performed the examination had returned to South Africa read the J88 report into the record. This medical evidence was accepted by the court *a quo*. The medical report indicates that the victim's hymen was not intact and that the inside walls of her vagina were inflamed. This was consistent with the victim's claim of being raped and taking into account the victim's age at the time of the

sexual assault. Also the fact that there was a whitish discharge and the examination was easy.

[13] The appellant denied having raped the victim on diverse occasions as alleged during February 2007 and February 2008. He claims that the victim, if raped, such rape was perpetrated by another person. Further that the victim was forced to lay false charges that she was raped by him. Further he claimed that his then girlfriend Ms. Tresia Negongo was vengeful as she had found out that the he had another girlfriend in Ruacana. He denied disappearing but confirmd to have left for Ruacana where he had other clothes and supplies at his disposal and had an intention to open a business there.

[14] He left home on his own free will after learning that his girlfriend Ms. Tresia Negongo was allegedly impregnated by someone else. However the appellant conceded that Tresia only fell pregnant a year later. He stated that he only came to discover after three months that all his belongings were sold. He received a phone call from his ex-girlfriend informing him that the police were looking for him on the allegations of rape.

[15] Mr. Albertus Mushongo, also known as Ngilokwa testified for the defense. Ngilokwa was only eight years at the time of the sexual assault on the victim. At the time of his testimony he was 16 years old. He confirmed that he shared a bedroom with the victim. Under cross-examination he stated that he could not recall much because of his tender age. He conceded that there were times they were left in the care of the appellant while Ms. Tresia Negongo went to the north.

[16] Mr. Siyomunji on behalf of the appellant contends that the victim was a single witness. Further that the J88 in his interpretation does not reach a conclusion of rape, but rather that the minor was sexually active. He concludes that the victim’s testimony was not credible and thus the sate failed to prove its case beyond a reasonable doubt.

[17] It was further correctly found that the victim is a single witness as far as the acts of rape are concerned. The magistrate interpreted the applicable principles on the evidence of a single witness with reference to section 208 of the Criminal Procedure Act 51 of 1977 and relevant case law. She found the victim, although nine and ten years old at the time of the commission of the offences, to have testified without hesitation and reliably of what happened nearly seven years back. The victim was clear. She gave a detailed explanation of what happened when the appellant would enter the bedroom in which she slept with Ngilokwa and that the appellant would ask the young boy to leave the room while he would insert his penis into her vagina and thereafter threaten the victim that he would beat her if she spoke of his deeds.

[18] The learned magistrate considered that there were indeed discrepancies but found them not to be material to such an extent that the victim could not be believed. She approached the evidence of the single witness with caution. She considered the shortcomings, probabilities and improbabilities and concluded that the State proved its case beyond a reasonable doubt.

[19] The magistrate correctly found that many material facts were corroborated by witnesses in cross-examination. The appellant's position that the victim accused him of rape out of revenge, was found to be improbable as the victim's testimony was corroborated by the findings in the J88. Although the victim was nine and ten years respectively when the acts of rape were perpetrated on her, she was clear and consistent about the acts and the identity of the perpetrator. This is after a period of seven years. The victim was not shaken in cross-examination and stood firm.

[20] The victim gave a plausible explanation for her hesitation to either tell her mother, guardian and teachers what was happening to her and the court *a quo,* correctly in my view, did not draw a negative inference from her reluctant conduct. She was also corroborated on material aspects on the evidence as to what happened by the medical examination report. On the other hand, the court *a quo* found the appellant to

be unreliable and dishonest. It concluded that the appellants' version was not probable and therefore, not reasonably possibly true and rejected it as false.

[21] It is trite that when the court considers the evidence of a single witness, the evidence needs to be approached with caution. Such witness should be credible and the evidence should be of such a nature that it constitutes proof of the guilt of an accused beyond reasonable doubt.[1] The evidence of the single witness should be clear and satisfactory in every material respect.

[22] The court's approach to the evidence of an accused, is that:

'…No onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.'[2]

[23] Furthermore in *Minister of Basic Education, Sports and Culture v Vivier No and Another*[3] the position was stated:

"The approach of the courts in assessing the credibility of child witnesses and the reliability of their evidence was informed by the evidential risks associated with their, as yet, inchoate social, emotional and intellectual abilities: their suggestibility and imaginativeness; their capacity to accurately observe, recollect and relate events and experiences their appreciation of the duty and importance of being truthful when testifying and there, sometimes, incomplete comprehension of the – often complex – matters which they were required to testify about. These evidential concerns must always be individualized when courts assess the evidence of the child witnesses but, given the gradual maturation of children's social skills and of their emotional and intellectual abilities from infancy to adulthood, it normally followed naturally and logically that the younger a child witness was, the more pronounced these concerns became and the greater of the measure of care required from the court in assessing the reliability of their evidence:... When the prosecution seeks a conviction on the evidence of a single,

[1] S *v Noble* 2002 NR 67 (HC).
[2] See: *S v Haileka* 2007 (1) NR 55 (HC); *S v Shaanika*1999 NR 247 at 252G.
[3] 2012 (2) NR 613 – 614.

uncorroborated witness, the court is required to make a guarded assessment of the veracity and reliability of the testimonies given by such witnesses in criminal proceedings. As a rule this, thus cautionary approach had constantly been applied in this jurisdiction. Not as a formalistic procedural requirements to which mere lip service must be paid, but as an intrinsic part of a broader logical and reasoned inquiry into the substance of the evidence against the accused: after due appreciation and assessment of the peculiar and inherent dangers of convicting the accused on the evidence of the single/child witness who testified at the trial, was the evidence of that witness, when considered in the context of and together with all other evidence adduced at the trial sufficiently credible and reliable to prove the guilt of the accused beyond a reasonable doubt?"

[24] In terms of s 208 of the Criminal Procedure Act 51 of 1977 the court may convict on the evidence of a single competent witness. The trial court should weigh the evidence of as single witness and consider its merits and having done so, should decide whether it is satisfied that the truth has been told, despite the shortcomings or defects in the evidence, see *S v Sauls*[4].

[25] Mr. Siyomunji in his heads of argument submitted that there exist substantial and compelling circumstances and therefore a suspended sentence should have been meted out by the court *a quo*.

[26] In *S v Tjiho*[5], 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.'[6]

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[4] 1981 (3) SA 172 (AD) at 180 E-G.
[5] 1991 NR 361 HC at 366 A-B.
[6] *S v Tjiho* 1991 361 (HC) at 366 A-B.

[27] On perusal of the judgment on sentence, it is unequivocally clear that the magistrate considered the personal circumstances of the accused and the fact that he is a first offender. She further considered substantial and compelling circumstances and concluded that there are none. Consequently she sentenced the appellant to 20 years imprisonment. She specifically pointed out that the victim came to his home at the tender age of seven to attend school in Arandis. That he and his girlfriend were in a position of trust in their capacity as guardian of the victim.

[28] It is trite that a court of appeal should be slow to interfere with a trial court's evaluation and findings on the evidence. A Court of appeal would not easily discompose a finding of fact on the part of the trial court.[7] In the result, the appeal against conviction and sentence is dismissed.

[29] In the result:

The appeal against the conviction and sentence is dismissed.

D N USIKU

Judge

C M CLAASEN

Judge

[7] *S v Simon* 2007 (2) NR 500 (HC) at 512 paragraph 56: *R v Dhlumayo and Another 1948 (2) SA 677 (A).*

APPEARANCES

APPELLANT:	Mr. Mbanga Siyomunji Of Siyomunji Law Chambers
RESPONDENT:	Ms. F. Shikerete Of the Office of the Prosecutor-General