

**REPUBLIC OF NAMIBIA**

NOT REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No.: HC-MD-CRI-APP-CAL-2022/00093

In the matter between:

**HOFENI LUPANDU**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Lupandu v The State* (HC-MD-CRI-APP-CAL-2022/00093) [2023]  
NAHCMD 265 (15 May 2023)

**Coram:** **LIEBENBERG J et JANUARY J**

**Heard:** 27 March 2023

**Delivered:** 15 May 2023

**Flynote:** Criminal Procedure – Appeal – Powers of Court of Appeal on appeal – No substantive reasons by trial court on conviction judgment – Constituting a misdirection – consequences – Court of appeal to decide evidence afresh – Not duty of court of appeal.

Criminal Procedure – Evaluation of evidence – Single witness evidence and mutually destructive versions principles restated.

Criminal Procedure – Sentence – No misdirection on the prescribed minimum sentences – Cumulative effect of the individual sentences not considered by trial court – Constitutes an irregularity.

**Summary:** The appellant appeared in the Regional Court sitting at Katima Mulilo on two counts of rape in contravention of s 2(1)(a) of the Combating of Domestic Violence Act 8 of 2000 (the Act). After evidence was heard, the appellant was convicted on both counts and sentenced to 15 years' imprisonment on each count. Aggrieved by the outcome of the trial, the appellant lodged an appeal against both the convictions and sentences imposed. Appellant alleges the trial court did not properly evaluate the evidence and that it further failed to apply its mind as regards the application of the law to the facts in its judgment. Appellant further contends that sentences imposed were harsh and startlingly shocking.

*Held:* The remissness of the presiding magistrate to prepare and deliver a full and reasoned judgment is a misdirection impacting severely on the function and duties of the court of appeal which is now forced to step into the shoes of the trial court. This is not the duty of a court of appeal except where an irregularity was committed which impacts on the outcome of the proceedings.

*Held that:* The State and the accused are entitled to know how the court reached its verdict in order to decide whether or not there are good grounds to appeal.

*Held further that:* Failure by a trial court to consider the cumulative effect of individual sentences is a misdirection and in the circumstances, the sentence of 30 years' imprisonment is found to be disproportionate to appellant's moral blameworthiness.

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## ORDER

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1. The appeal against conviction on count 1 and count 2 is dismissed.
2. The appeal against sentence partly succeeds with the addition of an order in terms of s 280(2) of Act 51 of 1977 that 10 years' imprisonment imposed on count 2 be served concurrently with the sentence imposed on count 1.

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## JUDGMENT

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LIEBENBERG J (concurring JANUARY J):

### Introduction

[1] The appellant appeared in the Regional Court sitting at Katima Mulilo on two counts of rape in contravention of s 2(1)(a) of the Combating of Domestic Violence Act 8 of 2000 ('the Act'). After evidence was heard, the appellant was convicted on both counts and sentenced to 15 years' imprisonment on each count. Aggrieved by the outcome of the trial, the appellant lodged an appeal within the prescribed time limit against both the convictions and sentences imposed.

[2] The appeal against conviction is founded on seven grounds enumerated in the appellant's Notice of Appeal whilst a further five grounds relate to the sentences imposed. The first ground of appeal against conviction amounts to nothing more than a conclusion reached by the drafter of the notice and clearly fails to meet the requirements of being clear and specific. This much, counsel for the appellant conceded during oral submissions. These grounds will be specified below when considering whether or not they have merit.

[3] Mr Amoomo appeared before us for the appellant while Mr Kumalo represents the respondent.

#### Judgment delivered by the trial court

[4] Before dealing with the respective grounds of appeal, it seems apposite to remark on the judgment of the court *a quo*, particularly in view of the argument advanced on behalf of the defence that the trial court's reasoning, as per the judgment, is so terse that it *per se* constitutes a misdirection. The judgment covers nine pages of which more than seven pages are devoted to the summary of evidence adduced. The court's reasoning and conclusions reached are condensed in only half a page from which, as counsel submitted, it is evident that the trial court did not properly evaluate the evidence and failed to apply its mind as regards the application of the law to the facts.

[5] Counsel's contention is not without merit. Besides stating that the case for the state stands and falls on the single evidence of the complainant, the court summarily found that the complainant was consistent in her testimony and that the court had no reason to doubt her reports made to her mother, aunt and a police officer and that she was credible. Having accepted the complainant's version as reliable, the court further accepted that the appellant gave the complainant money on each of the occasions he had sexual intercourse with her and told her not to tell her friends or her mother. By

offering her a lift and giving her chips, the court opined that, by so doing, he was grooming the complainant which the court described as 'a clear *modus operandi* of a paedophile'. The court reasoned that this prepared the complainant for the sexual act, which explains why she did not sustain any injuries during the sexual acts committed with her. Having been satisfied that the complainant was truthful, the appellant's version was rejected as being false and the accused was convicted on the basis of the complainant being under the age of 14 years and the appellant more than three years older, a coercive circumstance as provided for in the Act.

[6] During oral argument, counsel for the appellant conceded that the omission on the part of the magistrate to incorporate in the judgment, the court's reasoning and basis for the findings reached, does not *per se* constitute an irregularity vitiating the outcome of the trial. Unfortunately, the remissness of the presiding magistrate by neglecting to prepare and deliver a full and reasoned judgment when called upon to do so, has consequences. Without the benefit of having the court *a quo's* reasons for accepting the evidence of state witnesses, while rejecting that of the appellant and how the court applied the law to the proven facts, this court, sitting as court of appeal, is unable to gauge whether any misdirection was committed by the trial court during its assessment of the evidence which materially impacts on the convictions. What would now be required of this court is to evaluate the evidence afresh to decide whether the bold conclusions reached by the trial court are justified and based on the evidence and whether the convictions are in accordance with the applicable legal principles.

[7] It seems apposite at this juncture to remind presiding officers of their duty to set out in their judgments the weight accorded to evidence adduced and provide adequate reasons for the conclusions reached by the court. In my view, the state and the accused are entitled to know how the court reached the verdict pronounced in the end. Without a full judgment, how would the state or the accused be in a position to decide whether there are grounds of appeal, based on any misdirection by the trial court on either the facts or the law? Furthermore, it impacts severely on the function and duties of the court

of appeal which is now basically forced to step into the shoes of the trial court and decide the matter afresh. That is clearly not the purpose of a court of appeal, except in circumstances where an irregularity committed by the trial court is not of such gravity that it resulted in a failure of justice and where the court of appeal is required to evaluate the evidence afresh in order to determine whether, despite the irregularity, there is sufficient evidence to justify the trial court's finding(s).<sup>1</sup>

### Appeal against conviction

#### *Grounds of appeal and submissions*

[8] The appellant contends that the trial court, in essence, erred by failing to take into consideration the discrepancies, inconsistencies and improbabilities of the complainant's uncorroborated evidence. Appellant particularly took issue with the particulars contained in both charges which 'portrayed the alleged rape as a forceful and violent rape', which is not supported by the complainant's evidence. Moreover, where it is alleged that the complainant undressed herself on the instruction of the appellant who told her to bend forward without being threatened or assaulted, and at no stage attempted to run away. Furthermore, that the medical evidence equally does not show that forceful and violent sexual acts were committed with the complainant. Appellant further contends that information submitted by the complainant as regards the scene of the first incident, contradicts her own version and is sufficient to cast doubt as to her credibility and reliability of her evidence. Appellant further took issue with the date of the first incident which, according to the complainant happened on 19 February 2018, as opposed to 5 February 2018 reflected on a medical examination report (J88) handed in as evidence.

[9] The remaining grounds of appeal listed are that the trial court, when evaluating the single evidence of the complainant, failed to exercise the necessary caution; that the

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<sup>1</sup> *S v Shikunga and Another*, 1997 NR 156 (SC).

court erred when interpreting the appellant's offering of a lift and food to the complainant as acts of grooming and that the money allegedly given to the complainant as reward for sex, was not swabbed for fingerprints; that condoms allegedly used were not retrieved from the respective crime scenes and that these, together with the appellant's clothes that he wore on the respective dates, were not subjected to DNA analysis; lastly, that there was no basis on which the court could reject the appellant's corroborated alibi defence.

[10] Besides rehashing the grounds of appeal in his heads of argument, counsel for the appellant did not advance any further argument on the specific issues identified and raised as grounds of appeal. Instead, in the introductory paragraphs counsel cited applicable case law and criticises the court *a quo* for not following the principles enunciated in these judgments. He further touches on the trial court's failure to consider the testimony of the appellant's wife which, as submitted, the court at least should have rejected in order to come to its finding that the appellant's version was false. As regards the court's finding that the complainant did not sustain any injuries because she was prepared (groomed) for the sexual act and therefore, 'a willing participant', it was submitted that such finding contradicts the version of the complainant who stated that she was scared and unwilling to have sexual intercourse with the appellant. Linked thereto is the court's finding that the appellant's *modus operandi* is synonymous with that of a paedophile. In conclusion, the appellant contends that the appellant gave a solid and consistent version which is reasonably possibly true.

[11] In the absence of any further argument advanced, either in the heads of argument or during oral submission, besides appellant's bold assertion that the trial court misdirected itself in relation to the swabbing of money and forensic analysis of condoms, there is no need to consider these purported grounds of appeal. I accordingly decline to do so.

[12] Opposing the appeal, the respondent argued that, without derogating from the veracity of the complainant's evidence, that there is no general rule that every inconsistency or discrepancy in the testimony of a witness affects the credibility of the witness and leads to the rejection of his or her evidence. Support for counsel's contention is found in the unreported judgment of *S v Roger Mberira*<sup>2</sup> where the following is stated:

'In each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence.'

[13] With regards to the complainant's behaviour towards the appellant during the first incident, the respondent contends that there is no requirement that a victim of rape must be undressed by the assailant or is under a duty to raise the alarm or to flee. In furtherance of the argument, counsel submitted that, in this instance, the state does not only rely on one coercive circumstance namely, the application of force, but also on the coercive circumstance that the complainant was under the age of 14 years and the appellant more than three years older. As regards the nature of the application of force, this referred to the grabbing of the complainant, bending her over on the first occasion and grabbing and physically touching her and placing her in the vehicle before committing a sexual act with her. It was pointed out that the complainant testified that she did not want to engage in a sexual act with the appellant but was instructed by the appellant to cooperate and this scared her. As the respondent correctly submitted, the appellant's portrayal of both incidents being 'forceful' and 'violent' is inconsistent with the complainant's testimony that she merely did what she was told to do by the appellant as she was afraid or scared of what could happen if she refused.

[14] Regarding the absence of injuries to the complainant's genitalia, the respondent submits that the doctor merely expressed an opinion which does not contradict the complainant's version and neither does it support the appellant's denial of having committed a sexual act with the complainant.

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<sup>2</sup> *S v Roger Mberira* CA 88/2003 (HC) delivered on 12 August 2005.



[15] As to the alleged contradictions between the complainant's testimony and that of the scene of crime officer Patrick Mafwila regarding the exact spot where the first incident allegedly took place, the respondent referred to the appeal record (page 346) where it is stated that what is now labelled as a contradiction in the complainant's testimony, is based on an assumption made by the appellant's then legal representative and not as to what the complainant testified. I agree, rendering this ground baseless.

[16] With regards to the appellant's assertion that the complainant contradicted herself on the date of the first incident, the respondent submitted that the date of 5 February 2018 reflected in the medical report (J88) is wrong as the complainant testified that she mentioned the date of 19 February to the doctor and would not be able to explain the date recorded by him. It is common cause that the doctor who completed the report was not called to give evidence and explain the circumstances that led to the date entered in the report and what he was told by the complainant at the time.

[17] In circumstances where the complainant gave *viva voce* evidence regarding the date reflected in the report and, in the absence of evidence showing otherwise, there is no justification for appellant's contention that the complainant contradicted herself on this point. This ground is found to be baseless and may be disposed of summarily.

[18] Respondent further contends that the trial court was alive to the evidence of the complainant being single and duly considered the issues when finding her to be a credible witness. Although this ground ties in with the already stated ground pertaining to the discrepancies and inconsistencies in the complainant's testimony, I intend dealing with this ground in more detail later.

[19] With regards to the appellant's attack on the judgment that the court erred by rejecting the appellant's alibi defence, the respondent cited the matter of *S v Kandowa*<sup>3</sup> where this court at 732F-I endorsed the approach to an alibi defence as summarised in

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<sup>3</sup> *S v Kandowa* 2013 (3) NR 729 (HC).

*S v Malefo en Andere*<sup>4</sup>, at 157i – 158d, where it is stated at para (3) that ‘an alibi defence must be assessed, having regard to the totality of the evidence and the impression of the witnesses on the court’ and para (4) which reads ‘if there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable’. It is further submitted by the respondent that, in the absence of disclosing where the appellant’s place of work was and without mentioning the times he went and returned from work, it was impossible for the state to rebut the alibi defence of the appellant. Also, that the appellant was known to the complainant and that she was able to identify him.

### Discussion

[20] The gist of the appellant’s grounds of appeal is that the trial court misdirected itself in the assessment of the totality of evidence adduced when accepting the complainant’s version as credible, whilst at the same time rejecting the appellant’s version as false. To decide whether there is merit in the assertion, the complainant’s evidence requires further scrutiny. I do not consider to summarise it in all its detail but rather to put it in context with the rest of the evidence adduced.

[21] The two alleged incidents of rape testified to by the complainant took place on 19 February and 1 March 2018, respectively. It is not in dispute that the complainant resided with her mother and siblings at the informal settlement called Makaravan West at Katima Mulilo and that the appellant owned a shop/bar which is situated across the street from their house. They were therefore, considered as neighbours. Also evident from the evidence is that it was common practice for the residents in that area to visit the nearby bush to relieve themselves. According to the complainant, both incidents occurred when she went into the bush for that purpose whilst alone.

[22] At around 19h00 on 19 February 2018 (the first occasion) the complainant went into the bush and after relieving herself, she became aware of the appellant’s presence

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<sup>4</sup> *S v Malefo en Andere* 1998 (1) SACR 127 (W).

when called her. Upon reaching him, the appellant told her to take off her skirt and panty while he also undressed, and he then took a condom from his pocket and put it on his penis. He instructed her to bend over forward where after, he penetrated her vagina and started having sexual intercourse. She said that this was her first time to have sexual intercourse and that she did not want to have sex with him. As she felt pain, she conveyed this to the appellant who said she should not be worried as he would not injure her. Complainant said that during the sexual intercourse she was crying but not screaming for help. When he had finished, he removed the condom and threw it away. He handed her N\$20 and told her not to inform her mother or friends what had happened between them. The complainant got dressed and returned home. It is common cause that she kept quiet about the incident.

[23] On 1 March 2019 (the second incident) at about 19h00, the complainant left home on foot to go into the bush to relieve herself as she had diarrhoea. The appellant followed her in his car (used as a taxi) and when he caught up with her, he told her to board the vehicle. He drove on to a spot on the gravel road next to Mutelo road, some distance away from the houses where he stopped and disembarked. When asked why she got into the vehicle of the appellant, she explained that she was afraid of being assaulted if she refused. This fear of hers was based on what she had heard and read in the media. She, therefore, just complied with his instructions. He approached the complainant who was seated in the back and told her to take off her trousers and panty. She complied while he pulled a condom over his penis. He then told her to lie down on the rear seat where after he came on top of her and started having sexual intercourse with her. When he had finished, he threw away the condom and gave the complainant N\$110 while repeating his earlier instruction not to inform her friends or her mother about what happened. When she returned home, her mother, who went looking for her but was unable to find her, started questioning the complainant on her whereabouts. to She replied that she went to the bush. Her mother was clearly upset with her for taking so long to relieve herself in the nearby bush and grabbed the complainant on her trousers, at which stage money fell from her pocket. When asked where the money came from, she kept quiet.

[24] Her distressed mother there and then decided that the complainant could not in those circumstances stay any longer with her at home and took her to her aunt's house that same evening. Whilst at school the next day, the complainant's mother arrived, intending on taking her to see a social worker. Her mother told her to speak the truth about where she got the money whereupon the complainant said that she got it from the appellant for having sex with her on two different occasions.

[25] When asked in cross-examination why she did not run away, complainant answered that she was in the bush and there was nowhere to run to; also that the appellant was older than her. The appellant addressed her in a harsh way when telling her to undress and for that reason she complied with his instruction. She said the reason for not reporting the incidents to her mother at first is because she was instructed to keep quiet about it and in doubt whether or not to tell her mother. As regards the appellant's alibi defence that he was not at his shop at Makaravan West on 19 February 2018 but at home situated elsewhere, the complainant was adamant that it was the appellant who raped her on that day. She is further adamant that, despite the medical report stating the date of the first incident to be 5 February, she told the doctor that it was on the 19<sup>th</sup> of February 2018, and that the wrong date was noted down.

[26] It further emerged during cross-examination that on 1 March 2018, the appellant came across the complainant walking between 15h00 and 16h00 near the weigh bridge when he offered the complainant a lift home. When she got out of the vehicle, he gave her some food (chips and kapana) which she could take along. When asked why she boarded the appellant's vehicle that time if she was scared of him, she explained that she was not alone with him as there was another passenger. Counsel for the appellant put it to the complainant in cross-examination that the appellant in the evening drove with his vehicle to the bush to relieve himself and, on his way back, he saw the complainant going in the same direction. He stopped to ask where she was going to which she replied that she was on her way to relieve herself. He then drove off and shortly thereafter, saw the complainant's mother going in the same direction.

[27] Ms Swaniso Matilda is the biological mother of the complainant. Her evidence in all material respects corroborates that of the complainant regarding the events of 1 March 2018 and how she discovered the money in the complainant's possession. Complainant told her that she got the money from a taxi driver going to Mutelo. She confirmed having taken the complainant to stay with her aunt for the night and that she went to the complainant's school the next morning to question her further. This time she mentioned the name of the appellant and narrated what had happened on both occasions. She reported the matter to the police on 5 March 2018 whereafter the complainant was taken to the hospital for medical examination on the same day.

[28] Regarding the second incident, she said that she instructed the complainant not to go far when relieving herself, but to go to the nearby bushes. When she stayed away for over 30 minutes, she got worried and started looking for the complainant but was unable to find her. When she returned home, the complainant was already back and when asked to which bush she went, she responded that it was on the side of Mutelo.

[29] In cross-examination, the appellant's counsel addressed the discrepancies between what this witness said regarding where exactly she found the money on the complainant, opposed to the testimony of the complainant, and the physicality of her actions when she grabbed the complainant. Where the discovery of money on the complainant's person is not disputed, her reluctance at first to tell her mother where the money comes from, as well as any discrepancy in the testimonies of these two witnesses, opposed to what is contained in their witness statements, in my view, is immaterial and of no consequence to the outcome of the court's finding in the end. I say this in light of the established rule of law that, where a witness contradicts him/herself or is contradicted by other witnesses, it does not render the witness untruthful and whose evidence must be rejected in its entirety. Not every error made by a witness affects his/her credibility and in each case, the trier of fact must consider the nature, number

and importance of the errors made and in particular, their bearing on other parts of the witness' evidence.<sup>5</sup>

[30] The trial court in its judgment found that the complainant was consistent in her testimony and consistent with her earlier reports on the rape incidents. In the trial court's view, there was no reason to doubt her credibility. Having read the record of appeal, mindful of the appellant's assertion that there are discrepancies, inconsistencies, improbabilities and unsatisfactory aspects in the complainant's uncorroborated evidence, I am not convinced that the trial court was wrong in finding that the complainant was a credible witness. This is fortified by the fact that there is nothing on record showing that the complainant contradicted herself on any material aspect of her evidence or that she buckled during cross-examination. On the contrary, the record reflects that she was assertive and honest when narrating what happened to her, even though she is still of young age. She was adamant that it was the appellant, known to her, and that she could not falsely implicate him. This much is borne out by the appellant's own evidence when testifying about his interaction with the complainant when offering her a lift earlier in the day and giving her food when she disembarked the vehicle prior to the second incident. The appellant's evidence was that he stopped his vehicle and spoke to the complainant whilst on the way from the place where the alleged rape took place. That places him in the vicinity and time range of the alleged rape, as testified to by the complainant. Moreover, where it is not disputed that the appellant on this occasion used his vehicle in which, complainant said, she was raped on the rear seat.

[31] There is however, one important aspect of the evidence presented which, it would seem to me, was not given sufficient weight and this is the cash found on the complainant shortly after she returned home. Based on the evidence of the mother there could have been no way that the complainant was already in possession of the money when leaving the house in order to relieve herself. This money, according to the complainant was given to her by the appellant after having sexual intercourse with her,

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<sup>5</sup> *S v Roger Mberira* case number CA 88/2003 (HC) delivered on 12 August 2005.

clearly with the intention to buy her silence; which she did, until the money was found on her and an explanation demanded by her mother. Where the appellant was the only person with whom the complainant met on the way and the appellant placing himself near the scene at the time of the incident, as well as him using his vehicle to drive to the nearby bush to relieve himself, is consistent with her version that, on this occasion, sexual intercourse took place on the rear seat of the vehicle. To this end, the probabilities seem to favour the complainant's version and not that of the appellant which is a mere blunt denial of the charge.

[32] When considering the issue raised on appeal that the complainant's narrative as to how the sexual acts were committed being inconsistent with what is alleged in the charges, I find merit in the argument advanced by the respondent that where the charges alleged the application of force against the complainant, it relates to the positioning of the complainant on each occasion before committing the sexual act. The appellant's interpretation of the words 'application of physical force' to mean forceful and violent is self-created and clearly inconsistent with the particulars of the charge and the prosecutor's further particulars stated at the beginning of the trial.

[33] In addition, besides the appellant's physical handling or touching of her body, the complainant described the situation as fearful and that the appellant, being older than her, directed her on what to do and that she simply complied, not knowing how to get out of the situation. The fact that she remained quiet as told, confirms that she took the instructions as serious and only when caught out, she spoke out against the appellant. In these circumstances, it seems to me inescapable to come to the conclusion that when these circumstances are viewed together, it culminates in the application of physical force to the person of the complainant and therefore, constitutes a coercive circumstance as defined in the Combating of Rape Act 8 of 2000.

[34] With regards to the fact that no injuries were detected during the medical examination and the opinion expressed by Dr Anisi, who was called to testify on a report compiled by another doctor, Dr Oladineji, I note the following: Appellant's assertion that

the absence of injuries observed on the external parts of the complainant's genitalia being inconsistent with the charges and the complainant's portrayal of the rapes as forceful and violent, is a perversion of the complainant's testimony whose evidence is clear as to what the appellant's actions amounted to and how she perceived it. This point has already been discussed earlier. As for the opinion expressed by the doctor during his testimony, nothing turns on it because the opinion is based on the criminality of a sexual act committed with a child of young age who cannot give consent and not on the absence of any external injuries to the genitalia *per se*. The opinion, for that reason alone, does not support the argument advanced that it is a further discrepancy in the complainant's evidence. In deciding what weight (if any) should be given to the medical evidence, the respondent submits that the matter of *Both v S*<sup>6</sup> is on all fours with what the court *a quo* in this instance faced. In that case, the court found that 'On the medical evidence alone, it is not possible to find in favour of the appellant that, in the absence of clinical evidence of recent vaginal penetration, it should have raised sufficient doubt in the court's mind to lead to the appellant's acquittal. In as much as it does not corroborate the complainant's evidence, neither does it exonerate the appellant. It is nothing more than a neutral factor to be considered together with all the evidence adduced.'

[35] On the present facts, I am unable to come to a different conclusion for reason that there is no evidence about any of the two incidents having been forceful and violent. While the complainant said she was still a virgin until the first incident and experienced pain during the sexual act, it would be pure speculation on the part of the court to draw inferences from that evidence when attempting to find reasons for the absence of injuries to the complainant's genitalia. Sight should not be lost of the fact that the medical examination was only done 14 days after the first incident and four days after the second. Therefore, I am satisfied that the complainant's evidence has not been affected or contradicted by any finding noted in the medical examination report.

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<sup>6</sup> *Both v S* (CA 83/2016) [2018] NAHCMD 239 (10 August 2018) at paras 12 – 14.



[36] The trial court's reference to the *modus operandi* of the appellant which, in its view, was that of a paedophile was uncalled for and clearly not based on expert evidence from which such inference could be drawn. This notwithstanding, I am unable to see how the personal view of the presiding officer could constitute a misdirection of such magnitude that it vitiates the outcome of the trial. Nothing further turns on this point.

[37] Besides recognising that the complainant was a single witness in relation to the two incidents of rape, the judgment is silent on what the trial court's approach to such evidence was. Given the established case law<sup>7</sup> on how the evidence of a single witness should be approached and assessed, the presiding magistrate might be forgiven for merely stating that the complainant was consistent in her testimony and earlier reports, without discussing the assessment of the evidence which led to the conclusion that the complainant was credible. The correct approach is that the complainant's evidence should be approached with caution where uncorroborated.

[38] As regards the alibi defence raised by the appellant and support therefore found in the evidence of appellant's wife that he was at home at the time of the alleged rape on the first occasion, the respondent relies on *S v Kandowa*<sup>8</sup> where the dictum in *S v Malefo en Andere*<sup>9</sup> is followed, setting out the correct approach to the assessment of an alibi defence. The relevant part *inter alia* reads that regard must be had to the totality of the evidence and the impression of the witnesses on the court<sup>10</sup>; and if there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable<sup>11</sup>

[39] Whereas the trial court did not discuss the alibi defence raised by the appellant before rejecting his version as false, it now remains for this court to do so. When

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<sup>7</sup> *S v Esterhuizen and Another* 1990 NR 283 (HC); *S v HN* 2010 (2) NR 429 (HC).

<sup>8</sup> *S v Kandowa* 2013 (3) NR 729 (HC) at 732F-I.

<sup>9</sup> *S v Malefo en Andere* 1998 (1) SACR 127 (W) at 157i – 158d.

<sup>10</sup> Para 3.

<sup>11</sup> Para 4.

following the approach to an alibi defence as set out in *Malefo* (supra), regard must be had to the totality of the evidence adduced – in this instance particularly the testimony of the complainant. Although the alibi defence is only relied upon as far as it concerns the incident of 19 February 2018, the evidence regarding that day should not be compartmentalised and considered in isolation. When assessing the totality of the evidence, regard must equally be had to the complainant's evidence on the second incident of 1 March 2018. This is especially important for reason that, according to the complainant, the person she identified as her assailant is known to her and the same person who gave her a lift home earlier in the day; evidence which the appellant did not dispute. There can be no doubt that the complainant was well positioned to make a positive identification of this person on both occasions.

[40] The two alleged incidents of rape are further linked in that on both occasions the complainant had left home to relieve herself in the bush nearby. On the first occasion, she was approached whilst still in the bush and raped, whilst on the second, she was taken to a more distant spot by car and raped in the vehicle. After both incidents, she was given money, ostensibly to buy her silence. The last incident brings the appellant close to the scene and, on his own evidence, in verbal contact with the complainant during the period she was away from home. Cash found on the complainant shortly thereafter tends to render the appellant's evidence on this score questionable.

[41] The crux of the appellant's alibi defence is that he came from work earlier in the day of 19 February 2018 and worked on repairing the roof of his house, situated at New Cowboy in Katima Mulilo, until around 20h00, where after he retired to bed. His version of being at home on that day is corroborated by his wife, Ms Taulo Manyando. Her evidence in chief on this crucial aspect of the appellant's defence is contained in two sentences ie that the accused returned from work and did not go to the bar at Makaravan. In cross-examination she said she had been with the appellant at all times after he returned home from work. During her testimony, much time was spent on her interaction with the complainant's mother some days later about rumours implicating the appellant in the rapes and the response she got from Ms Swaniso. Besides this

evidence being after the fact, I am unable to see how it could be of any relevance in circumstances where the accepted evidence is that the complainant was at first unwilling to implicate the appellant and only parted that information after the insistence of her mother. The unfavourable picture painted of Ms Swaniso by this witness has signs of an ulterior motive and has no or little probative value. In the end, the evidence of Ms Manyando merely corroborates the appellant's bold assertion that he was at home and not at the bar at Makaravan on 19 February 2018.

[42] When considering the corroborated alibi defence relied upon by the appellant, the court is faced with two mutually destructive versions and stands guided by the approach followed in *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others*.<sup>12</sup> On the one hand, is the evidence of the complainant implicating the appellant as her rapist on two occasions, whilst on the other hand, the appellant disputes the allegations and relies on an alibi as regards the first incident. In these circumstances, the court has to apply its mind not only to the merits and demerits of the respective witnesses, but also to consider the probabilities of the case.

[43] After due consideration of all the evidence adduced and guided by the principles stated above, I am satisfied that the complainant was a credible witness and that her evidence is truthful. As for the appellant, I find his story not only improbable, but false beyond a reasonable doubt. The finding of this court is thus consistent with the findings made by the trial court who had the benefit of seeing and hearing the testimonies of the witnesses first hand. Consequently, the ground dealing with the alibi defence during the trial falls to be dismissed.

[44] As it appears from the judgment, the trial court did not pronounce itself as to whether the application of physical force to the complainant constituted a coercive circumstance, as alleged in the charges. The court only relied on the age difference between the complainant and the appellant as a coercive circumstance in respect of both counts. In light of the conclusion ultimately reached, this court is not required to

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<sup>12</sup> *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others* 2003 (1) SA 11 (SCA).

decide the application of physical force to be an additional coercive circumstance. The appellant during the trial did not contest documentary evidence<sup>13</sup> adduced by the state proving the age of the accused and the complainant, respectively. To this end, the court *a quo*'s finding is consistent with the proven facts and cannot be faulted.

[45] In the result, the appeal against the appellant's conviction on both counts falls to be dismissed.

[46] I turn next to consider the appeal against sentence.

#### Appeal against sentence

##### *Grounds of appeal*

[47] Although the appellant's appeal against sentence is founded on five grounds enumerated in the notice, these grounds either overlap or advance nonsensical assertions (para 10). In essence the gist of the appeal turns on the trial court's failure to (a) give sufficient weight to the appellant's personal circumstances which, as contended, constitute substantial and compelling circumstances, justifying the imposition of a lesser offence and (b) which resulted in the imposition of sentences considered to be unreasonable and startlingly inappropriate.

[48] From a reading of the judgment on sentence, it is evident that the trial court applied the relevant principles applicable to sentencing and gave due consideration to the triad of factors and evidence presented by the defence in mitigation of sentence. The appellant, for purposes of the appeal, relies on the same circumstances raised in mitigation which were considered by the court *a quo* in determining whether, cumulatively, they amount to substantial and compelling circumstances. The court in the end concluded that it did not and imposed the prescribed minimum sentence of 15 years' imprisonment on each count.

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<sup>13</sup> The appellant's identification document (Exh 'A') or the complainant's birth certificate (Exh 'B')

[49] The approach of the court to substantial and compelling circumstances in sentencing, has been clearly set out in this jurisdiction in a plethora of judgments and need not be repeated.<sup>14</sup> Suffice it to say that the court has a discretion which has to be exercised judiciously, guided by the principles set out in *S v Malgas* and adopted with approval by this court in *S v Lopez*.<sup>15</sup>

[50] When applying the stated principles to the present circumstances, the trial court was not convinced that the mitigating circumstance advanced by the appellant amount to being substantial and compelling, justifying the imposition of a lesser sentence. In coming to this conclusion, particular regard was had to the vulnerability of the young victim whom the appellant exploited to satisfy his sexual desires by giving her money for sex.

[51] In my view, the appellant's contention that the court *a quo* misdirected itself when concluding that the circumstances did not amount to being substantial and compelling, justifying a lesser sentence, is without merit. The fact that no weapons were used in the commission of the crimes and that the complainant did not sustain physical injuries are of no consequence, given the circumstances of the matter and certainly, cannot count in favour of the appellant. The imposition of the prescribed minimum sentence of 15 years' imprisonment on each count is thus, justified.

[52] During oral submissions, counsel were invited to address this court on whether the trial court's omission to consider the cumulative effect of the sentences imposed did not constitute a misdirection, rendering the sentence the appellant has to serve disproportionate to the appellant's moral blameworthiness. Divergent arguments were presented. Where the appellant, as in this instance, is sentenced in respect of two related offences, the ' . . . accepted practice is that the sentencing court should have regard to the cumulative effect of the sentences imposed in order to ensure that the

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<sup>14</sup> *S v Malgas* 2001 (2) SA 1222 (SCA).

<sup>15</sup> *S v Lopez* 2003 NR 162 (HC).

total sentence is not disproportionate to the accused's blameworthiness in relation to the offences in respect of which he or she has to be sentenced. (See *S v Coales* 1995 (1) SACR 33 (A) at 36e - f; *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 523g - h.) That approach appears to be particularly apposite where the offences are as closely interrelated in time and place as counts 1 and 2 are.<sup>16</sup>

[53] When applying these principles to the present matter, and, mindful that a deterrent sentence is called for in the circumstances, it is my considered view that a sentence of 30 years' direct imprisonment is disproportionate to the appellant's blameworthiness. I am further satisfied that by shortening the effective period the appellant has to serve, this would not derogate from the seriousness of the crimes committed and failing to do so, would render the sentences imposed unreasonable and unfair. In my view, the present matter is an instance where the cumulative effect of the separate sentences imposed should be ameliorated by an order that the sentences are to be served concurrently, as provided for in s 280(2) of the Criminal Procedure Act 51 of 1977.

### Conclusion

[54] It is for the above-stated reasons that this court is satisfied that the appeal against the conviction on both counts falls to be dismissed, while the appeal against sentence partly succeeds.

[55] In the result, it is ordered:

1. The appeal against conviction on count 1 and count 2 is dismissed.
2. The appeal against sentence partly succeeds with the addition of an order in terms of s 280(2) of Act 51 of 1977 that 10 years' imprisonment imposed on count 2 be served concurrently with the sentence imposed on count 1.

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<sup>16</sup> *S v Sevenster* 2002(2) SACR 400 (CPD) at 405 a-b.

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J C LIEBENBERG  
JUDGE

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H JANUARY  
JUDGE

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