REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC 19/2010

In the matter between:

BONIFATIUS MBWALE **APPLICANT/RESPONDENT**

and

THE STATE **RESPONDENT/APPLICANT**

Neutral citation: *Mbwale v The State* (CC 19/2010) [2014] NAHCNLD 3 (23 January 2014)

Coram: LIEBENBERG J
Heard: **23 January 2014**
Delivered: **23 January 2014**

Flynote: **Criminal procedure** – Appeal – Application for leave to appeal – Test – Applicant must clearly indicate reasonable prospects of success.

Summary: The accused was convicted on multiple charges of rape (c/s 2 (1)(*a*) of Act 8 of 2000) and sentenced to 40 years' imprisonment. On some counts sentences were ordered to run concurrently to the effect that accused

must serve 25 years' imprisonment. The accused aged 66 years worked as a traditional healer and the complainants were former patients of his. Accused sought leave to appeal against his conviction on all seven counts while the State, in a separate application seeks leave to appeal against the sentences imposed. Both applications dealt with simultaneously. Court found that both applicants failed to show they had reasonable prospects of success on appeal and dismissed the applications.

ORDER

Both applications for leave to appeal against conviction (Applicant) and sentence (Respondent) are dismissed.

JUDGMENT

Application for Leave to Appeal

LIEBENBERG J:

[1] In this judgment I intend dealing simultaneously with both applications for leave to appeal, firstly that of Mr Mbwale (accused) against his conviction on seven counts of rape in contravention of s 2(1) of the Combating of Rape Act 8 of 2000 and secondly, that of the State desirous of appealing against the sentences imposed on each count.

[2] For clarity and convenience I shall refer to the Applicant/Respondent as the applicant and to the Respondent/Applicant as the State.

[3] Mr *P Greyling* appears on behalf of the applicant while the State is represented by Mr *Lisulo.* With the hearing of the respective applications neither counsel further developed the arguments envisaged in their written submissions and informed the court that for purposes of their own applications

as well as their opposition of the adversary's application, they would adhere to their written submissions. Thus no further argument was heard.

[4] The crimes the applicant stands convicted of in counts 1 – 3; 5 – 6; 8 and 11are similar in nature and arose from incidents during which treatment was administered by the applicant, a traditional healer, to each of the complainants as patients of his. With the conclusion of proceedings he was convicted on seven (of 13) counts of rape and sentenced to ten years' imprisonment on the first count and to five years' imprisonment on each of the remaining six counts. In order to ameliorate the cumulative effect of 40 years' imprisonment, it was ordered that some of the sentences must be served concurrently, bringing the sum total to be served to 25 years.

[5] It is trite that the test to be applied in applications of this nature is that the applicant must satisfy the Court that there is a reasonable prospect of success on appeal (*R v Ngubane and Others*[1]; *R v Baloi*[2]). In *S v Nowaseb*[3] the court cited with approval the case of *S v Ceasar*[4] where Miller, J.A. emphasised that 'the mere possibility that another Court might come to a different conclusion is not sufficient to justify the grant of leave to appeal'. In *Nowaseb* (*supra*) the court said that what the trial judge is required to do is to disabuse his or her mind of the fact that there is no reasonable doubt as to the guilt of the accused person (applicant) and to ask himself or herself whether, on the grounds of appeal raised in the application, there is a reasonable prospect of success on appeal (640H-I).

APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION

[6] In respect of those counts applicant is convicted of, he has raised three general grounds of appeal on which the court either erred or misdirected itself on the facts and the law, namely, in its evaluation of the evidence of the respective complainants; by rejecting the applicant's evidence as false

[1] 1945 AD 185 at 186-7.
[2] 1949 (1) SA 523 (AD) at 524-5.
[3] 2007 (2) NR 640 (HC).
[4] 1977 (2) SA 348 (AD) at 350E.

beyond reasonable doubt; and by concluding that s 2 (2)(*h*) of the Combating of Rape Act 8 of 2000 (the Act) finds application as a coercive circumstance under which acts of sexual intercourse were committed.

[7] I pause here to point out that where applicant contends the court had found that he committed the offence of rape 'as envisaged in terms of Section 2 (2)(*h*) of the Combating of Rape Act and in terms of the Common law …', that the contention is incorrect as the applicant was convicted of rape in contravention of the Act and *not* under common law (see judgment p 89 par 242).

[8] Further grounds relied upon is that the court erred or misdirected itself in count 1 by allowing an amendment of the charge in terms of s 86 of the Criminal Procedure Act 51 of 1977 in that it constituted a substitution of the charge, alternatively, that applicant in his defence was prejudiced by the amendment. Also that in count 2 the court erred or misdirected itself by finding that the contradiction between the evidence of the complainant and that of a nurse, to whom the first report was made, did not constitute a material discrepancy. Another point raised, turns on the discrepancies between the evidence of complainant in count 8 about the statement she had made to the police, and the evidence of the police officer who reduced the statement to writing. Also in respect of count 8 the applicant takes issue with the court having relied on similar fact evidence when convicting on this count.

[9] As far as it concerns those grounds where applicant contends that the court misdirected itself on the evaluation of the evidence of the State witnesses and having rejected applicant's version, I do not deem it necessary or proper to re-evaluate same for purposes of this application. Suffice it to say that after summarising and evaluating all the evidence adduced by the State as well as the defence, and due regard being had to applicable principles and rules of court, the conclusion was reached that from the 13 counts charged, the State succeeded in proving beyond reasonable doubt that applicant was guilty on seven counts of rape and he was convicted accordingly. The court was alive to the fact that the complainants gave single

evidence which required a cautious approach to be followed in the evaluation of such evidence.[5] In respect of each count the merits and demerits of the evidence given by State and defence witnesses was analysed and evaluated against the totality of evidence adduced. In deciding whether the applicant's evidence, despite being found false in some respects, falls to be rejected, the approach followed by the court appears at p 13 (para 25) in that the court still has to 'investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false when considered together with the rest of the evidence'. In the light of all the evidence the court was satisfied beyond reasonable doubt that the applicant's defence was false and accordingly rejected it where in conflict with that of the complainants' evidence on the relevant counts. The court was equally mindful of the imperfections in the evidence of the respective complainants in some respects and gave due consideration thereto. However in the end the court concluded that the truth had been told and that the complainants' evidence, in material respects, was reliable.

[10] Regarding the specific ground raised in count 2 about the discrepancy between a previous statement made by the complainant to a nurse opposed to her evidence given in court, this aspect was indeed considered together with other discrepancies and improbabilities in complainant's evidence as pointed out by defence counsel. But, this notwithstanding, I had cme to the conclusion that it was immaterial and insufficient to find that her evidence was false and unreliable.[6]

[11] As for the discrepancy between the evidence of complainant in count 8 and that of Sergeant Sibolile regarding the circumstances under which the statement was taken and in some respects the content thereof, the court at p 40 (para 100) of the judgment discussed this issue and came to the conclusion that any discrepancy was satisfactorily explained and that the complainant in this instance could not be discredited on the strength of differences between a previously made statement and her testimony in court.

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[5] Judgment p 14 (par 26).
[6] Judgment p 17 (par 36).

Defence counsel throughout the trial extensively cross-examined State witnesses from their statements made to the police and I deemed it necessary at p 66 – 69 of the judgment to cite with approval South African case law (adopted and approved in this Jurisdiction) the approach to be followed by the court when required to evaluate contradicting evidence emanating from a witness statement. In some of the counts it emerged during the trial that discrepancies that alleged to exist between witness statements and what witnesses testified in court, came to nothing simply because, what is contained in the statement did not come from the witness but was inserted by the police officer taking down the statement.[7]

[12] In view of the above and having considered the discrepancies pointed out in the light of all the evidence, I was, despite some imperfections in the evidence of the complainant in count 8, satisfied that the truth has been told.[8] Whereas the applicant's evidence had been rejected as false, the court was entitled to convict on that count.

[13] Pertaining to the ground of appeal about the court having relied on similar fact evidence to convict on count 8, the court discussed and considered similar fact evidence[9] in the judgment and the weight accorded thereto. In this regard the following was said:

'The present case, in my view, is not an instance where proof of similar fact evidence regarding the treatment of the complainants bear to each other such striking similarity that in itself it also proves the other offences. But, it does tend to show the same pattern of conduct followed by the accused during the course of the treatment with the smearing of the complainants' private parts'.

And further:

'the specific procedure of treatment followed by the accused in respect of the complainants is sufficient to find that, when considered as a whole, it serves as

[7]Judgment p 69 (par189).
[8]Judgment p 41 (paras 101 – 102).
[9]See judgment p 56 (par 148) and p 87 (par 238).

corroboration of the single evidence of the complainants who allegedly fabricated evidence in order to incriminate the accused. Other than that, I do not think that more weight should be given to similar fact evidence adduced in this trial'.

The court was entitled to rely on similar fact evidence but for the reasons stated, accorded limited weight thereto and considered it together with the rest of the evidence.

[14] Applicant further took issue with the amendment of the charge in count 1and more specifically, that the amendment was not 'permissible' and in effect constituted a substitution of the charge, alternatively, that by granting the amendment the accused was prejudiced in his defence. This argument was fully dealt with in the judgment[10] and in the absence of any further argument presented, it requires no further attention.

[15] Lastly, applicant contends that the court misdirected itself by convicting him of rape despite the complainants having been aware that 'acts of sexual intercourse were committed with [them], and furthermore [they] tacitly [having] consented to sexual intercourse' with the accused. The court indeed concluded that complainants tacitly permitted the accused to commit sexual acts with them but found that this came about only because of fraudulent misrepresentations made by the accused to the complainants regarding the treatment they were to receive and not because there was any mutual agreement between them to have sexual intercourse. This point was comprehensively dealt with in the judgement and I deem it unnecessary to rehash what has been said at pp 81 – 87 thereof.

[16] Mr *Lisulo,* contrary to what has been submitted on the applicant's behalf, maintained that the court did not err or misdirect itself in any manner on the facts or the law as applicant contends, and prays for the application for leave to appeal against conviction to be dismissed.

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[10]Page 70 (paras 190 – 193).

APPLICATION FOR LEAVE TO APPEAL BY THE STATE AGAINST SENTENCE

[17] The grounds relied upon by the State in its application for leave to appeal against the sentences imposed, in summary, amount to the following: The sentences in the circumstances of the case are inappropriate and so lenient that it induces a sense of shock; that the seriousness of the offence of rape and the interest of society was under-emphasised while the personal circumstances of the accused (applicant) were over-emphasised; that insufficient weight was attached to the fact that the applicant was in a position of trust (towards the complainants) and has used his 'privileged and trusted position' to commit the offences; and lastly, that the court misdirected itself by attaching insufficient weight to the fact that these offences were committed over considerable periods of time.

[18] Mr *Greyling*, contrary thereto, submits that in sentencing the accused the court did not misdirect itself in any manner as contended; neither do the sentences imposed induce a sense of shock. He therefore asks that the application be dismissed.

[19] I have not been referred by Mr *Lisulo* to any similar cases and the sentences imposed which could be compared with the sentences imposed herein. In the absence thereof I am of the view that the court was at liberty to impose sentences which, in the circumstances of the case, would be justified.

[20] The seriousness of an offence and the circumstances under which it is committed are indeed crucial to the determination of punishment; also the interest of society. These factors, considered together with the personal circumstances of the accused, were weighed up against each other by the court in order to decide what sentence would '…fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances'.[11]

[11] *S v Rabie* 1975 (4) 855 (AD) at 862G-H.

[21] After summarising applicant's personal circumstances the court discussed the crime and the circumstances under which it was committed[12] and the interest of society.[13] From the reasons given in the judgment on sentence it is evident that due consideration was given to the deceitful conduct on the part of the applicant by gradually working the complainants over into a position where they were vulnerable pertaining to the nature of his so-called treatment, by persuading them that the commission sexual acts (with them) is part of their treatment and consistent with traditional healing practices. The court acknowledged that the relationship between applicant and the complainants was one of trust, which he betrayed only to satisfy his urges of lust. The young age of the complainants was also a factor taken into consideration as well as the irresponsible manner in which the accused went about even after he believed that he was HIV+. All these the court found to be aggravating circumstances. Regard was further had to the crimes having been committed over a period of two years.[14]

[22] From p14 of the judgment on sentence the court discussed applicant's interests opposed to that of society and indicated the weight accorded thereto. Regard was also had to the mandatory sentences and why the court found substantial and compelling circumstances to exist. Having duly weighed up and considered all factors and circumstances relevant to sentence the court imposed the sentences as reflected in para 4 above. Save for saying that, when sentencing the applicant I endeavoured to find a suitable sentence without over- or under-emphasising any of the factors, I find myself constrained to take it any further.

[23] It is a settled rule of practice that punishment falls within the discretion of the trial court[15] and it is important to note that a mere difference between the sentence imposed by that court and the sentence the Court of appeal would have imposed had it sat as court of first instance, is not sufficient reason or

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[12]Sentence judgment pp8 – 12.
[13]Sentence judgment pp13 – 14.
[14]Sentence judgment p12 para17.
[15]*S v Ndikwetepo and Others* 1993 NR 319 (SC).

ground for interference. There must be more and in *Attorney-General, Venda v Maraga*[16] it was said:

> 'The degree of distinction must be such that it appears that the trial court exercised its penal discretion unreasonably.'

[24] In the words of Parker J in the *Nowaseb* case (*supra*), I have objectively and with a clear mind approached both applications for leave to appeal and 'disabused my mind' of the fact that I had no doubt concerning the guilt of the applicant when convicting and imposing, what I considered to be, appropriate and balanced sentences. I have thus come to the conclusion that there are no reasonable prospects of success on appeal as regards the applicant's conviction on the relevant counts and the sentence imposed in respect of each.

[25] In the result, the applications for leave to appeal against conviction on seven counts of rape and the sentences imposed on each, respectively, are dismissed.

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J C LIEBENBERG

JUDGE

[16] 1992 (2) SACR 594 (V) at 607i-j.

APPEARANCES

APPLICANT/RESPONDENT P Greyling
Of Jan Greyling and Associates, Oshakati.

RESPONDENT/APPLICANT D Lisulu
Of the Office of the Prosecutor-General, Oshakati.