



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: CA 50/2014

In the matter between:

**JOHANNES AUKALIUS**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Aukalius v S* (CA 50-2014) [2017] NAHCNLD 10 (20 February 2017)

**Coram:** TOMMASI J and JANUARY J

**Heard on:** 7 October 2016

**Delivered:** 20 February 2017

**Flynote:** Criminal Procedure — Evidence — Duty of magistrate to inform the unrepresented accused of his right to apply for disclosure of the docket — Failure to do so is irregular — A breach of the fundamental right to a fair trial — Nature of irregularity of such a fundamental nature constitutes a failure of justice.

**Summary:** The appellant was convicted of having contravened sections 2(1)(a) and 2(1)(b) of the Combating of Rape Act. He appealed against his conviction. The court considered the single ground that a vitiating irregularity occurred when the learned magistrate failed to inform the appellant of his right to apply for the disclosure of the

docket. The magistrate conceded that he did not inform the appellant of his right to apply for disclosure.

Held: The learned magistrate had a duty to inform the accused of his right to have disclosure and his failure to do so constituted an irregularity;

Held further: that the irregularity was of a fundamental nature and a failure of justice *per se* has occurred warranting the setting aside of the conviction and sentence.

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### ORDER

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1. The application for condonation for the late filing of the appeal is granted;
2. The appeal is upheld and;
3. The conviction and sentence of the appellant are hereby set aside.

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### JUDGEMENT

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TOMMASI J (JANUARY J concurring)

[1] The appellant in this matter filed his appeal against conviction out of time and applied for condonation for the late filing of his appeal. The application was opposed by the respondent.

[2] I shall briefly deal with the application for condonation. The appellant was sentenced on 28 July 2008. His notice of appeal is dated 10 April 2016 and it is accompanied by an application for condonation i.e almost 8 years after he was sentenced.

[3] The long and short of his explanation is that he is functionally illiterate, that he is a layperson who could only find someone to help him draft a notice of appeal on 5 December 2008. He applied for Legal Aid and Mr P Greyling was instructed. Some delay was occasioned by his legal practitioner who explained the reasons for the delay.

On the advice of his Legal Practitioner, he withdrew his first notice of appeal and filed the current appeal under consideration.

[4] The delay is substantial. I consider the explanation proffered to be reasonable. It is however the prospects of success which would be the determining factor in view of the lengthy delay.

[5] The appellant incorporated the grounds of his appeal and submitted that he has reasonable prospects to succeed on the said grounds. His first ground is that the learned magistrate erred and/or misdirected himself in law and in fact, by failing to advise him of his right to disclosure, which infringed his rights to a fair trial. The learned magistrate in his additional reasons conceded that he did not explain the right to apply for disclosure to the appellant. There are thus reasonable prospects that the appellant may succeed on this ground alone.

[6] In view of the above this court considered it prudent to grant condonation.

[7] The appellant was jointly charged with another accused. Both of them were charged with having contravened sections 2(1) (a) and 2(1)(b) of the Combatting of Rape Act, 200 (Act 8 of 2000) i.e that each one of them raped the complainant and that each one assisted the other in raping the complainant by holding her arms while the other accused was committing a sexual act with the complainant.

[8] The complainant herein is deaf and she was 19 years old at the time of the incident. She was the only witness to the incident. She testified that she was working in a cuca shop as a shopkeeper and went home around midnight. On her way home and at the entrance of her homestead, two man grabbed her, tripped her, removed her clothes and each one raped her whilst the other one was holding her arms. They left her naked after the rape and she walked in that state to her room. Her parents were not there at the time. She reported it to her neighbour the next morning and they went looking for the accused with the neighbour and the police. They found the accused and they were arrested. She went to the hospital where she was examined. The State called her father and a neighbour to confirm the report they received. The medical examination

was performed 9 days after the event. The examiner recorded that the complainant was allegedly raped by one man and he found no evidence of penetration or injuries.

[9] The appellant and his co-accused opted to defend themselves and pleaded not guilty. Both denied having committed the offence. The proceedings in terms of section 119 in the district court was handed into evidence. Accused' 1's plea explanation given in the district court was as follow: "I am not guilty because I am not the one who spoke to the victim. Accused 2 is the one who spoke to the victim. I did not have sexual intercourse with the complainant." Accused 2 (appellant) stated the following: "I did not have sexual intercourse with the complainant but I spoke to her on 4 July 2007 and I was with accused 1. We left the complainant with 3 men who were constructing school buildings at Onghangha village. Complainant is just accusing us saying we raped her. We just left her and went to our cattle post." Both appellant and his co-accused opted to remain silent.

[10] Counsel for the appellant submitted that the appellant has a fundamental right to a fair trial in terms of article 7 and 12 of the Namibian Constitution. He submitted that the appellant not only has a right to have full access to information contained in the police docket, but also to receive such disclosure timeously to allow him sufficient opportunity to prepare thoroughly his reply to the charge and his defense. He further submitted that the court has a duty to explain the right of disclosure to an unrepresented accused without the accused asking for disclosure; and when necessary make an appropriate order, compelling the State to comply. He referred this court to *S v Scholtz 1998 NR 207 (SC) (1996 (2) SACR 426)*; *S v Nassar 1994 NR 233 (HC)* and *State v Floyed Kahevita CASE NO.: CR 11/2011, delivered on 14th February 2011*.

[11] In *State v Floyed Kahevita, supra*, Liebenberg J, Damaseb JP concurring, stated as follow at page 4 paragraph 6 of that judgment:

"This clearly suggests that the content of the police docket was not disclosed to the accused before the trial had started. It is not only legal practitioners, representing accused persons in criminal cases, who have the right to disclosure of witness statements and other documents the State intends relying on during the trial, but also the unrepresented accused. They are equally entitled to disclosure of all witness statements and other documents relied on by the State at the trial; and where the accused is unsophisticated and unaware of such right,

the court should explain it to the unrepresented accused, and when necessary, make an appropriate order, compelling the State to comply. In the present case it is clear that the accused, at the commencement of the trial, was not put in the position where he knew what case he had to face, so that he could properly prepare his defence or give proper and full instructions to his legal representative (*S v Nassar 1994 NR 233 (HC)*). He therefore could not be said to be ready for trial - least, to conduct his own defence.”

[12] The above succinctly sums up the law on the issue of disclosure where the accused is unrepresented.<sup>1</sup> In this matter the learned magistrate conceded that such a right was not explained. It was also evident from the record that the appellant was not given a copy of the medical report prior to it being handed into evidence. The court however has to determine the nature of the irregularity and its effect.

[13] In *S v Kandovazu 1998 NR 1 (SC)*, Gibson AJA, Mahomed CJ and Mtambanengwe AJA concurring, set aside a conviction and sentence on the basis that the accused was refused access, after request was made by his attorney, to the contents of the State docket. Gibson AJA, at page 7 G, stated the following:

‘In non-constitutional matters, therefore the Court asks whether the irregularity is of a general or exceptional category. On reaching this conclusion the learned Chief Justice turned to consider the effect of a breach of the fundamental rights and freedoms entrenched in the Constitution. To decide this issue the learned Chief Justice examined authorities in the Commonwealth, (Canada, Jamaica, Australia) and the United States of America, and went on at 484A:

‘But even if it is assumed that the breach of every constitutional right has the same effect on a conviction which is attacked on appeal, it does not follow that in all cases that consequence should be to set aside the conviction. I am not persuaded that there is justification for setting aside on appeal convictions following upon a constitutional irregularity committed by a trial court.’

The learned Chief Justice then concludes at 484B-C

...‘that the test proposed by our common law is adequate in relation both to constitutional and non-constitutional errors’.

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

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<sup>1</sup> Also see *Shimweetheleni Thofilus v The State*, CA98/2010 delivered on 1 October 2012, page 4 para 11.

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

[14] The nature of the magistrate's failure to advise the appellant of his right to disclosure is of such a fundamental nature that the accused had not been afforded a fair trial. It is not needed for this court to go into the merits of the case given the nature of the irregularity. It is therefore not necessary for this court to consider the other grounds of appeal in view of the conclusion reached.

[15] In the result the following order is made:

1. The application for condonation for the late filing of the appeal is granted;
2. The appeal is upheld and;
3. The conviction and sentence of the appellant are hereby set aside.

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MA Tommasi

Judge

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HC January

Judge

APPEARANCE:

For the Appellant:

Mr Greyling

Of Greyling & Associates

Instructed by Legal Aid

For the Respondent:

Mr Pienaar

Prosecutor General Office -Oshakati