

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT

Case no: CA 55/2013

In the matter between:

MICHAEL WALUSIKU

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Walusiku v S* (CA 55-2013) [2017] NAHCNLD 28 (7 April 2017)

Coram: TOMMASI J and JANUARY J

Heard: 11 November 2016

Delivered: 7 April 2017

Flynote: Appeal – Criminal Procedure – Evidence of witnesses to be given viva voce – Admission of Affidavit of a crucial witness without allowing the appellant the opportunity to cross-examine – Failure to allow appellant opportunity to cross-examine grossly irregular – Learned magistrate’s conduct in obtaining the affidavit and the reliance thereon to convict the appellant amounted to an irregularity which tainted the verdict – Appeal against conviction upheld.

Summary: The accused was convicted of rape in contravention of the Combating of Rape Act, 2000 (Act 8 of 2000). He was sentenced to 8 years' imprisonment. After submissions were made and before judgment was given, the learned magistrate obtained an affidavit from the Head Mistress of Oshakati West Primary School which indicated that the School started its operations on 17 January 2007. This was before the incident occurred. The contents hereof confirmed that the accused misled the parties present at an inspection in *loco* when he stated that the school was built after the incident and that he was, for this reason, unable to assist the court. The court held that the learned magistrate ought to have called the witness in terms of s 186 of the CPA to give her *viva voce* evidence as is required in terms of the provisions of s 161 of the CPA. It was further held that the learned magistrate's failure to allow the appellant the opportunity to cross-examine this witness was grossly irregular; it was further held that manner of admission and the learned magistrate's reliance on this evidence to convict the appellant, tainted the verdict. The appeal is upheld and the conviction and sentence are set aside.

ORDER

1. The appeal against conviction is upheld;
2. The conviction and sentence are hereby set aside.

JUDGMENT

TOMMASI J (JANUARY J concurring):

[1] The appellant noted an appeal against conviction. The State applied for and was granted leave to appeal against the sentence. This court furthermore ordered that the appeal against conviction by the appellant and the appeal against sentence by the State be consolidated. The appellant noted his appeal outside the time frame provided for lodging an appeal in terms of rule 67 of the Magistrate's Court Rules. He simultaneously applied for condonation. The application for condonation was not opposed. The State applied for condonation for the late filing of the Heads of Argument. This was also not opposed. Condonation was granted for the non-compliance with the rules by both parties and the appeal was heard on the merits.

[2] The appellant was convicted of having contravened section 2(1) (a) of the Combating of Rape Act, 2000 (Act 8 of 2000). He was sentenced to 8 years' imprisonment on 25 April 2013. His appeal against conviction, would for obvious reasons, be considered first.

[3] The appellant's first ground of appeal is that the appellant was not afforded a fair trial as the learned magistrate relied on evidence of a witness' statement under oath that was not called to testify and as a result the appellant was not afforded an opportunity to cross-examine such witness.

[4] The learned magistrate's reply to this ground is as follow:

"This witness in question is not mentioned to enable the trial court to fully comprehend the basis of this ground.

- Assuming, as the trial court hereby does, that the alleged witness is the Oshakati West Primary School head, this ground is without merit because the record more fully shows, the Oshakati-West-Primary School Head's affidavit was sought as a measure of caution on a point that the appellant had clearly lied on.
- The trial court did not rely on that Affidavit to make a finding on the issue. The finding was based on the evidence on record before the Appellant misled the court at the inspection in *loco*.'

[5] Mr Ntinda counsel for the appellant submitted in argument that the magistrate had, unknown to the accused, on its own accord sought some evidence on affidavit, and accepted such evidence, without it being subjected to cross-examination. He argued that this was a vitiating irregularity which should result in the setting aside of the conviction.

[6] Mr Pienaar, counsel for the appellant submitted that the learned Magistrate did not rely on the evidence of the witness which was not called as there were ample other grounds to convict the accused on.

[7] The appellant was represented by a legal practitioner in the court *a quo*. He pleaded not guilty and denied that he had sexual intercourse with the complainant. The State called the complainant who testified that she was raped in plain view of other people. The scene was set along a path close to where other people were staying and near Oshakati West Primary School. She testified that the appellant chased her; threw her down to the ground; and raped her whilst other people, who were too frightened to come close, looked on. Those eye witnesses were called as well as the man who apprehended the appellant when he tried to run away. The appellant's defence was that it was not him but someone else who raped the complainant. He was just in the vicinity relieving himself when he witnessed how the victim was being manhandled and thrown to the ground by another man. He called one witness in his defence.

[8] The learned magistrate ordered that an inspection *in loco* should be conducted. None of the state witnesses were present and only the appellant was in attendance. When they returned from the inspection *in loco*, the learned magistrate recorded the following 'For the record, the inspection *in loco* has not yielded in anything because at the scene of the alleged offence there has in the meantime be constructed, so for these reasons the inspection *in loco* has been abandoned.' (sic)

[9] Both counsel made submission hereafter and the learned magistrate reserved his judgment. On the adjourned date the learned magistrate handed down the judgment. The learned magistrate, in what I would described as an otherwise sound judgment, made the following remarks:

“I will also pause here to comment and clear something. The complainant testified that the incident took place near Oshakati-West Primary School. Similarly the accused person testified as much. The court ordered an inspection in loco when we went to the scene, the accused person indicated to the court that at the time of the incident which is common cause was 29 March 2007. Oshakati West Primary School had not been built at that site where it stands today. As a result of which he could not make any or rather it could not assist the court, because now there was a structure which had not been there. It is to be admitted that this trial started on 11 August 2009 is almost four (4) years now. The court allowed the explanation of the accused person at the scene, believing that this Oshakati West Primary School had not been built at the time of the alleged offence. And so did the legal practitioner, who at the time was representing the accused person and the public prosecutor, who inherited the matter from the previous public prosecutors. However when we came to court back on record, as the record will more fully show, during submissions, the public prosecutor indicated or raise the issue that the school had already been built or put is differently, that the school was there at the time of the alleged offence as testified to by the complainant and not controverted by the Defence. The Defence did not address that issue in their submissions. And in the interest of justice, the court found it prudent that enquiries be made from the Oshakati West Primary School as to when the school was built and those enquiries made, revealed by way of an Affidavit by the Head Mistress of the school or the principal of the school, that the school actually started operation on the 17 of January 2007, that is two and half months or so before the alleged offence. That affidavit was made available to the court before court wrote the judgment and it is part of the record.” Further in the judgment when considering

the version of the appellant the court remarked as follows: 'We have alluded to the fact that the accused person misled and we dare add deliberately, the court officials and the court itself as regard the presence at the scene of the Oshakati West Primary School.'

[10] The first criticism is that which is raised in the ground of appeal i.e that the learned magistrate failed to afford the appellant the opportunity to cross-examine a witness whose evidence was crucial. It in essence destroyed his credibility.

[11] Section 161(1) of the Criminal Procedure Act provides that:

'A witness at criminal proceedings shall, except where this Act or any other law expressly provides otherwise, give his evidence *viva voce*'

It was not proper procedure to obtain an affidavit as this was not provided for in terms of the Act or any other law. It is furthermore trite that cross-examination is a right under our adversarial process and that the importance thereof cannot be downplayed.¹

[12] This however is not the only criticism which may be levelled against the manner in which the evidence made its way onto the record. The magistrate conduct should at all times be beyond reproach i.e independent and impartial. The presentation of evidence is a matter best left to the parties. It is also that a trial is not a game and the magistrate is not an umpire. The learned magistrate however, ought to have utilised the provisions of section 186 which empowers him to subpoena the witness if such witness appears to the court

¹ S v SS 2014 (2) NR 399 (HC) at page 408 para 33

essential to the just decision of the case. This witness was such a witness and the court *a quo* would have been empowered, before handing down his judgment to exercise his powers in terms of this section to procure this evidence in accordance with the precepts of a fair trial.²

[13] As matters stand, and may I add, regrettably so, the conduct of the magistrate was irregular. A failure to allow an accused the opportunity to cross-examine a witness, particularly one who destroys his credibility, is grossly irregular.

[14] The test is whether the irregularity which occurred is so fundamental that it could be said that in effect there had been no trial at all. If the answer is in the affirmative the conviction must be set aside. Where the irregularity was of less severe nature, then depending on the impact of the irregularity on the verdict, the conviction should either stand or a verdict of acquittal on the merits should be substituted therefor, the essential question being whether the verdict was tainted by the irregularity.³

[15] The learned magistrate intimated that he did not place any reliance on the evidence of the Head Mistress but it is evident that this information was taken into consideration to make a credibility finding of the appellant and to reject his evidence as false beyond reasonable doubt. The irregularity of the admission and reliance of the learned magistrate on this evidence to convict

² *S v Van Den Berg* 1995 NR 23 (HC)

³ *S v SS 2014 (2) NR 399* (HC) referring to *S v Shikunga & another* 1997 NR 156 (SC) at page 412 para 47

the appellant in fact tainted the verdict and leaves this court with no alternative but to set aside the conviction.

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

1. The appeal against conviction is upheld;
2. The conviction and sentence are hereby set aside.

M A TOMMASI
JUDGE

H C JANUARY
JUDGE

APPEARANCES

For the Appellant:

Mr N Mbushandje
Sisa Namandje Inc.

For the Respondent :

Mr Pienaar
Prosecutor General Office-oshakati