



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI  
JUDGMENT**

Case no: CA 23/2013

In the matter between:

**AMUPANDA JACOBUS**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Amupanda v The State* (CA 23-2013) 2017 NAHCNLD 4  
(27 January 2017)

**Coram:** TOMMASI J and JANUARY J

**Heard:** 2 August 2016

**Delivered:** 27 January 2017

**Flynote:** Appeal – application for condonation – Appellant not assisted by a legal practitioner – Procedure for condonation application not explained – Court of the view that it may consider reasons advanced and determine whether there are reasonable prospects of success.

Criminal Law Procedure – Evidence – Caution – Single witness – Evidence of single witness should be treated with caution – Material discrepancies in report made – Bias adverse to the appellant established by evidence.

**Summary:** The appellant noted an appeal against his conviction (rape) and sentence out of time and applied for condonation. It is not borne out by the record that it was explained to him how to obtain condonation from the court. The court found his explanation acceptable and concluded that his ground that the court erred when it evaluated the evidence was meritorious. The complainant was a single witness and the mother was called to testify in respect of the report made to her by the complainant. The court a quo found that the mother corroborated the evidence of the complainant when this was in fact not so. In terms of the actual rape the complainant was a single witness. In respect of her report made to her mother there were various discrepancies and evidence of biasness towards the appellant. The court, in view of the learned magistrates' error in the evaluation of the evidence, considered the evidence afresh and held that it was not safe for the court to rely on the evidence of the complainant. The appeal against conviction is upheld.

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### **ORDER**

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1. Condonation is granted for the late noting of the appeal;
  2. The appeal against conviction is upheld; and
  3. The conviction and sentence are hereby set aside.
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### **JUDGMENT**

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TOMMASI J (JANUARY J concurring):

[1] The appeal is against both sentence and conviction. The appellant filed his appeal outside the time limits and filed an "application" for condonation.

[2] I shall first deal with the application for condonation. The appellant was convicted of having contravened 2(1)(a) of the Combating of the Rape Act, 2000 (Act 8 of 2000). He was sentenced to 15 years' imprisonment on 16

September 2009. The appellant was unrepresented. On 5 February 2010 the appellant, without the assistance of a legal representative, drafted a notice of appeal and an “application” for condonation. He advanced reasons for his delay but the explanations were not given under oath.

[3] The learned magistrate, after sentence, stated as follow: “If you are not satisfied with the decision of this court, whether with regard to the conviction or whether with regard to sentence, you may note an appeal with the clerk of the court within 14 days from today.” The accused indicated that he understood the explanation. This explanation falls far short of what is required to enable an unrepresented accused to note an appeal and it furthermore fails to inform the accused how to obtain condonation if he is not able to note his appeal within the prescribed time limit.

[4] Section 309 (2) provides that an appeal by an accused from the district court shall be noted and be prosecuted within the period and in the manner prescribed by the rules of court: provided that the provincial division having jurisdiction may in any case extend such period. In *S v Kashire 1978 (4) SA 168SWA 167* Lichtenberg AJ, at page 167 H stated as follow: “The proper procedure for the obtaining of condonation of the late filing of a notice of appeal is by way of an application, supported by an affidavit made by the accused...”

[5] It comes as no surprise that the appellant, who was not assisted by a Legal Practitioner, was unable to follow the proper procedure for obtaining condonation. This procedure was not explained to the applicant. I shall therefore consider the reasons for delay advanced in the “application” and consider the grounds to determine whether there are reasonable prospects of success.

[6] The applicant’s explanation for the delay of approximately 5 months is as follow: He is an ignorant person who is unable to understand what a notice of appeal is; and he tried to raise sufficient legal fees to instruct a private legal practitioner but was unable to do so as his debtors were out of reach and had other commitments. The explanation offered by the appellant is in my view acceptable.

[7] The grounds of appeal against conviction may be summarised as follow:

1. The magistrate failed to evaluate the weight of evidence and the charge
2. The learned magistrate was unjustly biased and failed to take into consideration the unrepresented appellant's version;
3. There were no witnesses present before Court;
4. The medical report did not indicate that the complainant was raped or that there was any forceful penetration or injury to the complainant;
5. The doctor was not called to testify;
6. The magistrate did not say why he was convicted or what evidence he found to conclude that the appellant was guilty;
7. The prosecution failed to bring "technical evidence";
8. The appellant did not give any evidence under oath and the prosecutor did not cross-examine the appellant;
9. The State failed to call the investigating officer;
10. The testimony of the lady who opened the case is contradicting.

[8] The appellant raises a single ground against sentence i.e that the magistrate imposed a sentence which "negates the notion that an accused as a culpable human being should not be regarded with a desire of revenge."(sic).

[9] Ground 1, 2, 4, 6 and 10 above complains about the magistrate's evaluation of the evidence. Ground 3 and 8 are without merit as the record clearly reflects that the state called witnesses, the appellant testified under oath and was cross-examined. Ground 5 and 9 relate to the failure by the State to call certain witnesses. Ground 7 lacks particularity and will therefore not be considered. The court would first consider whether there are reasonable prospects that the appellant may succeed on the ground that the magistrate erred when evaluation the evidence adduced.

[10] The appellant faced a main count of rape and in the alternative that he committed or attempted to commit an indecent or immoral act with a child under the age of 16 years. He pleaded not guilty to both the main and the alternative and gave no plea explanation in terms of section 115 of the Criminal Procedure Act, 51 of 1977.

[11] The complainant was 7 years and 9 months old when her mother left her in the care of her stepfather over a weekend. When her mother returned the complainant appeared to be unwell and did not want to talk to her mother. She was taken to the hospital and a case of rape was subsequently reported to the police.

[12] The complainant testified that the appellant took her from the mattress where she was sleeping. He removed his “trunkie” and her panty. He then put her on his stomach and he pressed her with his “thing”. With the assistance of a sketch she was able to identify the “thing” as a penis and her “stomach” as her vagina. She testified that the appellant’s “thing” could not enter. She returned to her mattress and the appellant once again took her from the mattress and pressed her again on him. A student came in and asked her where her mother had gone to. She replied that her mother had gone home. Another lady also came in asked her about her mother’s whereabouts to which she replied the same. She left the room after that and went to lie down in the corridor where her mother found her. Her mother asked her what was wrong and the appellant said that she may be hungry. Her mother took her to hospital and after that they went to the police. Her mother enquired from her what the appellant did to her and she told her what had happened.

[13] The complainant’s mother testified that she was married to the accused and she divorced him the day the case was made. She narrated that the complainant informed her that the appellant called her to sleep on the bed. He told her to remove her panty and he put his finger in her vagina. He thereafter took out his penis and put it in the child. She testified that she was not happy when she returned because the accused had slaughtered a chicken and a pig and had another lady in the house.

[14] The State handed the birth certificate of the accused into evidence as well as the Medical Report. The doctor was not called to testify. The medical report reflects that the complainant had a small laceration on both *labia minora*. The conclusion recorded reads as follow: “The penis did not penetrate in the vagina because the hymen is normal” (sic)

[15] The accused testified under oath and complained that he was framed because he impregnated another lady. He denied having had any sexual intercourse with the complainant.

[16] The learned magistrate, in his judgment, stated that: “ the complainant testified that she informed her mother that the appellant put his penis into her vagina or tried to put his penis into her vagina”. He took into consideration the appellant’s testimony that there was a problem between him and the mother of the complainant and that the appellant denied having had sexual intercourse with the complainant. The learned magistrate indicated that he had to determine who was telling the truth and whether the state succeeded in proving its case beyond a reasonable doubt.

[17] The magistrate concluded: “ ... the complainant was indeed consistent with regard to her version in this matter. Even the version of the mother is corroborative of the evidence of the complainant.” He explained to the appellant that he had failed to cross-examine the complainant and her mother about the problems he had with the mother. He also remarked that the appellant failed to put his version as to where he was that specific date; and he was not able to defy the evidence of the complainant. The magistrate did not give additional reasons.

[18] Mr Greyling, acting *amicus curiae*, submitted helpful heads of argument herein. He submitted that it is not evident that the magistrate approached the evidence of the complainant with caution given the fact that she was a single witness. He further submitted that the learned magistrate, if he had taken into consideration the inherent dangers of relying on the uncorroborated evidence of a single witness, would not have placed any reliance on the single evidence of the complainant for the following reasons: the complainant testified that she only knows the name of the appellant whereas he was in fact her stepfather; she failed to testify that there was the slightest degree of penetration; and there were material discrepancies between her evidence and that of her mother.

[19] Counsel for the State submitted that the complainant testified that the appellant was pressing his penis into her vagina and also refer to the

testimony of her mother that she told her that the appellant inserted his finger in her vagina. Counsel pointed out that the J88 reveals that there were small lacerations on the labia minora and that the examination was painful. He referred to and that the note attached to the J88 which indicates that the vaginal opening was a little enlarged. It is not clear who the author of this note was and it does not form part of the medical report. The court can thus not rely on this evidence.

[20] It is indeed trite that a court ought to apply caution to the evidence of a single witness. In *S v Noble 2002 NR 67 (HC)* the principles are set out and there is no need to repeat same herein. In this matter the magistrate's conclusion that the mother corroborates the complainant's evidence is not correct. The complainant's evidence in respect of the rape is uncorroborated. The evidence of the mother relates to the report by the complainant.

[21] There are clear discrepancies between the evidence of the complainant and that of her mother. Her mother confirms that she found her sleeping in the corridor. Her testimony was that the appellant said that perhaps she was hungry whereas her mother testified that the appellant said perhaps she was not well. She testified that the appellant took her from the mattress whereas her mother testified that she informed her that the appellant called her to come and sleep with her.

[22] A material discrepancy is that the complainant told her mother the appellant put his fingers into the complainant's vagina but failed to mention this during her testimony. The complainant mentioned that the appellant on two occasions pressed his thing on her stomach. The mother made no mention that the complainant informed her of a second time. The complainant testified that her mother asked her after they had been to the police and hospital what the accused had done to her whereas her mother testified that she informed the nurses at the hospital.

[23] The learned magistrate made no mention of these discrepancies and it may be inferred that he did not take it into consideration when he assessed the evidence of the complainant.

[24] A further aspect was the defence raised by the appellant that he was framed. The complainant spoke about two ladies who came to the house asking where her mother was. The complainant's mother testified that she was unhappy on her return to the house because the appellant had slaughtered a pig and a chicken; and he brought another lady also in the house. The mother's testimony confirms the appellant's testimony that there were problems relating to the infidelity of the appellant. There was no need for the appellant to further question the mother of the complainant about this issue as she readily admitted it to the court. The magistrate erred when he did not consider the impact of the bias adverse to the appellant given the obvious acrimony between the appellant and the complainant's mother.

[25] The grounds challenging the evaluation of the evidence are meritorious and it is my considered view that the magistrate failed to apply caution to the uncorroborated evidence of the complainant.

[26] This court may still reach the same conclusion as that of the court *a quo* i.e that the accused is guilty of the offence if it is satisfied that despite the discrepancies and contradictions, the truth had been told. Discrepancies may be explicable and may even be indicative of the fact that the testimonies are not rehearsed. The injuries described by the Medical Examiner in his report are consistent with injuries which may be sustained when a penis is pressed on or in the vagina. Some of the discrepancies referred to above are also not material.

[27] The concern however is that the complainant narrated two different versions of the incident i.e the one that the appellant pressed his thing on her stomach on two occasions; and the other to her mother that the appellant put his fingers in her vagina and thereafter put his penis "in the child." These are material discrepancies.

[28] When one further considers the complainant's mother potential bias against the appellant, doubt arises in the mind of the court. The complainant testified they went to the hospital, the police and the school and thereafter



returned to the hospital. It is then that her mother asked her: "What did the accused do to you?" The following was recorded hereafter:

"Then I said to my mother: 'He had take me off from the mattress, then he put me in his stomach. Then he was pressing me in his stomach.'" Then my mother said: 'Let me go and ask you somewhere.'" And she took me away. Then I said "the accused Mr Jacob took me in his stomach, he was pressing me in his stomach and then he took of his trunky and he removed my panty, then he was pressing me in his stomach but I was not fitting on". And then it is from there, my mother said oh so he has raped you. Then after my mother asked me whether the accused has raped me then I said yes." (sic)

[29] The mother testified that she found the complainant dirty and that she examined her. It appears that the examination was done when she returned from the weekend. At this point the complainant did not want to speak to her and only disclosed to the nurses at the hospital what had happened to her. The possibility that rape was suggested to the complainant cannot be excluded. The State relied on the evidence of a witness who clearly displayed bias when they could have relied on the testimony of the independent witnesses at the hospital to whom the complainant disclosed the incident.

[30] It is my considered view that it would not be safe for this court to rely on the uncorroborated evidence of the complainant and it cannot conclude that the State had proven that the appellant is guilty beyond a reasonable doubt. Given this conclusion it is not necessary for the court to consider the other grounds raised by the appellant.

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

1. Condonation is granted for the late noting of the appeal;
2. The appeal against conviction is upheld; and
3. The conviction and sentence are hereby set aside.

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M A TOMMASI  
JUDGE

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JUDGE  
HC JANUARY

APPEARANCES

APPELLANT

Mr Grelying (JNR)  
Of Grelying & Associates  
(Amicus Curiae)

RESPONDENT

Adv L. Matota  
Prosecutor General Office