



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGEMENT REASONS

Case no: CA 35/2013

In the matter between:

KATUVEREKE KANARE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Kanare v S* (CA 35/2013) [2017] NAHCNLD 86 (15 August 2017)

Coram: TOMMASI J and CHEDA J

Heard: 5 November 2015

Delivered: 5 November 2015.

Reasons Released: 15 August 2017

Flynote: Criminal Procedure – Appeal – Evidence – Evaluation of the evidence of a complainant in a sexual assault case who is a single witness – The cautionary rule applicable to the evidence of a single witness.

Summary: The appellant was convicted of having contravened sections 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000). He appealed against his conviction primarily on the ground that the trial court erred in the evaluation of the evidence. The court held that the trial court erred by finding that the cautionary rule is not applicable in rape cases. The court held that although section 208 of the Criminal Procedure empowers a court to convict an accused on the evidence of a single competent witness, the court must still apply caution to the evidence of such a witness. The court further held that section 5 of the Combating of Rape Act abolishes the cautionary rule relating to offences of a sexual or indecent nature but that it does not mean that the evidence of a single witness should not be treated with caution. Failure by trial court to apply caution meant that this court was at liberty to disregard the factual findings of the trial court and to make its own findings on the recorded evidence. The court held that the appellant ought to have been given the benefit of doubt given the number of discrepancies, inconsistencies, improbabilities and unsatisfactory aspects of the evidence of the complainant. The appeal against conviction and sentence was therefore upheld.

ORDER

1. The application for condonation for the late filing of the appeal is granted;
2. The appeal is upheld;
3. The appeal against conviction and sentence is upheld;
4. The appellant is to be released with immediate effect;
5. The reasons to be handed down on or before 6 March 2016.

JUDGEMENT

TOMMASI J (CHEDA J concurring)

[1] The appellant was charged with contravention of s 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000). He pleaded not guilty but was convicted and sentenced to 10 years' imprisonment.

[2] The appellant was sentenced on 7 July 2007 and filed his appeal on 24 September 2009 i.e. almost 2 months outside the time period provided for in terms of Rule 67 of the Magistrate's Court Rules. His notice of appeal was accompanied by what purported to be an application for condonation.

[3] When the matter was heard the following order was made:

1. The application for condonation for the late filing of the appeal is granted;
2. The appeal is upheld;
3. The appeal against conviction and sentence is upheld;
4. The appellant is to be released with immediate effect;
5. The reasons to be handed down on or before 6 March 2016.

The following are the reasons for the above order.

[4] Mr Shileka, counsel for the respondent, objected to the granting of condonation on the ground that there were no reasonable prospects of success. The court however granted condonation having considered the reasons advanced for the delay, the period of delay and prospects of success. The appeal was thus considered on the merits.

[5] The appellant drafted his notice of appeal in person and what follows are his grounds in respect of his appeal against conviction:

'The learned magistrate erred in law or in fact;

- (a) by concluding that the charge had been perpetrated against the complainant;
- (b) by accepting hearsay evidence from the state witness who testified about an issue heard, not what he saw on the alleged rape;
- (c) by not finding that the witness had an interest of the said witness in this case as he was having an affair with the complainant; and he had bad blood with the appellant who married the complainant before and had children with the complainant;
- (d) in not finding that the evidence in chief of the complainant was contradicting itself and by not enquiring from the complainant why she was contradicting herself in her testimony;
- (e) in concluding or holding that the state had proved that the appellant's alibi could not possibly be true; as the appellant denied the charge and admitted that he had sexual intercourse with the complainant on the evening in question but the appellant indicated that she had been his wife and that their encounter had been consensual;
- (f) by not affording the appellant the opportunity to call his witness to come and testify in his defense on the alleged rape;
- (g) in convicting the appellant without summoning the investigating officer to come and testify viva voce and for the appellant to cross-examine the said officer.
- (h) in not enquiring from the complainant as to why she did not shout for assistance, as she spent the next half day at the appellant's house, in the house there were people around;
- (g) in failing to weigh the version of the state.'

[6] The learned magistrate in response to the above grounds referred to his reasons set out in the judgment. He provided no additional reasons.

[7] The complainant who was 26 years old at the material time, testified that she was drinking alcohol at a bar when the appellant called her. She went to him and he wanted her to go with him. When she refused, he twisted her two fingers and grabbed her hair. She was screaming but the bystanders refused to help. He pulled her behind Jamistal at a bush where he had sexual intercourse with her. He thereafter forcefully took her to his tent where he once again raped her. She did not resist the appellant as he had a fire-arm in his possession and she feared that he might use it. She had pimples on her head as a result of the pulling out of her braids and her finger which he pushed, was swollen. Her uncle found her in the tent the next morning and she told him what had happened. She admitted that she had previously been in a relationship with the appellant and that she has one child which was born out of this relationship. She testified that the relationship was severed by the elders as they were not on good terms.

[8] Her uncle testified that they were at Jamistal looking for a lift. At around 20h00 the complainant informed him that she was going to the toilet. She failed to return and a search for her proved fruitless. The next day he went looking for her and found her in the appellant's tent. He called her three times and on the third occasion she answered. She then told him that she was raped twice by the appellant. He observed that she looked weak and did not have her shoes. Her braids were also pulled out and he observed some pimples in her head. She informed him that although the appellant had a fire-arm on him, he never used it or said that he wanted to shoot her. He testified that: 'I told her and then because I was angry I said no there is no way I am going to take this I am first going to take the matter to the police and she agreed.' He also testified as follow: 'It was not her first intention to take the matter to the police but I am the one who brought that out.'

[9] The medical report was handed in by agreement. No injuries were recorded. The explanatory notes indicate that the patient informed the examiner that she had been sexually assaulted twice, in the bush and at the residence of the attacker under the threat of a gun.

[10] The appellant testified that he went to buy cigarettes at a bar, in Jamistal. The complainant came to him and they greeted each other while he was buying the cigarettes at the counter. He indicated that he wanted to be with her that evening. He

denied that they were separated by the elders. They discussed where they would stay and he told her that he had a tent. She informed him that she would go and tell a colleague by the surname Mwenye that she was going with him. He walked from the bar with the complainant and a friend named Orumba up to Ornada. He took her into the tent where they had consensual sex. There was another person at the tent who spoke to him and the complainant.

[11] The learned magistrate concluded that it was common cause that: the appellant and the complainant knew each other well; that they had a child and that they had sexual intercourse that evening. According to the accused they were still in a relationship whereas, according to the complainant they were separated by the elders. The magistrate determined that the only issue in dispute was whether or not the sexual intercourse was consensual. He indicated that he could rely on the evidence of a single witness and that the cautionary rule is not applicable in rape cases. He accepted the evidence of the uncle that the complainant looked weak; she had no shoes on, and that the complainant lost the shoes at the place where she was pulled. This he found was consistent with the complainant's version that she lost her shoes when she was pulled by the appellant. He was satisfied that the complainant did not protest as she feared that appellant might use the fire-arm, although he did not physically threaten her with it. The court further took into consideration the failure of the appellant to call the person who was at the tent to testify. The learned magistrate found no reason why the complainant would falsely implicate the appellant as there was no bad blood between them. He was thus persuaded that the sexual intercourse was not consensual.

[12] The ground mentioned in paragraph 5 (b) has no merit as the court is entitled in terms of section 6 of the Rape Act to admit into evidence previous consistent statements of the complainant. The fact that there was a relationship between the uncle and the victim and the issue of an alibi were not raised during trial. This court shall therefor not entertain these issues on appeal. The appellant was afforded the opportunity to call witnesses and his legal practitioner informed the court that he was unable to locate the witnesses. His ground referred to in paragraph 5 (f) is therefore

without merit. The remaining grounds relate to the trial court's evaluation of the evidence.

[13] The judgment of the trial court reveals a fundamental error in respect of the evaluation of the evidence when the learned magistrate concluded as follows: 'The Rape Act is quite clear that the court may rely on evidence of a single witness and the cautionary rule is not applicable in rape cases.'

[14] Section 208 of the Criminal Procedure Act, 1977 (Act 51 of 1977) provides that an accused may be convicted of any offence on the single evidence of any competent witness. In *S v Noble* 2002 NR 67 (HC) this court considered this provision and held that the court, when evaluating the evidence of a single witness, is to exercise caution; that such a witness should be credible; and the evidence should be of such a nature that it constitutes proof of the guilt of the accused beyond reasonable doubt.

[15] Section 5 of the Rape Act, 2000 (Act 8 of 2000) provides that:

'No court shall treat the evidence of any complainant in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature with special caution because the accused is charged with any such offence.'

This followed the recommendations by the Supreme Court in *S v Katamba* 1999 NR 348 (SC) where the court held that the cautionary rule in sexual offences as it had been traditionally applied should be abolished. The Court, however, added the proviso that the evidence of any witness, especially a single witness, should be regarded with caution.

[16] In this matter the victim was not the only witness. The State called the uncle to give evidence, not on the rape itself but on peripheral issues such as the state in which the complainant was found. The learned authors LH Hoffmann & DT Zeffertt in The South African Law of Evidence, 4th Ed at page 575 state the following:

'A point of some interest arises where there is more than one witness in a case but only one who testifies on the point in issue while the evidence of the others relates to peripheral matter that has no bearing on the credibility of the crucial witness. It is submitted that he has to be treated as a single witness precisely because the single-

witness "rule" is not a rule of law, but reflects common sense – a recognition of the danger inherent in having to rely of a single witness and, as a consequence, the caution that the courts require in dealing with it. The same considerations apply here.'

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[17] The victim was the only witness who testified about the rape incidences and in that respect she was a single witness her evidence ought to have been treated with caution. The learned magistrate thus erred by concluding that the cautionary rule does not apply. This court must then accept that he failed to caution himself against the inherent dangers of relying on the evidence of the victim. In view of this error this court is at liberty to disregard the trial court's factual findings and to come to its own conclusion. In doing so the court is reminded of the following remarks by Maritz J, as he then was, in *S v Noble, supra*¹:

'Judicial experience of the inherent danger to convict on the evidence of a single uncorroborated witness 'evoked a judicial practice that such evidence be treated with utmost care' (Du Toit et al Commentary on the Criminal Procedure Act at 24-1). The most basic requirement demanded by our courts for the acceptability of such evidence is that it must be credible. That requirement was also expressly demanded by s 231 of the Criminal Procedure Ordinance, 1963 and its predecessor, s 243 of the Criminal Procedure and Evidence Proclamation, 1935. The statutory omission of that requirement in s 208 of the Criminal Procedure Act 1977, is, as Diemont JA pointed out in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180D-E, 'of no significance; the single witness must still be credible, but there are, as Wigmore points out, "infinite degrees in this character we call credibility". (Wigmore on Evidence vol III para 2034 at 262.) There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpf JA in *S v Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses'

¹ at page 70 H-I and 71 A-B

evidence were well founded" (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

[18] There are indeed some discrepancies in the testimony of the complainant. A material discrepancy is the fact that she failed to mention in her evidence in chief or in her narration to the medical examiner that the appellant had sexual intercourse with her on four occasions; once behind Jamistal in the bushes and three times during the night in his tent.

[19] There are furthermore discrepancies between her evidence and that of her uncle. According to the uncle they were waiting for a lift and she informed him that she was going to the toilet. According to the complainant she was at the bar drinking alcohol and she went to appellant after she had been to the toilet. Her uncle was part of the group of people she was with but when confronted with his version that she disappeared, she testified that he was sitting at the counter and suggested that perhaps he did not see her return from the toilet.

[20] She screamed when the appellant twisted her fingers and pulled her hair. This was done outside the bar in plain sight of other people and purportedly where her uncle was waiting for her to come from the toilet. It is plausible that other people may not have wanted to interfere but it is unlikely that her uncle would have ignored her screams. He referred to her as his daughter and he was concerned by her disappearance.

[21] A further unsatisfactory aspect of her evidence is that she, according to her uncle, did not immediately answer him the next morning when he came looking for her but only responded after the third time. The complainant's account of what happened the next morning also differs materially from her uncle's version.

[22] The injuries described by both the complainant and her uncle are not reflected in the medical report.

[23] The appellant's version that the relationship was still ongoing is not consistent with the version which was put to witness by his legal representative. The complainant's version in this regard is more plausible.

[24] The onus was on the State to prove appellant's guilt beyond reasonable doubt. The number of discrepancies, inconsistencies, unsatisfactory aspects and improbabilities in the testimony of the complainant means that the State failed to discharge the onus of proving the appellant's guilt beyond reasonable doubt. The appellant ought to have been given the benefit of doubt.

[25] It was for these reasons that the court granted the following order:

1. The application for condonation for the late filing of the appeal is granted;
2. The appeal is upheld;
3. The appeal against conviction and sentence is upheld;
4. The appellant is to be released with immediate effect;
5. The reasons to be handed down on or before 6 March 2016.

MA Tommasi
Judge

I agree

M Cheda
Judge

APPEARANCE

For the Appellant:

Ms Mugaviri
Of Mugaviri Attorney (Amicus Curiae)

For the Respondent:

Adv. Shileka
Of office of the Prosecutor General
Oshakati