

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2018/00034

In the matter between:

RAUL MUROTUA

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Murotua v S* (HC-NLD-CRI-APP-CAL-2018/00034) [2019]
NAHCNLD 26 (28 February 2019)

Coram: CHEDA J and TOMMASI J

Heard on: 27 November 2018

Delivered: 28 February 2019

Flynote: Criminal procedure-Evidence-Evaluation of evidence-The version of the appellant was totally disregarded by the magistrate and it amounted to a

misdirection which justifies this court to interfere in the conclusion reached by the magistrate.

Summary: The appellant appealed against a rape conviction. When the court *a quo* evaluated the evidence only considered the testimony of the complainant and found corroboration in the fact that she made a report to the defense's witness and her mother. The learned magistrate totally disregarded the version of the appellant and the court held that it was a misdirection which warranted the court's interference with the conclusion reached by the magistrate. This court, having evaluated the evidence was not satisfied that the State had proved its case beyond reasonable doubt and the conviction was consequently set aside.

ORDER

1. The appeal against conviction succeeds;
2. The conviction and sentence is set aside.

JUDGMENT

TOMMASI J (CHEDA J concurring):

[1] The appellant herein appealed against the conviction of contravening section 2(1) (a) of the Combating of Rape Act, 2000 (Act 8 of 2000) - rape. He was sentenced to 8 years imprisonment.

[2] Appellant was represented by Mr Tjirera while respondent was represented by Mr Pienaar. Mr Tjirera filed a notice of appeal against sentence in the regional court sitting at Opuwo. The notice of appeal does not bear a date indicating when it was signed and neither does it bear a date stamp of the clerk of the court where it was lodged.

[3] The court appointed Mr Tjirera to act *amicus curiae* in this matter. On 16 October 2018 Mr Tjirera informed the court that he had faced difficulty in uploading his heads of argument. The court accepted counsel's request and ordered him to file his heads of argument before 25 October 2018. At that stage the respondent had already filed its heads of argument.

[4] On 24 October 2018, Mr Tjirera's filed his heads of argument together with a new notice of appeal and an application for condonation of late noting of the said appeal were filed. The respondent, in response filed additional heads of argument on 16 November 2018.

[5] The new notice of appeal was not served on the regional court magistrate and neither was there a notice of withdrawal of the previous one filed. The matter is thus considered on the first notice of appeal. The court, however, also took into consideration the application for condonation as the notice of appeal did not indicate whether the appeal was noted timeously.

[6] The appellant's application for condonation for the late filing of the appeal was supported by an affidavit deposed by the clerk of court who stated that the notice of appeal was filed timeously. This was not disputed by the respondent and I am satisfied that the first notice of appeal was accordingly lodged timeously.

[7] The grounds of appeal are that the learned trial magistrate erred in law and /or in fact by:

- 'a) only taking the state's version into account in his analysis of the evidence and consequently concluding that the state had proven its case beyond reasonable doubt;
- b) failing to take the version of the appellant into account in his analysis thus failing to give the court the opportunity to see the possibility of the appellant's version being reasonably possibly true; and
- c) ignoring the version of the appellant in his analysis of the evidence.'

[8] The respondent raised a *point in limine* that the grounds of appeal do not comply with rule 67(1) of the Magistrate's Court Rules in that they are not clear and specific. In support thereof, Ms Nghiyoonanye for the respondent, referred us to the matter of *S v Wellington* 1990 NR 20 (HC). In that case the court held that certain

grounds meant nothing more than that the conviction was against the weight of evidence and bad in law and as such could be ignored as not complying with rule 67(1) of the Magistrates' Courts rules relating to the setting out of the basis of the appeal with sufficient particularity. These grounds were that the court a quo misdirected itself as to the law and the facts on the following grounds by:

- 'a) accepting the evidence of the State rather than of the appellant;
- b) finding, in effect, that the State proved its case beyond reasonable doubt; and
- c) finding, in effect, that the appellant's explanation could not reasonably possibly be true.'

[9] Appellant submitted that the learned trial magistrate did not properly evaluate the evidence before it. He further argued that it would be a miscarriage of justice, if this court does not entertain the appeal in light of this omission by the learned trial magistrate.

[10] The appellant was charged with rape in contravention of section 2(1) of the Combating of Rape Act, 8 of 2000. The coercive circumstances relied on were that the appellant applied physical force, and that the complainant was under the age of fourteen years and the perpetrator was more than three years older than her. In the alternative he was charged with having contravened section 14(b) of the Combating of Immoral Practices Act, 7 of 2000.

[11] The appellant pleaded not guilty to the charge and gave no plea explanation in terms of section 115 of the Criminal Procedure Act.

[12] The state handed into evidence the J88 Medico - legal examination form of the complainant and two reports from the National Forensic Science Institute. The latter reports indicate that the appellant cannot be excluded as a possible main contributor of the profile collected from samples of vaginal swabs and vestibule samples of the complainant. The clothing of the complainant rendered a mixed profile of at least three individuals i.e. one female and two male contributors.

[13] The Doctor who carried out a physical examination of the complainant made the following observations:

- 'a) General condition: calm
- b) Physical examination - normal
- c) Vaginal examination - had dried vaginal discharge medial aspect of both upper parts of thighs
- d) Hymen - long gone
- e) No bruises or wounds observed. No abnormal discharge seen.'

[14] The State also called a state Dentist for the determination of the complainant's age evidence in his Age Determination Report. In his opinion the complainant is between 11 and 13 years of age.

[15] The complainant's version is that, on the day in question she was sent by her mother to buy meat. Her mother gave her N\$200. The appellant invited her when she was at the vending place and invited her to go with him. She responded to the invitation and they entered a bar. The appellant left her seated with his laptop bag and spoke to a bar lady. After a while the bar lady told her to take the bag to the appellant who was in a small room next to the bar. He pulled her down on the bed and asked her to have sexual intercourse with him in exchange for money. She refused his offer, but, he proceeded to have sexual intercourse with her against her will. In that process he threatened to kill her if she screamed. She went outside the room crying. There were ladies who were outside and they asked her why she was crying. She, however, did not answer them. Instead she went to her home and made a report to her mother about the rape. Complainant also reported the incident to the police. She denied that she had consensual sex with appellant in exchange for money.

[16] Complainant's matter confirmed that she sent the complainant to buy meat and gave her N\$200. Complainant, however, returned without the meat and was crying. She confirmed that the complainant told her she had been raped. She testified that her daughter returned without the meat and the money she gave her. She was unable to give the date of birth of her daughter. The complainant's mother was unable to say what happened to the money.

[17] The appellant testified that on the day in question he met the complainant at a bar where he went to buy cigarettes. He asked her to sleep with her and offered to pay her N\$100, N\$150 or N\$200 for the services contemplated. He asked the bar

lady for a room to carry out his purpose. He proceeded to have consensual sexual intercourse with her, but, thereafter, refused to pay her for the services rendered. He then left her and went to another bar where he was subsequently arrested. He, however, did not know how old she was.

[18] The appellant also called a witness one, Elizabeth to give evidence on his behalf. In her evidence she stated that she saw complaint crying and was standing next to a wall. It was her further evidence that she saw the complaint crying and when she inquired as to why she was crying, complaint stated that appellant had heard sexual intercourse with her, but, did not pay her N\$300 as per their agreement.

[19] In respect of the alternative count, the learned magistrate concluded that the dentist gave an estimated age and not the exact age. He, further, found that it was difficult to determine the age of the complainant given her appearance and physical stature. He, therefore, gave the appellant the benefit of the doubt in respect of the alternative count.

[20] In respect of the main count, the learned magistrate accepted that the complainant was forced into having sexual intercourse against her will and that the appellant even offered to pay her for the services rendered. He considered the undisputed evidence that although the complainant was seen by Elizabeth crying, she however, did not relate the alleged rape to her, but, reported to her mother. In my view, it was unavoidable for her to come up with a story to her mother as she had an obligation to account for the N\$200 she had been given to buy meat and also that she reported the rape to her. The learned magistrate found her evidence to have been credible and concluded that the respondent had proved its case beyond reasonable doubt. This is not supported by the facts present before the court.

[21] However, the learned magistrate failed to consider the appellant's version, which in short is that sexual intercourse was consensual and that there was an agreement that the appellant would pay the complainant for services rendered. This, therefore, constitutes a clear misdirection in respect of the evaluation of evidence which justifies the courts interference in the conclusion reached by the magistrate. The learned trial magistrate should have realized that there was a high possibility

that the complainant was not a reliable witness and should, therefore, given the appellant the benefit of doubt.

[22] It is trite that the court may convict on the evidence of a single witness if satisfied that every material fact was proved. It is trite that the court should follow a cautious approach in its assessment of a single witness evidence. I am guided by what was stated in *S v Katjingisua* 2005 (3) NCLP 26, where Mtambanengwe AJ (as he then was) with Damaseb JP concurring where they quoted with approval the matter of *S v Singh* 1975 (1) SA 227 (N) at 228F –H I where Leon J stated:

'Because this is not the first time that one has been faced with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond reasonable doubt. The best indication that a court has applied its mind in the proper manner in the above-mentioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.'

[23] In the complainant's evidence she admits that an offer to pay for the service rendered was indeed made by the appellant, but, that she declined the said offer. She also stated that she first made the report to her mother, but, did not make the same report to the ladies who were outside the room where the alleged rape took place. However, Elizabeth, appellant witness contradicted her by stating that the complainant made a first report to her when she mentioned that indeed sexual intercourse had taken place and that appellant had refused to pay N\$300 for it as previously agreed. What comes out clearly in this matter is that:

- a) sexual intercourse took place;
- b) complainant was seen crying;

- c) there was a mention of N\$300 by complainant to Elizabeth;
- d) complainant had been given N\$200 by her mother to buy meat;
- e) complainant, however, did not buy the meat, but, chose to while up time at the bar on a frolic of her own;
- f) complainant did not make a report to the ladies who were outside the room where the offense is alleged to have taken place, despite the fact that one of the ladies is the one who had shepherded her into this pleasure room as it were; and
- g) complainant seems to have misled the court in matters of facts. Complainant therefore cannot be behaved as she seems to be a stranger to the truth.

[24] The report made to this witness corroborates the version of the appellant that there was an agreement to have sexual intercourse in exchange for money. This is a material discrepancy between her testimony and that of the appellant and his witness. The issue of money lends credence to the appellant's version that there was an agreement in place. It is not hard to imagine why the complainant would not want to admit that she spoke to one of the ladies outside the room where the alleged rape took place. There is therefore doubt that there was rape in this case. Where doubt exists it should be to the benefit of the appellant (accused).

[25] The medical and forensic evidence proved that sexual intercourse took place, but, it is doubtful that it took place under forced circumstances.

[26] In light of the unsatisfactory aspects of the complainant's evidence I am not satisfied that the truth has been told in this matter.

[27] The conclusion that the State had proved its case beyond reasonable doubt, is not supported by evidence before this court accordingly the conviction and sentence cannot be allowed to stand.

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

1. The appeal against conviction succeeds;
2. The conviction and sentence is set aside.

M CHEDA
JUDGE

I agree

M A TOMMASI
JUDGE

APPEARANCES:

For the Appellant:

Mr Tjirera
Of the Directorate of Legal Aid,
Opuwo

For the Respondent;

Ms Nghiyoonanye
Of Office of the Prosecutor General,
Oshakati