

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI
APPEAL JUDGMENT**

Case No: HC-NLD-CRI-APP-CAL-2018/00024

In the matter between:

EBEN FANIE AWARAB

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Awarab v S* (HC-NLD-CRI-APP-CAL-2018/00024) [2019] NAHCNLD 43 (23 April 2019)

Coram: JANUARY J et SALIONGA J

Heard: 26 March 2019

Delivered: 23 April 2019

Flynote: Criminal Procedure - Duplication of convictions - Accused convicted of kidnapping and rape in contravening section 2(1) (a) of the Combating of Rape Act 8 of

2000 - Tests applied and referred - Same amounted to improper duplication of convictions - Appeal against conviction on kidnapping upheld - Appeal against conviction on rape dismissed.

Sentence - Minimum sentence - Combating of Rape Act - Magistrate has a duty after conviction to inform the appellant of the provisions of section (3) (2) of the Combating of Rape Act - Failure to inform the appellant render the trial unfair - Appeal against sentence on both counts upheld.

Summary: The appellant was convicted in the Regional Court sitting at Opuwo on charges of kidnapping and rape. The evidence necessary to establish kidnapping will also prove the commission of rape. Ultimately the conviction on both charges amount to an improper duplication of convictions. Appellant was sentenced to five years imprisonment for kidnapping and ten years imprisonment for raping the complainant. The court failed upon conviction to explain to the appellant the provisions of section 3(2). It also failed to give him an opportunity to address the court on the issue. Such failure renders the trial unfair as fairness can hardly be achieved if an accused is uninformed. On appeal the conviction on count one and sentences on both counts are upheld. The appeal against the conviction on count two is refused. The sentences on both counts are set aside. The matter is remitted to the magistrate to comply with the guidelines as stipulated in Gurirab's case and to sentence the appellant afresh.

ORDER

1. The appeal against conviction and sentence on count one is upheld and set aside.
2. The appeal against conviction on count two is refused.
3. The appeal against sentence on count two is upheld and the sentence imposed in respect of count two is set aside.

4. The matter is remitted to the magistrate to sentence the appellant afresh and to comply with the applicable guidelines as set out in the case of *Gurirab*.
5. In an event the trial magistrate is unavailable to finalize the case, any other magistrate may sentence the appellant but should take the period already served into consideration.

APPEAL JUDGMENT

SALIONGA J (JANUARY J concurring)

[1] Appellant appeared in the Regional Court sitting in Opuwo on charges of kidnapping and rape in contravening the provisions of section 2(1) (a) of the Combating of Rape Act, Act 8 of 2000.

[2] The appellant pleaded guilty to the charge of kidnapping. A plea of not guilty was subsequently entered in terms of section 113 of the Criminal Procedure Act 51 of 1977. On a charge of rape appellant pleaded not guilty. After the evidence was led he was convicted on both counts and was sentenced to five and ten years imprisonment respectively. Displeased with the magistrate's findings, the appellant appeals against the convictions and sentences on both counts. Appellant appears in person at the trial as well as at the appeal hearing.

[3] Even though the unrepresented appellant should be applauded for filing his notice within the time limit prescribed by Rule 67 of the Magistrates Court Rules, the notice of appeal does not set out the grounds of appeal against conviction. The grounds of appeal against sentence filed were vague. I was in any event able to make out the grounds of his appeal as follows;

a) Conviction:

He stated that he was only arrested on a rape charge and not about kidnapping. What he in essence is saying is that the learned magistrate misdirected himself in convicting the appellant on a charge of kidnapping.

b) Sentence

That the magistrate erred himself in overemphasized the seriousness of the offence at the expense of the personal circumstances of the appellant. Therefore the appellant submitted that the sentence of 15 years imprisonment is excessive, severe and induces a sense of shock.

[4] From the notice of appeal it seems the appellant has no dispute with the conviction on a charge of rape but for kidnapping. The appellant stated that at no stage was he informed or warned of kidnapping case during the arrest. He was only made aware of that charge after his case was transferred to the Regional Court. He states that these offences were committed at the same time and on the same day and is strange to him to be convicted on both charges.

[5] Appellant further stated that the effective term of 15 years imprisonment imposed is out proportion. He submitted that the court a quo erred in overemphasizing the seriousness of the offence and disregarding his personal circumstances. The appellant is thus asking for a reduction of sentence. In the alternative he is asking the appeal court to order the two sentences to run concurrent.

[6] In his reply, counsel for the respondent conceded that the manner in which the appellant dragged the complainant forcefully to his house and locked the door, shows that it was for purposes of raping the complainant. This action cannot be separated from the incident of rape. The two separate offences were committed with a single intent and were part of one continuous transaction. Counsel in this regard referred this court to *S v Seibeb and Another*; *S v Eixab* 1997 NR 254 (HC) where the single and same evidence tests were explained and discussed. I endorse the application of the tests as discussed in the aforesaid cases but am not going to discuss the same again in the instant case.

[7] With regard to sentence on both counts, counsel in his supplementary heads of argument conceded and submits that the notion of substantial and compelling circumstances were not explained to the appellant upon conviction as required by section 3(2) of the Combating of Rape Act 8 of 2000. Counsel further submitted that it was the duty of the magistrate to explain to the appellant what he was facing with regard to the minimum sentence the court was to impose on a charge of rape.

[8] It is apparent from the record that the learned magistrate in convicting the appellant on both counts did not follow the guidelines set out in Seibeb and Eixab's case. Had the abovementioned guidelines been applied, the court should have found that the manner in which the appellant dragged the complainant forcefully to his house and locked the house was an act to bring about rape.

[9] Applying the aforementioned tests to the instant matter, we are satisfied that there was only one offence committed. The conviction on both counts constitutes an improper duplication of convictions. The conviction of kidnapping has to be set aside.

[10] The court a quo in convicting the appellant on a rape charge, considered that; the appellant placed himself on the scene when he was questioned in terms of section 112 (1) (b) of the Criminal Procedure Act. He admitted to have taken the complainant to his room as he did not want her to sleep at the shop. In his own words he was protecting her. He denied that the house was locked. The complainant testified contrary that the appellant grabbed her to his house, locked the house and raped her by putting his penis into her vagina. Her evidence was corroborated by Fransina Awaras his aunt who heard a scream from the appellant's house and when she went up to the house she found the house locked. The said evidence was further confirmed by Fredrick Lewelly. He testified that they had to untie the wire in order to get inside the accused's house where they found the complainant in the first room and accused was behind the door. The appellant did not challenge the evidence presented. This court found no misdirection on the part of the magistrate in rejecting the appellant's evidence. In our views the appellant was correctly convicted on a charge of rape and the appeal against conviction is to be refused.

[11] Coming to the appeal against sentence imposed, the magistrate in sentencing the appellant considered; the personal circumstances of the appellant, the public interest as well as the seriousness of the offences. He found and concluded that the seriousness of the offence outweighed the personal circumstances of the accused. He also found there were no compelling and substantial circumstances present to deviate from the prescribed minimum sentence.

[12] Section 3(2) of the Combating of Rape Act states 'if a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the applicable sentence prescribed in subsection (1), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.' The learned magistrate correctly recorded that he did not find any substantial and compelling circumstances. He however failed to explain them to the unrepresented appellant and failed to afford him an opportunity to address him.

[13] In the judgement of *S v Gurirab 2005 NR 518 (F)*, it has been stated that 'it is imperative that the accused must be assisted during this process. The State should be informed and the parties should be given an opportunity to address him on such an issue'. Nowhere on record was it shown that the State was informed of the provisions of section (3) (2) as required. Nor were the parties given the opportunity to address the court. A court of appeal is entitled to interfere with the sentence of the trial court if the sentence is vitiated by irregularity or if the sentence is one to which no reasonable court would have arrived at. The appellant in this matter was not legally represented. Failure by magistrate to explain the provisions of the Combating of Rape Act to the appellant renders the trial unfair as fairness can hardly be capable of being achieved if an accused is uninformed. For the aforesaid reasons the sentence on count one and two has also to be set aside.

[14] In the result the following order is made.

1. The appeal against conviction and sentence on count one is upheld and set aside.
2. The appeal against conviction on count two is refused.

3. The appeal against sentence on count two is upheld and the sentence imposed in respect of count two is set aside.
4. The matter is remitted to the magistrate to sentence the appellant afresh and to comply with the applicable guidelines as set out in the case of *Gurirab*.
5. In an event the trial magistrate is unavailable to finalize the case, any other magistrate may sentence the appellant but should take the period already served into consideration.

J T SALIONGA
Judge

H C JANUARY
Judge

APPEARANCES:

THE APPELLANT: Mr E F Awarab
Of Elizabeth Nepembe Correctional Facility, Rundu

THE RESPONDENT: Mr J Mudamburi
Of Office of the Prosecutor General, Oshakati