

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2019/00037

In the matter between:

LUCAS NATANGWE NGHIPUNYA

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Nghipunya v S* (HC-NLD-CRI-APP-CAL-2019/00037) [2020]
NAHCNLD 124 (3 September 2020)

Coram: JANUARY J *et* SALIONGA J

Heard: 23 July 2020

Delivered: 3 September 2020

Flynote: Criminal Procedure – Appeal – Conviction & Sentence– Late filing of notice of appeal – Application for condonation – No reasonable explanation for delay – Prospects of success on appeal on sentence – Sentence set aside and matter remitted for the magistrate to sentence afresh.

Summary: The appellant in this matter was properly convicted on 2 charges of rape of minor females. He filed his notice of appeal late with an application for condonation. An explanation for the delay was provided but found not to be reasonable. There are no prospects of success on the convictions but prospects of success on appeal on sentence. The sentences are set aside and the matter remitted to the magistrate to sentence the appellant afresh.

ORDER

1. The conviction is confirmed;
2. The appellant's sentences are set aside;
3. The matter is referred back to the magistrate who found the appellant guilty, for sentencing afresh and to comply with the applicable guidelines as set out in this case, and generally to deal with the appellant according to law;
4. The magistrate is furthermore directed to take into consideration, in whatever sentence is to be imposed, that the appellant has already served part of the sentence as from the date the original sentence was imposed.
5. The appellant shall remain in custody until such time as the magistrate has reheard the matter and complied with the guidelines as set out herein.

APPEAL JUDGMENT

JANUARY J (SALIONGA J concurring):

Introduction

[1] The appellant was charged in the Regional court, Eenhana with two charges of contravening section 2(1) (a) read with sections 1, 2(2), 2(3), 3, 4 of the Combating of Rape Act, Act 8 of 2000- Rape of two different minor complainants. He pleaded not

guilty but was eventually convicted and sentenced to 15 years' imprisonment on each charge. His appeal is against both conviction and sentence.

[2] The appellant is represented by Mr Aingura and the respondent by Mr Gaweseb.

The grounds of appeal

Ad conviction

[3] Appellant submitted that the learned magistrate erred and/or misdirected himself:

'1. in admitting into the evidence inconsistent oral evidence from State witnesses in that the Learned Magistrate placed excessive probative value on the state's evidence notwithstanding that this evidence was marred with inconsistencies;

2. In failing to explain the seriousness of the charges nor the possible minimum sentences the appellant is likely to serve if convicted. This is so in that the appellant was not adequately informed of his right to consult a legal practitioner (legal aid or at his own expense) prior to deciding to proceeding with the trial on his own accord, alternatively the Appellant was not encouraged to seek legal representation.

3. The learned magistrate erred and/or misdirected himself in admitting into the record the J88 medical report without; without alternatively (sic), adequately explaining its purpose, the appellant right to challenge it and the effect it will have if appellant choses to not challenge it.

4. The learned magistrate erred and/or misdirected himself in not assisting alternatively, properly explaining the purpose of cross-examination to the then unrepresented Appellant.

5. The Learned magistrate erred and/or misdirected himself in failing to explain before the appellant pleads and right before sentencing the effect and meaning of 'coercive circumstances' and 'substantial and compelling circumstances.

Ad Sentence

6. The learned magistrate erred and/or misdirected himself in failing to exercise his sentencing discretion judicially in that he failed to consider the personal circumstances of the appellant when weighing them against the crime and the interest of society and thereby placing undue weight on the latter two factors.

7. The learned magistrate erred and/or misdirected himself in failing to assist the then unrepresented appellant in placing sufficient evidence in mitigation of sentence and/or evidence of the appellants personal circumstances.

8. The sentence imposed by the learned magistrate is startlingly excessive and inappropriate, and induces a sense of shock.'

The application for condonation

[4] Mr Gaweseb raised a point *in limine* because the appellant filed his notice of appeal late. The appellant was sentenced on 9 September 2015. The notice of appeal to the clerk of Eenhana magistrate's court is dated 5 February 2018 and date stamped 23 May 2019. The appellant filed an application for condonation. His explanation for the delay is that he felt emotionally overwhelmed by the long sentence. He concedes that his right to appeal was explained by the learned magistrate. According to him, he filed his first notice of appeal on 21 September 2015. There is no proof of this alleged notice to appeal. The appellant states that several months passed without receiving any feedback from the clerk of the court Eenhana. The appellant allegedly complained to the clerk of court and wrote letters to the ombudsman.

[5] Eventually the appellant received a letter on 20th April 2016 from the clerk of court that the case record was in the process of being transcribed. A copy of the letter is attached to his affidavit. He applied for legal aid on 20th July 2017. He received a letter of acknowledgement from the Directorate Legal Aid on or about 11th September 2017, a copy of which is also attached to the affidavit.

[6] On 5th February 2018 the appellant filed a second notice of appeal. Despite a considerable period of months passing in the meantime, the appellant only filed a third notice of appeal in July 2018 and again complained to the ombudsman. Copies of the letters and notices of appeal are attached.

Points in limine

[7] Rule 67(1) of the Magistrates' Courts Rules requires that convicted persons who wish to appeal under s 309(1) of the Criminal Procedure Act 51 of 1977, 'shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of the court

a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based'.

[8] In the matter of *S v Kakololo*¹ this court stated regarding the requirements of rule 67(1). (Applied in *S v PV* 2016 (1) NR 77 (HC):

'The noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall (*S v Khoza* 1979 (4) SA 757 (N) at 758B). It serves to inform the trial magistrate in clear and specific terms which part of his or her judgment is being appealed against, what the grounds are on which the appeal is being brought and whether they relate to issues of law or fact, or both. It is with reference to the grounds of appeal specifically relied on that the magistrate is required to frame his or her reasons under Magistrates' Courts Rule 67(3). Once those reasons have been given, the appellant may amend the notice of appeal under sub rule (5) and the magistrate may again respond to the amended grounds of appeal.

The notice also serves to inform the respondent of the case it is required to meet and, regard being had to the record and the magistrate's reasons, whether it should concede or oppose the appeal. Finally, it crystallises the disputes and determines the parameters within which the Court of Appeal will have to decide the case (Compare: *S v Maliwa and Others* 1986 (3) SA 721 (W) at 727; *S v Nel* 1962 (1) SA 134 (T) at 135A; and *R v Lepile* 1953 (1) SA 225 (T) at 230H.)

Consequently, it also serves to focus the minds of the Judges of Appeal when reading the (sometimes lengthy) record of appeal, researching the law in point, considering argument and adjudicating the merits of the appeal. Given the importance of its objectives, the rule is for good A reason formulated in peremptory terms and, as Broome JP pointed out in *R v Hoosen* 1953 (3) SA 823 (N) at 824:

an attorney filing such a notice assumes the onus of satisfying this Court, when the case comes on for hearing, that the appeal has been properly noted and that, if the notice 'is not B a proper notice, all the consequences of a failure to note an appeal properly in terms of the Rules necessarily follow.'²

[9] I find that the grounds of appeal ad conviction are not clear. The grounds are framed in general terms. It is not surprising that the learned magistrate had no additional reasons for his ex tempore judgment on conviction and sentence.

¹

² At p8 to 9.

Ad conviction-Condonation

[10] In accordance with rule 309 (2) of the Criminal Procedure Act, Act 51 of 1977 (the CPA) as amended a court of appeal is competent to condone a failure to file a notice of appeal timeously within the period of 14 days. Condonation will only be granted: If there is good cause shown for the non-compliance with the rule of court; and if there are reasonable prospects of success on appeal.

[11] Upon sentencing the appellant was asked if he understood the sentence and he confirmed. The court record thereafter reflects as follows: "You also have the right to appeal against this conviction and/or the sentence or both if you feel that the court erred or made a mistake in fact or law to convict you or that this particular sentence is not an appropriate one. You can appeal with the assistance of a lawyer or you can do it yourself by filing written grounds or reasons for appeal within 14 days at the clerk of the court here in Eenhana. You should not just appeal in general but you should mention your reasons in particular. It is important to appeal within FOURTEEN DAYS (14) from today otherwise you have to bring an additional application for condonation for the late filing of your appeal before the High Court will hear you. Do you understand?"

ACCUSED: Understand Your Worship.

COURT: Is there anything else that you want me to explain to you in more detail?

ACCUSED: Nothing Your Worship.

COURT: Then you can stand down.

COURT ADJOURNS "

[12] 'Condonation falls entirely within the discretion of the Court. Proper condonation would be granted if a reasonable and acceptable explanation for the failure to comply with the sub rule was given; where the appellant had shown that he had good prospects of success on the merits in the appeal; and where the appellant had a reasonable and acceptable explanation. These requirements must be satisfied in turn. Thus if the appellant failed on the first requirement, the appellant was out of Court. In determining what was a reasonable and acceptable explanation for the failure to comply with the

rules of Court, the Court made a value judgment on the particular circumstances of the case. This of necessity would vary according to each case.³

[13] In my view the explanation on the right to appeal is clear and in no ambiguous terms. It was twice explained that the appellant should file the notice of appeal within fourteen days. He understood. His allegation of emotional shock appears to me as an afterthought. Likewise, without any proof that he filed a first notice of appeal it appears as an afterthought without proof of such notice to appeal. Furthermore on his own affidavit long periods of time passed before he started to make enquiries either through the clerk of court or the office of the ombudsman. This is a display of flagrant disregard for the rules of court or gross negligence in the prosecution of his appeal.

[14] The explanation is not reasonable in the circumstances of this matter.

Legal representation

[15] The record of proceedings reflects that on 12 May 2014 the accused insisted on conducting his own defense. When the appellant appeared on 24 January 2015 before the trial commenced, the court confirmed from him if it was still his intention to defend himself. The accused confirmed it. It seems he made an informed decision. It was not necessary for the learned magistrate to insist for him to be legally represented. From the record it is clear that the appellant understood the charges. There is no indication that he did not appreciate the seriousness of the charges.

Purpose of cross-examination

[16] The defense of the appellant was a bare denial. The learned magistrate therefore did not have much to assist the appellant with in cross-examination. Despite that, the record reflects that he did assist the appellant appropriately especially after the appellant indicated that he did not have further questions to witnesses. The appellant intelligently cross-examined both the complainants, police officer who charged him and took the warning statement from him and the doctor who examined the first complainant. It is an indication that he understood what the purpose of cross-examination is.

³ See: *S v Nakapela & another* 1997 NR 184 (HC) Headnote E-G.

[17] The purpose of cross-examination was appropriately explained to the appellant after the grandmother of the first complainant testified. The record of proceedings reflects as follows: 'COURT: Accused you have the right to cross-examine this witness and any other witness that the State may call. Purpose of cross-examination is to attack the evidence presented by this witness and also to point out where she is mistaken or lying. You can also use this opportunity to put your version of events to this witness so that she can reply thereto. If she has left out any fact that you wish to have mentioned you can put that to her so that she can also reply thereto. If you fail to dispute the evidence presented by this witness it will later be argued that you did not find fault with her evidence. Do you understand?

ACCUSED: Understand your worship.

COURT: Do you have any questions for this witness?

ACCUSED: Yes your worship.

COURT: You can proceed.'

[18] After the first complainant testified the appellant indicated that he had no questions for her. The learned magistrate asked the accused if he was in agreement with her evidence. The appellant indicated that he was not in agreement. The magistrate informed the appellant that he must point out to the witness where she was mistaken.

[19] During the testimony of the third witness the court had to proceed with a trial within a trial. The magistrate again informed the appellant of his right to cross-examination and assisted the appellant.

The medical examination report

[20] I find no merit in this ground of appeal. The report was not merely handed up from the bar but the doctor testified about his findings. It is evident from the appellant's cross-examination that he understood what the purpose of the report was. The doctor did not find any injuries. The cross-examination of the appellant centered on this fact.

[21] I do not find any error or misdirection in relation to the conviction. The appeal thereto therefore stands to be dismissed.

Ad sentence

[22] The appellant addressed the court in mitigation and called a witness who confirmed his evidence. He was staying with his grandmother. He assisted her with ploughing fields. He stated that there is no one else to assist with the ploughing. Their livestock might go astray as he is the only boy at home. Two boys at home were struck by lightning and a third boy went away. His whereabouts are unknown. There is no one to take care of the appellant's parents.

[23] He was 17 years old at the time of the incident and still at school. He intends to continue with studies at NAMCOL. At the time when he was sentenced, he was 22 years old. The appellant is a first offender. It seems from the record of proceedings that the appellant made his first appearance on 12 May 2014. On that date his bail was extended. It therefore seems that the appellant was incarcerated for a short period if at all he was in custody. He informed the court that he was half a month in custody. After conviction his bail was cancelled. He was then incarcerated for about a month and a half before sentence. The appellant has 1 child who is staying with the appellant's mother.

[24] During mitigation the magistrate informed the appellant that according to the Rape Act there are certain minimum sentences without properly explaining what it is. He was further informed that even though the appellant was a minor at the time of the crimes, he was given the opportunity to address the court on any extra-ordinary mitigating factors, substantial or compelling circumstances to impose a just sentence. The magistrate asked questions during this stage to extract further mitigating circumstances.

[25] Section 3(2) of the Combating of Rape Act, Act 8 of 2000 provides:

'(2) 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.'

[26] It is by now established law that sentencing is pre-eminently within the discretion of the trial court. This court of appeal has limited power to interfere with the sentencing discretion of a court *a quo*. A court of appeal can only interfere;

- when there was a material irregularity; or

- a material misdirection on the facts or on the law; or
- where the sentence was startlingly inappropriate;
- or induced a sense of shock; or
- was such that a striking disparity exists between the sentence imposed by the trial Court and that which the Court of appeal would have imposed had it sat in first instance in that;
- irrelevant factors were considered and when the court *a quo* failed to consider relevant factors.⁴

[27] This court laid down guidelines in *S v Gurirab* 2005 NR 510 at 510 D-H in the headnote how a court should go about to determine if there are substantial and compelling circumstances as follows:

'The Court laid down the following guidelines which should be followed before imposing sentence in terms of the Combating of Rape Act 8 of 2000. These guidelines would ensure that the accused, especially if he is unrepresented, will have a fair trial as required by art 12 of the Namibian Constitution. 1. At least after the accused has been convicted, the accused should be informed which provisions of the Act are applicable for purposes of a specific minimum prescribed sentence and on which specific facts the State relies for that purpose; and 2. at least, the following should then be stated to the accused:

2.1 it must be pointed out to the accused that as a result of the fact that he had been found guilty of the offence of rape under coercive circumstances (the coercive circumstances must be mentioned and explained) and that unless the Court finds that substantial and compelling circumstances exist, which would justify the court to impose a lesser sentence, the Court will have to impose at least a period of imprisonment of ... (the term of this minimum imprisonment period must be specified);

2.2 it must be explained to the accused that if the Court is satisfied that his particular circumstances render the minimum prescribed sentence unjust, in that it would be disproportionate to the crime, the accused's personal circumstances and the needs of society (so that an injustice would be done by imposing the minimum prescribed period), the Court will be entitled to impose a lesser sentence;

⁴ *S v Kasita* 2007 (1) NR 190 (HC); *S v Shapumba* 1999 NR 342 (SC) at 344 I to 345A; *S v Jason & another* 2008 NR 359 at 363 to 364G.

2.3 it must be explained to the accused that the Court must take into account that this particular crime has been singled out by the Legislator for severe punishment and that the minimum prescribed sentence is not to be departed from lightly or for flimsy reasons, but that the Court will take into consideration all facts and factors the accused will advance in order for the Court to come to a just conclusion. As usual, it must be pointed out that the accused may make statements from the dock, or that he may testify under oath. If he testifies under oath the State will be again entitled to cross-examine him, but more weight may be attached to what he says under oath. It should also be emphasized that he may call witnesses to testify on his behalf; and

2.4 it is also imperative that the accused be assisted during this process. If the magistrate is aware of any reason why the minimum prescribed sentence should not be imposed (which came to his knowledge as a result of the evidence led at the trial) he should inform the State about that, and give the parties opportunity to address him on such an issue.'

[28] In addition to the abovementioned guidelines, this court had in numerous recent cases emphasized the importance of complying with section 3(2) in the following judgements; *Awarab v S* (HCNLD-CRI-APP-CAL-2018/00024) [2019] NAHCNLD 43 (23 April 2019), *Zeronimo v S* (HC-NLD-CRI-APP-CAL- 2019/00011) [2020] NAHCNLD 57 (26 May 2020) and *Shanghala v S* (HC-NLD-CRI-APP-CAL-2019/00055) [2020] NAHCNLD 39 (12 March 2020) with reference to *S v Limbare* 2006 (2) NR 505 (HC) and *S v Gurirab* 2005 NR 510 (HC). Rightfully so, the court should only impose minimum sentences after a proper enquiry was made.

[29] The learned magistrate did not comply with section 3(2) of the Act to explain to the appellant what extraordinary circumstances, a minimum sentence, substantial and compelling circumstances and/or coercive circumstances are. The appellant was neither afforded the opportunity to address the court on it. The non-compliance with the guidelines is a misdirection. The sentences therefore stand to be set aside. The magistrate imposed the maximum sentence of 15 years on each charge. The accused was more than 3 years older than the complainants and in a position of trust as a family member. He was 17 years old at the time of the crimes.

[30] In the result it is ordered that:

1. The conviction is confirmed;

2. The appellant's sentence is set aside;
3. The matter is referred back to the magistrate who found the appellant guilty, for sentencing afresh and to comply with the applicable guidelines as set out in this case, and generally to deal with the appellant according to law;
4. The magistrate is furthermore directed to take into consideration, in whatever sentence is to be imposed, that the appellant has already served part of the sentence as from the date the original sentence was imposed.
5. The appellant shall remain in custody until such time as the magistrate has reheard the matter and complied with the guidelines as set out herein.

H C JANUARY
JUDGE

I agree,

J T SALIONGA
JUDGE

Appearances:

For the Appellant: Mr S Aingura
 Of Aingura Attorneys,
 Oshakati

For the Respondent: Mr T Gaweseb
 Of Office of the Prosecutor-General,
 Oshakati