

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

EX TEMPORE APPEAL JUDGEMENT

<b>Case Title:</b> <i>Haimbili Immo Inicko v The State</i>	<b>Case No.:</b> HC-NLD-CRI-APP-CAL-2019/00065
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Mr Justice January J <i>et</i> Honourable Ms Justice Salionga J	<b>Heard on:</b> 6 February 2020 <b>Delivered on:</b> 6 February 2020 <b>Released on:</b> 24 February 2020
<b>Neutral citation:</b> <i>Inicko v S</i> (HC-NLD-CRI-APP-CAL-2019/00065) [2020] NAHCNLD 30 (24 February 2020)	
<b>IT IS ORDERED THAT:</b>  1. The judgement is delivered ex tempore;  2. The matter is remitted to the Magistrate to comply with Section 3 (2) of the Combating of Rape Act, 8 of 2000 and the guidelines in <i>S v Gurirab</i> 2005 NR 510 at pages 517G-J to 518A-F.	

3. Appellant is remanded in custody.

**Reasons for the order:**

JANUARY J (SALIONGA J concurring) :

[1] The appellant was convicted in the Regional Court sitting at Eenhana on a charge of Rape in contravention of section 2(1) (a) of the Combating of Rape Act, (Act 8 of 2000). He was subsequently sentenced to 15 years imprisonment on 30 October 2018.

[2] Dissatisfied with the sentence imposed, the appellant filed a notice of appeal against his sentence on 14 November 2018 and simultaneously filed an application for condonation of his late filing of the notice of appeal.

[3] The appellant was a self-actor during the hearing whereas the respondent was represented by Ms Petrus.

[4] At the hearing Ms Petrus for respondent abandoned points *in limine* and made concession that the trial magistrate had misdirected himself during sentencing, as specific guidelines were not applied. She maintained that 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

[5] Apart from concession made by the respondent, the appellant did not supplement his case any further and left it for the consideration of this court.

[6] A court convicting an accused of contravening section 2 of Act 8 of 2000 has a duty to

explain to him/her the provisions of section 3(2) of the Combating of Rape Act. In *S v Gurirab* 2005 NR 510 at pages 517G-J to 518A-F the court set out the guidelines to be followed and emphasised that a court is under a duty to explain the concept of substantial and compelling circumstances to the appellant during the proceedings and in the absence of anything indicating that the same were explained it cannot be said that the appellant received a fair trial. The judicial officer should have played an active role and properly advise the appellant. The accused must be made aware of minimum sentences to enable him to properly mitigate before sentence. See also *S v Limbare* 2006 (2) NR 505 (HC) and *Awarab v S* (HC-NLD-CRI-APP-CAL-2018) [2019] NAHCNLD 43 (23 April 2019).

[7] In our view, failure to follow the guidelines including failure to explain the coercive circumstances to an unrepresented accused in a rape case is material misdirection that calls for the appeal court to interfere with a sentence.

[8] In the result:

1. The judgement is delivered ex tempore;
2. The matter is remitted back to the Magistrate to comply with Section 3 (2) of the Combating of Rape Act, 8 of 2000 and the guidelines in *S v Gurirab* 2005 NR 510 at pages 517G-J to 518A-F.
3. Appellant is remanded in custody.

Judge(s) signature	Comments:
January J:	None
Salionga J	None
<b>Counsel:</b>	

<b>Appellant</b>	<b>Respondent</b>
Ms S Petrus Office of the Prosecutor General, Oshakati	Mr H I Inicko - In person Oluno Correctional Facility, Ondangwa