

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGEMENT

Case No.: HC-NLD-CRI-APP-CAL-2019/00055

In the matter between:

TITUS HAUFIKU SHANGHALA

APPELLANT

v

STATE

RESPONDENT

Neutral citation: *Shanghala v S* (HC-NLD-CRI-APP-CAL-2019/00055 [2020]
NAHCNLD 39 (12 March 2020)

Coram: SALIONGA J *et* NAMWEYA AJ

Heard: 07 November 2019

Delivered: 12 March 2020

Flynote: Criminal Procedure - Appeal - Conviction and sentence - Rape - Victim 7 years old - No misdirection on conviction - Appeal against conviction dismissed - Minimum sentences, substantial and compelling circumstances and coercive not explained during proceedings - guidelines not followed - Appeal against sentence upheld - Remitted back for sentence

Summary: The appellant pleaded not guilty. After the evidence was led he was convicted of Rape under the Combating of Rape Act, 8 of 2000. No evidence was led regarding any domestic relationship. Appellant was convicted and then sentenced to 15 years imprisonment. He now appeals against both the conviction and the sentence. This court found that the conviction was in accordance with justice and was confirmed. The appeal against sentence was upheld and sentence imposed is set aside. The matter is remitted for magistrate to comply with the guidelines and explain the minimum sentences, substantial and compelling circumstances and coercive circumstances. Period already served should also be considered

ORDER

In the result the following order is made;

1. The appeal partially succeeds;
2. The appeal against conviction is dismissed and the conviction is confirmed;
3. The appeal against sentence is upheld and the sentence is set aside;
4. The matter is remitted back to the Magistrate in order to comply with the guidelines and explain the minimum sentences, substantial and compelling circumstances and coercive circumstances;
5. The period already served should also be considered when sentencing the appellant afresh.

JUDGMENT

SALIONGA J (NAMWEYA AJ concurring):

Introduction

[1] The appellant was convicted in the Regional Court at Outapi on a charge of Rape in contravention of section 2(1) (a) of the Combating of Rape Act, (Act 8 of 2000) read with the provisions of the Combating of Domestic Violence Act, (Act 4 of 2003). He was subsequently sentenced to 15 years imprisonment on 10 August 2017.

[2] Dissatisfied with both the conviction and sentence appellant filed a notice of appeal on 17 August 2017. The notice of appeal was filed on time and therefore no condonation application was required. The appellant conducted his own defence during the appeal and the state was represented by Mr Matota.

Grounds of appeal

[3] The grounds of appeal have been drafted in layman's language and can be summarized as follows:

- '(a) That the sentence of 15 years is unfair;
- (b) That the appellant was falsely accused;
- (c) The discrepancy in the age of the appellant in the annexure and the age testified too and
- (d) That the appellant is 51 years old and had 6 children.'

Factual background

[4] At the beginning of his trial the appellant tendered a plea of not guilty and the state called five witnesses. The appellant chose to testify in his defense after the state case and called no witness.

[5] Aili Salomo testified that she was at home with a seven years old victim on the day of the incident. She later went to fetch water leaving the victim home. Upon her return she could not find her. She started calling the victim who responded from the accused's room. It is the witness's testimony that she went to the appellant's room. She found the victim seated on the mat without a panty and the accused was lying on his back in his room. At that period the accused was employed at her house for a month and some days. When enquiring why she (the victim) was sited in that room without a panty, the victim reported to her that the accused had sex with her. She further testified that the victim's vagina was not bleeding but was swollen. She also observed that the victim was in shock. It was the witness who reported the matter to the head man and thereafter took the victim to the hospital.

[6] Bernadette Andowa was the investigation officer. She obtained a warning statement from the accused. She stated that she informed the accused of his rights to make a statement or to remain silent. She also informed the appellant of his rights to obtain a private lawyer or apply for legal aid or conduct his own defence. The appellant elected to give a statement which was handed in court as Exhibit "B". According to this witness the victim was found in the room of the appellant. She observed bruises on her leg. His evidence was confirmed by Jeremia Shipiki the scene of crime photographer.

[7] Mwele Uwele is a doctor who examined the victim at Okahao hospital. He also compiled a J88 (Medico-Legal examination report) which was received into evidence. His examination revealed bruises or hyperemia on the inner surface of the labia minora. This witness went on to say that the victim's hymen was intact, that the redness is evidence of trauma and that there was a form of penetration but not up to the hymen.

[8] The last state witness was the victim, Kaolwa Keelu. She testified that the appellant called her inside his room where he ordered her to undress herself. She did not want to undress herself and tried to run away. The appellant followed her, grabbed her and pulled her in his room. While in the room the appellant undressed her and put

her on the bed before undressing himself. She further testified that appellant 'put his thing on my cookie (Kambatu) and thereafter gave her an orange fruit. She was able to demonstrate how she was raped by using a doll in court. That her mother (Aili) found her in the appellant's room and she informed her of what the appellant had done to her.

[9] At the end of the state case, appellant testified in his defense. He informed the court that on the date of the alleged incident he was picking sticks where after he came home and went to sleep. When he woke up he found the victim in his room sitting on the floor. He confirmed the first state witness's evidence that she found the victim inside his room. When the victim was asked what she was doing in his room she replied 'nothing' and she (first state witness) threatened to beat up the victim. He was thereafter arrested.

Application of the law and evaluation of evidence

[10] At the commencement of this hearing counsel for the state had raised points *in limine* where they asserted that the appellant's notice of appeal failed to comply with rule 67 (1) of the Rules of the Magistrate's court and that the appellant did not endeavor to make sure that the complete record is before court. That apart from the argument that he did not commit the crime he was convicted of and his complaint that the sentence is unfair, the appellant's notice of appeal does not stipulate any clear/grounds on which the learned magistrate misdirected himself, either on facts or law or both in conviction and sentencing him. Counsel submitted that the matter should be struck from the roll.

[11] I agree with Mr Matota's submission that the courts have on many occasions emphasised the requirements for clear and specific grounds of appeal and the importance of a proper and complete notice of appeal. I, however, also took note of the fact that each notice of appeal must be considered on its own merit in assessing its compliance or otherwise with the requirements set by the law.

[12] In this case, the notice of appeal was drafted by a lay person without the assistance of a lawyer. We further take cognizance of the fact that the appellant was not represented both at trial and during this appeal. I therefore find the comments of Van Niekerk J in *S v Zemburuka* 2008 (2) NR 737 (HC) at page 738, befitting the matter before us when she said:

'I do not think that an overly fastidious and technical approach should be followed in the circumstances of this case in considering whether it is a notice of appeal. I think justice will be served if the Court rather seeks, if possible, to interpret the letter in a manner upholding its validity as a notice of appeal so that the merits of the matter may be dealt with and the appeal may be disposed of. While the letter is not couched in the form and language that a properly drawn notice of appeal should be, the substance of the letter is clear - the accused appeals against sentence because he feels aggrieved by the fact that a sentence of direct imprisonment was imposed....'

[13] This court is alive to the requirements of the law and the Magistrates' Court Rules as cited by counsel for the state. He specifically stated that the magistrate misdirected himself as there was not sufficient evidence to sustain a conviction. In my view the letter in this case should be considered a valid notice of appeal. In addition if one has regards to the handwritten part of the record one is able to make sense or follow the proceeding without hiccups. Therefore Mr Matota's argument that appellant did not endeavour to make sure that the complete record is before court has no merit and is rejected. The court record consist of both handwritten and a typed one and they must be read together. It is on that basis that we are satisfied that the appellant clearly sets out the basis of his appeal. Accordingly the point *in limine* ought to fail and the parties were allowed to argue the appeal on the merits.

[14] We now turn to the merits of this appeal. It is apparent that the state case is based on the evidence of the victim's guardian (Aili Salomo), the victim herself and the doctor who examined the victim. During his testimony in chief appellant denied raping the victim and that the rape allegation were just a made up story because the guardian of the victim owed him money. That explanation or version was only raised in his defense and was not put to any of the witnesses called by the state. What stands out

here is that the evidence of the guardian corroborates that of the victim and the doctor's. It is therefore our finding that the court *a quo's* assessment of the evidence before it was justified in law.

[15] A well-established principle in our law is that a court of appeal when called upon to consider the credibility of witnesses who testified in the court *a quo*, must be mindful of the fact that the presiding officer in that court has advantages over the court sitting on appeal, namely having observed the demeanor of the witnesses during their testimony, and the court being steeped in the atmosphere of the trial. An appeal court will thus be slow to intervene with or reject findings of credibility by the trial court, unless satisfied that an irregularity or misdirection has been committed that vitiates the court *a quo's* verdict. In the absence of any irregularity or misdirection, the appeal court will usually proceed on the factual basis as found by the trial court, because the function of acceptance or rejection of evidence falls primarily within the domain of the trial court, see *S v Slinger* 1994 NR 9 (HC).

[16] Although the record of proceedings is not complete and clear in all material aspects there appears to be no misdirection from the trial magistrate with regards the conviction. The conviction was proper and based on available proven evidence.

Sentence

[17] The court here was 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). Rightfully so, the court should only impose minimum sentences after a proper enquiry.

[18] Reading from the record it concerns this court that minimum sentences, substantial and compelling circumstances as well as coercive circumstances were not

explained to the appellant during proceedings and after his conviction but before sentence. In *S v Gurirab* 2005 NR 510 (HC) at pages 517G-J to 518A-F, the court emphasized on the guidelines to be followed in sentencing in rape matters as follows:

'I am of the view that to assist magistrates, the following guidelines should be implemented in respect of the Combating of Rape Act, 2000:

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;
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 a lesser sentence, the court will have to impose at least a period of imprisonment of (the term of this minimum imprisonment 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;
 - 2.3 it must be explained to the accused that this type of 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 it 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;
 - 2.4 it is also imperative that the accused be assisted during this process. If the magistrate is aware of any reason why minimum prescribed sentence should not be

imposed (which came to his knowledge as a result of evidence led at the trial) he should inform the State about, and give the parties opportunity to address him on such an issue.'

[19] 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.

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

1. The appeal partially succeeds;
2. The appeal against conviction is dismissed and the conviction is confirmed;
3. The appeal against sentence is upheld and the sentence is set aside;
4. The matter is remitted back to the Magistrate in order to explain the minimum sentences, substantial and compelling circumstances and coercive circumstances and comply with the guidelines set out above;
5. The period already served should also be considered when sentencing the appellant afresh.

J T SALIONGA
JUDGE

I agree

M
NAMWEYA

ACTING JUDGE

APPEARANCES

FOR THE STATE:

Mr L Matota
Prosecutor General's Office, Oshakati

FOR THE ACCUSED:

Mr T H Shanghala (In person)
Oluno Correctional Facility, Ondangwa