



**REPORTABLE**

CASE NO: SA 10/2017

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**PROSECUTOR-GENERAL**

**Appellant**

and

**JACO MARIUS KENNEDY**

**Respondent**

**Coram:** DAMASEB DCJ, HOFF JA and FRANK AJA

**Heard:** 25 March 2019, 8 May 2019 and 13 May 2019

**Delivered:** 12 June 2019

**SUMMARY:** This appeal was originally set down for 25 March 2019. The appellant brought an appeal against a decision of the court *a quo*. During the period before the date of hearing, the record of the appeal was lodged late and the appeal was thus deemed to have been withdrawn. Additionally, appellant failed to file their bundle of authorities and their heads of argument simultaneously. For these non-compliances with the rules of court, appellant lodged applications for condonation for the late filing of the record, their bundle of authorities and the reinstatement of the appeal. Respondent opposed the condonation applications, albeit late and without an application for condonation for his non-compliance.

The issue to be dealt with is whether the respondent should be allowed to oppose the application for reinstatement as the notice to oppose and the answering affidavit in respect thereof was filed late and without a condonation application?

*It is held that*, as far as the condonation application for the late filing of the record is concerned, the point of 'non-service' cannot prevail. This is so because the respondent did get access to the record through his own endeavours and filed an answering affidavit to the condonation application without raising this issue. In any event, the objection initially raised against the late filing of the bundle of authorities of the applicant was not persisted with.

*It is held that*, respondent's answering affidavit to the application for reinstatement contained no factual matters contradicting the application for reinstatement by the applicant. In this instance, the court will deal with the facts put forward by the applicant. The court is however alive to respondent's submissions in respect of prospects of success on appeal.

*It is further held that*, the manner in which applicant's conducted themselves in the preparation of the record of appeal leaves a lot to be desired. Apart from the process to authorise an appeal which wasted a month, the conduct of the officials at the AFU is also indicative of the fact that they did not apprise themselves of the rules of this court. There was a lack of urgency with which the officials at the AFU dealt with the compilation of the record. The lackadaisical approach of these officials was of such a nature that a lengthy delay in the filing of the record would have warranted a dismissal of this application without referring to the prospects on appeal. However, seeing that the record was filed only days late and the respondent was not materially prejudiced by the late filing of the record it is thus necessary to deal with the prospects of success before finally deciding this application.

In the court *a quo*, applicant applied for and obtained a preservation order in respect of a Polo motor vehicle pursuant to s 51 of the Prevention of Organised Crime Act (POCA). As is the process, the preservation order was followed up by an application to have the property declared forfeited to the State pursuant to s 59

of POCA. The basis for the forfeiture order sought was that the Polo was an 'instrumentality' of the offences of kidnaping and rape. The court *a quo* found that the applicant failed to establish the offence of kidnaping and insofar as the rape was concerned, that the applicant failed to establish that the Polo was an instrumentality of the offence, and that it was merely incidental to the offence.

*It is held that*, this is not a case where the Polo was used merely to facilitate or make the offence possible. The vehicle was functional to the commission of the crime. The Polo was reasonably directly connected to the crime and that it was the method by which respondent transported the complainant to the spot where he intended to rape her and he did rape her.

*It is further held that*, the court *a quo* erred in finding that the use of the Polo in the present matter was merely incidental to the commission of the offence.

*It is thus held that*, the applicant does not only have prospects of success in the appeal, but that the appeal should be allowed in respect of the offence of rape.

Another issue this court dealt with is whether the court should allow in new evidence, an 'affidavit' of the complainant in the rape case?

To allow further evidence on appeal is only done in exceptional circumstances. It must be explained, based on evidence which may be true, why this evidence was not presented to the court *a quo*. Secondly, there must be a *prima facie* likelihood of the truth of the evidence. Thirdly, the evidence should be materially relevant to the outcome of the initial proceedings. The evidence sought to be introduced need not be incontrovertible but it must be apparently credible. Whereas the new evidence clearly raises questions as to the reliability of the complainant in respect of the details of the assault on her, it does not in any manner impugn the credibility of the persons who arrived on the scene and who basically caught the respondent red handed busy having sexual intercourse with the complainant.

*It is thus held that*, the application to present further evidence is declined.

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## APPEAL JUDGMENT

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FRANK AJA (DAMASEB DCJ and HOFF JA concurring):

[1] This appeal was originally set down for 25 March 2019. The Prosecutor-General (PG) desired to appeal a decision of the High Court but the record of the intended appeal was lodged late and the appeal was thus deemed to have been withdrawn. In addition, the legal practitioners acting for the PG did not file their bundle of authorities simultaneously with their heads of argument. The PG thus sought condonation for the late filing of the record as well as their bundle of authorities and the reinstatement of the appeal. The respondent opposed these condonation applications.

### Preliminary issues

[2] The opposition to the two condonation applications arose in the following circumstances. Respondent made an application for legal aid. When no answer was forthcoming he, on 29 March 2018, per letter facsimiled to his legal practitioner terminated his mandate and indicating that any further process should be served on the 'Windhoek Correctional Facility'. This letter was delivered to the Registrar of this court on 3 April 2018 and to the office of the PG on the same date. Despite this notice, the legal practitioner of the PG when realising that the record would not be filed timeously, wrote a letter to the erstwhile legal practitioner of the respondent seeking his consent to file the record late. The erstwhile legal practitioner of the respondent when contacted telephonically in this regard did not inform the legal practitioner of the PG that his mandate was terminated but

indicated that he would oppose any condonation application. The condonation application and the record were then filed on the (erstwhile) legal practitioner of respondent. The respondent personally, who it must be stated is a qualified legal practitioner, in preparing for the appeal inspected the record at the office of the Registrar of this court and on 29 June 2018 filed an opposing affidavit to the condonation application. The Directorate of Legal Aid on 20 March 2019 granted respondent's request and appointed his erstwhile legal representative to act for him in this court. His legal representative thus came on record on 20 March 2019 after consulting the respondent. This was, taking the public holiday of 21 March 2019 and the intervening weekend into account, one working day prior to the hearing of the appeal.

[3] In respect of the condonation application for the late filing of the record the point taken on behalf of the respondent is that neither this application nor the record was ever served on him. In respect of the condonation application relating to the late filing of the bundle of authorities the point is taken that Rule 5 of this court affords a respondent 10 days to file an answering affidavit and this period had not yet expired and would only expire on a date after the original date of set down of the appeal.

[4] As far as the condonation application for the late filing of the record is concerned, the point of 'non-service' cannot prevail. This is so because the respondent did get access to the record through his own endeavours and filed an answering affidavit to the condonation application without raising this issue. He personally also filed heads of argument without raising this aspect. Furthermore, a postponement to enable his belatedly appointed legal practitioner to acquaint

himself with the record and to file additional heads of argument, if he so desired, would also prevent any possible prejudice the respondent could have suffered through the alleged non-service of the condonation application and the record.

[5] As far as the condonation application relating to the late filing of the bundle of authorities is concerned, a postponement would not only allow the respondent to answer to his application but would also probably dispose of the application. It must be pointed out that heads of argument must contain a list of authorities a party wishes to rely on. An opposing party when receiving heads of argument is thus apprised of the authorities the other party will rely upon and hence will usually suffer no prejudice as a result of a bundle of authorities being filed late. The provisions of this rule is thus primarily for the benefit of the court. I say primarily because in cases where the opposing party is a lay litigant or incarcerated those bundles will assist such persons who cannot easily gain access to such authorities. The same consideration would also apply to certain foreign authorities even if the opposing side is legally represented.

[6] The procedural issues raised coupled with the late decision of the Directorate of Legal Aid to grant legal aid thus resulted in the initial hearing being postponed with costs to be costs in the cause, to 8 May 2019.

[7] The postponement led to further issues arising. The respondent who is accused in a criminal case was provided with a copy of a document which on the face thereof is a copy of an affidavit by the complainant in the rape case which forms the factual backdrop to this appeal. In this 'affidavit' she states 'As far as I can remember he (respondent) did not have any sexual intercourse with me or

physically raped me . . . because the police arrived at the scene whilst he (respondent) was still beating me . . . '.

[8] The respondent launched an application to present the mentioned 'affidavit' as new evidence in the appeal as it 'may assist the court to determine the reasonable prospects of success on appeal'. As required by Rule 5 of this court relating to interlocutory applications, the appellant was granted 10 days to respond to this application. In a letter to the legal practitioner of the respondent the appellant's legal practitioner pointed out that the 10 days would only expire in the afternoon of 8 May 2019 (the date which the appeal was set down for) and enquired from respondent to 'revert to us on the way forward in respect of the interlocutory application as a matter of urgency'. He responded by suggesting timelines and a further postponement of the matter to a date in June 2019. The appellant however filed her answering affidavit the day prior to the hearing to which the respondent then wished to file a reply. The matter was then postponed to 13 May 2019 to allow respondent to file a replying affidavit by 10 May 2019 inclusive of an order that respondent pay the wasted costs occasioned by the postponement.

[9] Rule 5 clearly anticipates interlocutory proceedings that are finalised prior to or together with the hearing of the appeal. Thus the Registrar must set these interlocutory applications down without taking cognisance of the court terms provided for in rule 3(1) and the judge hearing such interlocutory application may decide it or refer it to be heard together with the appeal. Rule 5 provides that a respondent in an interlocutory application must 'within 10 days of service' answer thereto whereafter the applicant has 7 days to file a reply. It goes without saying

that where an interlocutory application is launched at a stage where the stipulated time limits will only expire subsequent to the date set down for the appeal, either the appeal would have to be postponed or the interlocutory application will have to be ignored.

[10] An applicant in an interlocutory application, where the time periods provided for in the rules will take the finalisation of the application beyond the date for which the appeal is set down, must either truncate the dates in the Notice of Motion and indicate this in the affidavit accompanying the application and seek condonation for this non-compliance with the rule or stick to the timeframes stipulated in the Rule and seek a postponement of the appeal in a properly motivated postponement application. In both instances the prejudice to the respondent would be an important consideration. To simply use the timelines in Rule 5 where these timelines would not be completed by the day the appeal is to be heard and to then hope the court will come to the applicant's assistance with a postponement if the process had not been finalised will not be countenanced. Applications from the bar in this regard will in future, save in exceptional circumstances, not be entertained.

[11] On the day of the final hearing the following interlocutory issues remained intact in the tit for tat procedural dust-up between the parties, namely:

- (a) Whether the respondent should be allowed to oppose the application for reinstatement as the notice to oppose and the answering affidavit in respect thereof was filed late without any condonation application for these late filings;



- (b) Should the new evidence 'affidavit' of the complainant in the rape case be allowed. In that regard, the admissibility of certain evidence contained in the answering affidavit also arose.

I mention in passing that the objection initially raised against the late filing of the bundle of authorities of the PG was not persisted with.

[12] I shall deal with the application to admit the new evidence first, as this will determine what evidence must be considered in considering the application for reinstatement and/or the appeal and thereafter with the question as to whether the respondent is entitled to oppose the application for reinstatement and finally with the said application and if necessary the appeal.

#### Additional evidence

[13] To allow further evidence on appeal is only done in exceptional circumstances. It must be explained, based on evidence which may be true, why this evidence was not presented to the court *a quo*. Secondly, there must be a *prima facie* likelihood of the truth of the evidence. Thirdly, the evidence should be materially relevant to the outcome of the initial proceedings. The evidence sought to be introduced need not be incontrovertible but it must be apparently credible.<sup>1</sup>

[14] The PG in answer to the application to admit new evidence seeks to question the authenticity of the affidavit sought to be introduced. In this regard the

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<sup>1</sup> *Makheta v Linbada* 1998(4) SA 143 (W) at 146-147; *Staats President v Lefuo* 1990(2) 679 (A) at 692A-C and *JCL Civils (Pty) Ltd v Steenkamp* 2007(1) NR 1 (SC) para [27].

main line of attack is based on allegations that the respondent could not have received the statement from the police as it does not and did not form part of the police docket. Significantly no affidavit from the complainant in the rape case is provided to either admit or deny that the affidavit was made by her. The PG concludes 'it is safe to submit that at this stage it is not possible to conclude whether the statement is authentic or not'.

[15] In my view it is not necessary to deal in detail with all the criticisms and improbabilities sought to be raised by the PG as two of the essential requirements for the admission of the new evidence is not really directly challenged. The first being the authenticity of the evidence as discussed above. The second, despite suggestions that the respondent is not being frank with the court as to when he came into possession of the evidence, that this evidence only came into the possession of the respondent after the proceedings in the court *a quo* had been finalised. This is a reasonable explanation why the evidence was not tendered in the court *a quo* and it being in the form of an affidavit there is a *prima facie* likelihood of its truth. On this approach it is also not necessary to deal with the admissibility or otherwise of certain evidence objected to on behalf of the respondent.

[16] The only question that remains is whether the new evidence will be materially relevant to the outcome of the application. The application that served before the court *a quo* referred to an affidavit of the complainant in which she describes what was clearly a sexual assault perpetrated on her and how the respondent strangled her so that she lost consciousness and that when she regained consciousness she became aware of the police officers being on the

scene. The persons who came to her assistance are the ones who deposed to the statements indicating the respondent was busy having sexual intercourse with her when they arrived on the scene. The medical evidence corroborates the version to the extent of the injuries found on the complainant's private parts and other parts of her body. The new evidence sought to be introduced does implicate the respondent in an assault of the complainant but not one of a sexual nature and as indicated above states that the complainant cannot remember the respondent having sexual intercourse or raping her on the day in question. In the context of the assault described in the new evidence rape of the complainant on her evidence is not likely.

[17] In the affidavit of the complainant in the rape case which formed part of the record before the court *a quo*, the complainant likewise did not state that the respondent raped her. She describes an assault with clear sexual intentions which caused her to lose consciousness which she only regained after the police arrived on the scene and had already apprehended the respondent.

[18] Counsel for respondent did not seek the admission of the new evidence so as to have the matter referred back to the court *a quo* for the purpose of oral evidence, but simply to consider it at face value as an additional affidavit of the complainant in respect of the rape and to be dealt with as if it was part of the forfeiture application that served before the court *a quo*. Whereas the new evidence clearly raises questions as to the reliability of the complainant in respect of the details of the assault on her, it does not in any manner impugn the credibility of the persons who arrived on the scene and who basically caught the respondent red handed busy having sexual intercourse with the complainant.

[19] As pointed out above, in neither her affidavits (assuming the authenticity of the one now sought to be introduced) did the complainant testify to such rape nor is it expressly excluded. In fact, the evidence of the independent witnesses as corroborated by the medical evidence establishes the rape. The new evidence, on the basis of an application not referred to evidence, is thus not materially relevant as it does not have the potential to change the outcome based on the evidence that was presented to the court *a quo*.

[20] In the result the application to present further evidence is declined.

Respondent entitled to oppose application to reinstatement

[21] It is pointed out on behalf of the PG that the respondent on 8 May 2018 filed a notice to oppose the application to condone the late filing of the record and only filed an affidavit opposing its application on 3 July 2018 without seeking condonation for the late filing of these two documents. The application for reinstatement was filed nearly a year prior to the Notice to Oppose, namely on 11 May 2017.

[22] Even if the application should be dealt with on an unopposed basis the PG must still persuade this court to condone the late filing of the record and to reinstate the appeal.

[23] The matters raised in the answering affidavit are not new factual matters but all legal matters pointing out alleged long delays and remissness on those

acting on behalf of the PG based on the facts deposed to on behalf of the PG. All these issues could be raised without the filing of an answering affidavit.

[24] The question of the late filing of both the Notice to Oppose and the answering affidavit were not raised in the original heads of argument filed on behalf of the PG but is raised in the answering affidavit opposing the application to lead new evidence. This is a somewhat opportunistic manner to raise a point which is not really of any moment in the application to lead further evidence and which should have been raised from the outset.

[25] A reasonable explanation must be given for the non-compliance and the applicant must show prospects of success on appeal for condonation to be granted. The prejudice to the respondent and the interest of the administration of justice are also relevant considerations.<sup>2</sup>

[26] If the reasons for the failure to comply with the Rules of Court evidences a flagrant disregard of the rules or gross dereliction of duties on the part of a litigant or his or her legal practitioner the application can be dismissed without considering the prospects of success.<sup>3</sup>

[27] I mention the above principles so as to point out that unless the explanation for the non-compliance of the Rules is such that prospects of success is irrelevant, it must be considered and if there are prospects then the matter should be reinstated and the appeal be heard. If this happens there is no bar to respondent

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<sup>2</sup> *Rally for Democracy and Progress and others v Electoral Commission for Namibia* 2013(3) NR 664 (SC).

<sup>3</sup> *Rally for Democracy and Progress and others* case above.

addressing the merits on appeal as there is no suggestion that he should not, for whatever reason, be allowed to oppose the appeal. In practice all the issues, including prospects of success, are normally canvassed and where prospects of success are established the appeal is reinstated. The appeal is then also finalised based on the submissions advanced in respect of the prospects of success to avoid having to hear submissions on the prospects twice. To have to deal with the matter in a piecemeal fashion in the present case would have meant that this court would have to hear the questions of prospects of success twice, namely once on behalf of the PG as the respondent did not timeously oppose in respect of the application for reinstatement and again, if the appeal was reinstated, by both parties on the merits. To avoid this scenario, both parties were allowed to address the court on this aspect from the outset.

[28] As the answering affidavit to the application for reinstatement contains no factual matter that contradicts that on behalf of the PG, I deal with this application below on the facts put forward on behalf of the PG only. As mentioned above the respondent's submissions in respect of the merits are however considered.

#### Application for reinstatement

[29] The record was filed two or three days late. The relevant facts in relation to the late filing of the record are as follows. The order of the court *a quo* was available on 6 February 2017. The full judgment only came to the knowledge of the office of the PG 'a few days later'. Nobody knows actually when. On 6 March 2017 the legal practitioner for the PG was instructed to appeal. About a week later and on 14 March 2017 an official of the Asset Forfeiture Unit (AFU) which is a qualified legal practitioner undertook to prepare the record for the appeal. About

two weeks later and on 31 March 2017 she requested the recording company (Tunga) to prepare the record. She followed this up with Tunga in the following week, who informed her to also request the registrar for access to the court file as they (Tunga) sometimes experienced difficulties in this regard. On 19 April 2017 the legal practitioner for the PG enquired from the official of the AFU on the progress relating to the completion of the record and the official informed him of what transpired and undertook to take the matter up with Tunga. This official on 20 April 2017 requested the court file from the registrar of the High Court 'as a matter of precaution . . . in the event that (Tunga) had not receive it yet'. She followed this up with the registrar on 24 April 2017, who informed her that Tunga had also requested the file. She then contacted officials of with Tunga who informed her that they had not yet started compiling the record as they 'struggled to get the court file'. She also inspected the documentation in possession of Tunga and saw the notice of appeal was missing and informed the official of Tunga that she would be able to provide a copy of the notice of appeal, should Tunga not find one on the court file. From 1-5 May 2017 this official went on leave and asked a colleague to follow up the issue of the record with Tunga. There is nothing in the papers to suggest this colleague did anything in this regard. On 8 May 2017 the official of the AFU went to Tunga to collect the record. She was informed that the Notice of Appeal was still missing and she provided Tunga with a copy. She was also told that Tunga could not find the proceedings of 13 September 2016 (the day the matter was argued in the High Court). The official of the AFU expressly stated that this had to be included in the record as she saw it, included in a similar appeal, a copy whereof was available in the offices of the AFU. She reported this problem to her supervisor who on 9 May 2017 contacted the legal practitioner for the PG to inform him of this problem. The legal practitioner then informed Tunga to prepare

the record without the proceedings of 13 September 2016 as these proceedings 'need not form part of the record'. The legal practitioner wrote to the legal practitioner of the respondent to seek consent to file the record late. Later on the same day the legal practitioners for the PG followed the letter up with a telephone call as there was no response to the letter and was informed that the request for extension was declined. An attempt was made to file the record with the registrar of the Supreme Court on 9 May 2017 but the registrar refused to accept it as it was a day late and the record was then filed together with the condonation application in respect of the late filing on 11 May 2017.

[30] From the foregoing history it is clear that the late filing can be solely attributed to the fault of those acting on behalf of the PG. The record is supposed to be filed within three months of the judgment or order appealed against. The procedures at the PG's office to obtain authority for the appeal took about a month, ie from around 6 February 2017 – 6 March 2017. This meant that there were two months left to file the record. It took from 6 March 2017 to 31 March 2017 before Tunga was even approached to compile the record. This meant nearly two of the three months to compile the record went wasted. As is evident from the narrative of events subsequent to Tunga being approached on 31 March 2017 to prepare the record, they had to obtain the court file for this purpose. When the official of the AFU was asked about the progress as far as the record was concerned on 19 April 2017, ie more than two months into the three month period it is clear nothing had happened. Strangely enough the official of the AFU on 20 April 2017 filed the request for the record with the registrar of the High Court 'as a matter of precaution' in the event that Tunga had not yet received it. Why did she not contact Tunga to establish whether the court file had already been received?



She followed the request up on 24 April 2017 and was then informed that Tunga had already requested the file. Nowhere is it disclosed when the file was requested by Tunga and when it was forwarded to Tunga. Why the official of AFU did not follow this aspect up with Tunga from 31 March 2017 to 29 April 2017 is inexplicable and inexcusable. Furthermore, Tunga is instructed to include the proceedings of 13 September 2017 as part of the record despite this court making it clear in the *Channel Life*<sup>4</sup> case that it should normally not be part of the record and that legal practitioners should inform themselves of the processes of this court. The official from the AFU's colleague does nothing while she is on leave and on virtually the last day to file the record, the official goes to Tunga to collect the record, despite not knowing if the proceedings of 13 September 2017 had been found. As it turned out, it was still missing. Fortunately for the PG the proceedings were application proceedings which could be filed quickly and thus were filed only two or three days late. The late filing of the appeal is not the end of the PG's woes. A bundle of authorities was not filed with the appellant's heads of argument as provided for in rule 21(1) of the rules of this court and a second condonation application was launched in this regard. A legal practitioner in the office of the PG admits that she was not acquainted with this rule and states:

'I confused myself in considering the old practices of handing up the bundle of authorities to the honourable court on the day of the hearing instead of the procedure described in rule 21.'

This official submits that the case is an important one, as it is the first time the court will deal with the concept of 'instrumentality of an offence' and that

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<sup>4</sup> *Channel Life Namibia (Pty) Ltd v Gudrun Otto SA 22/2007* delivered 15/08/2008.

respondent was not prejudiced by the late filing of the bundle of authorities as the authorities were all referred to in the appellant's heads of argument.

[31] The manner in which the officials (other than the PG's legal representative) conducted themselves leaves a lot to be desired. Apart from the process to authorise an appeal which wasted a month, the conduct of the officials at the AFU is also indicative of the fact that they did not apprise themselves of the rules of this court. I have also set out above the lack of urgency with which the officials at the AFU dealt with the compilation of the record. The lackadaisical approach of the officials of the AFU is of such a nature that a lengthy delay in the filing of the record would have warranted a dismissal of this application without referring to the prospects on appeal. However, seeing that the record was filed only days late and the respondent was not materially prejudiced by the late filing of the record it is thus necessary to deal with the prospects of success before finally deciding this application.

#### Prospects of success

[32] The PG applied for and obtained a preservation order in respect of a Polo motor vehicle pursuant to s 51 of the Prevention of Organised Crime Act (POCA)<sup>5</sup>. This was followed up by an application from the PG to have the motor vehicle declared forfeited to the State pursuant to s 59 of POCA. The basis for the forfeiture order sought was that the Polo was an 'instrumentality' of the offences of kidnaping and of rape. The High Court found that the PG failed to establish the

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<sup>5</sup> Act 29 of 2004.

offence of kidnapping and insofar as the rape was concerned, that the PG failed to establish that the Polo was an instrumentality of the offence but that it was merely incidental to the offence. In the result the forfeiture application was declined. The intended appeal lies against this order of the court *a quo*.

[33] Section 61 of POCA provides that a forfeiture order must be granted where a case is made out 'on a balance of probabilities' that the property involved 'is an instrumentality of an offence referred to in Schedule 1' of POCA.<sup>6</sup> Both kidnapping and rape (including rape as contemplated in the Combating of Rape Act, No 8 of 2000) are listed in the said Schedule 1.

[34] It follows that before one can determine whether the Polo was an instrumentality of the alleged offences it must be determined whether the alleged offences have been established. This is also determined by reference to the test in civil matters (ie on a balance of probabilities) and not with reference to the test in criminal matters (ie beyond a reasonable doubt). This so because s 50 of POCA states that all proceedings pursuant to Chapter 6 of POCA which include applications for preservation orders and for forfeiture orders are 'civil proceedings and not criminal proceedings'.

[35] Complainant's version is that she was waiting for a taxi to proceed to meet her husband in town when a Polo stopped at her side and respondent, who was the driver, enquired whether she wanted a lift. She indicated that she wanted a lift into town and he said he was en route to Khomasdal but he would drop her in

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<sup>6</sup> An interested person can apply on the 'innocent owner' principle for his or her interest to be excluded from a forfeiture order, but this aspect is not relevant in the present matter. Section 63 of POCA.

town. She then got in the back seat of the car as the front passenger seat was occupied by a male person who appeared to be asleep. The respondent's version is that the complainant stopped him at a four way stop and asked him for a lift into town to which he agreed. He admits that his friend was in the passenger seat at the time.

[36] At some stage when it appeared to the complainant that the respondent was not proceeding to town, she asked him where he was going and he responded that he was going to drop his friend at the nurse's home on the grounds of the Central Hospital complex. Respondent drove to the area but passed the nurse's home and drove into a 'bushy area'.

[37] The complainant again asked where the respondent is driving to. He stopped the car, got out of the car, opened the rear door where she was sitting and pushed her into the seat, and told her to take off her skirt which she refused. She screamed and he pressed her legs down, he held a knife against her throat and threatened to kill her. He then cut her panties and shouted at her, hit her on the head with a knife and smacked her on the eye. He strangled her, ordered her to have oral sex with the passenger and she passed out, only to awake when the police arrived at the scene. The respondent acted aggressively towards the police.

[38] The respondent's version is that he cannot remember the exact route that he travelled as he was intoxicated. In his bail application he stated that after picking up the complainant, he discussed the possibility of the complainant providing sexual favours to him and his friend (the passenger) and handed her between N\$200 and N\$300, which she took, but just laughed. This aspect is not

dealt with at all in his affidavits in response to the preservation order and in the forfeiture application. She then asked him to take her to a different spot, known as the taxi and bus stop on the Okahandja road. This caused him to alter his route and to drive through the hospital premises as it would be the shortest route to drop her and then proceed to town via the high way. While on the hospital premises, his friend urinated on the front seat of the Polo and he stopped, reprimanded his friend and told him to exit the car. While the friend was outside the car, he looked for his wallet which he could not find. He then started swearing at his friend and the complainant. At this juncture the complainant hit him from behind with a knife which he then attempted to wrest from her. While struggling for this knife the police arrived at the scene and took him into custody.

[39] Complainant's version as to the alleged rape is corroborated by other evidence. The medical practitioner examining the complainant on the day of the alleged rape noted that she had a torn skirt and torn underwear and also injuries to her genitalia that indicated 'forceful entry'. A security guard heard a woman screaming from the car and alerted the police. When this guard and the police arrived at the scene, they caught the respondent *in flagrante delicto* whilst beating the complainant. After the police intervened at the scene the complainant struggled to talk, had marks on her neck, her shirt was torn, her handbag damaged, she cried and appeared exhausted.

[40] The respondent states in answer to complainant's version as to the run-up to the rape as follows:

'I cannot remember having told the complainant to remove her skirt, throttle her, pushed a knife against her neck, cut her panties, hitting her on the head with a knife (I can remember she hit me on the head with the knife), smack her on the right eye and strangled her until she passed out. I deny such version and submit same is a complete fabrication'.

The respondent's version is a prevarication. If he cannot remember whether he did something he cannot really deny it in the face of contrary evidence. Despite this, he calls the complainant's version a fabrication which implies that none of the things she testifies to happened. This is only consistent with a denial. Furthermore, the respondent's criticism against the evidence of the security guard and the police to the effect that they did not positively identify the assailant, or did not say what they had personally observed but what they heard from each other is wholly misplaced. On the evidence it is common cause that there were only three persons in the Polo, namely the complainant, the respondent and the passenger. It is also common cause that complainant and respondent were involved with one another when the security guard and the police arrived and not the passenger.

[41] The respondent's version is such that it can safely be rejected on the papers. The complainant's version is corroborated by the medical report, the security guard and police who took respondent into custody. His attempt to discredit these independent witnesses falls far short of raising any questions as to the credibility of the evidence. The challenges raised against the evidence of these independent witnesses is of such a nature to amount to bare denials and the prevaricating denial of the complainant's allegations referred to the above leaves one with a version that is clearly untenable and which can be rejected on the papers.<sup>7</sup>

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<sup>7</sup> *New African Dimension and another v Prosecutor General SA 22/2016 [2018] NASC 8 paras [15] - [19].*

[42] From the foregoing it follows that the PG did establish on a balance of probabilities that the crime of rape was committed and that the Polo was the vehicle in which the crime was committed.

[43] Seeing that the rape occurred in the Polo, the question that arises is, whether the Polo was an 'instrumentality' of the offence of rape. The court *a quo* with reference to a decision of the South African Supreme Court of Appeal held that for the property to be 'an instrumentality of an offence' some closer connection than mere presence on the property is normally required and that the property must have been employed to some way to make possible or to facilitate the commission of the offence. That the link between the property and the crime committed must be reasonably direct and the use of the property must be functional to the commission of the crime'. This means that the property must play a reasonably direct role in the commission of the offence. The property must be instrumental in the commission of the offence and not merely incidental to in such commission.<sup>8</sup>

[44] The parties agree that the approach in the *Cook* case is the apposite one and I shall thus apply it to the facts of this matter. In fact, the main dispute between the parties in respect of the alleged rape is whether the Polo was 'an instrumentality' of the alleged offences or whether it was merely incidental to the offences.

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<sup>8</sup> *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd* [2004] 2 All SA 491 (SCA).

[45] It is instructive to refer to four paragraphs from the judgment in the *Cook* case in this context:

[31] . . . For now it is enough to say that the words "concerned in the commission of an offence" must in our view be interpreted so that the link between the crime committed and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime. By this we mean that the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence. As the term "instrumentality" itself suggests (albeit that it is defined to extend beyond its ordinary meaning), the property must be instrumental and not merely incidental to, the commission of the offence. For otherwise there is no rational connection between the deprivation of property; and the objective of the Act: the deprivation will constitute merely an additional penalty in relation to the crime, but without the constitutional safeguards that are a prerequisite for the imposition of criminal penalties.

[32] It follows that we endorse broadly the conclusion in those cases, following the first-instance decision in *NDPP v Carolus and others*, where a narrow, rather than a wide interpretation of the definition of "instrumentality" was held appropriate. Here, despite its different (and pre-constitutional) context, we find practical assistance in *S v Bissessue*, where a magistrate declared forfeit a motor vehicle and fishing rods used in fishing without a licence under an ordinance that, in addition to a criminal penalty, required the court to declare any article used "in, for the purpose of, or in connection with the commission of the offence" forfeit. On appeal the forfeiture of the fishing rods was upheld, but that of the vehicle was set aside. The court held that "to qualify for forfeiture the thing must play a part, in a reasonably direct sense, in those acts which constitute the *actual commission* of the offence in question". The same in our view applies to "instrumentality of an offence". As suggested in *NDPP v Prophet*, the determining question is whether there is a sufficiently close link between the property and its criminal use, and whether the property has a close enough relationship to the actual commission of the offence to render it an instrumentality. Every case will of course have to be decided on its own facts.



We turn now to apply these principles to the three cases before us.

### **Cook properties**

[33] Earlier we set out the facts in brief (paragraph 2). The fact that kidnapped persons were held hostage and assaulted at the house does not make the property an “instrumentality of an offence”. The property was the place where the crimes were committed. But the location was purely incidental to their commission. We agree with the approach Stegmann J adopted in *National Director of Public Prosecutions re Application for Forfeiture of Property in terms of sections 48 and 53 of the Prevention of Organised Crime Act, 1998*:

“The mere fact that a particular offence was committed on a particular property would not necessarily entail the consequence that the property was 'concerned in the commission' of the offence or that the property had become an 'instrumentality of an offence'. It seems to me that evidence of some closer connection than mere presence on the property would ordinarily be required in order to establish that the property had been 'concerned in the commission' of an offence.”

He added:

“Every [scheduled] offence must be committed on some piece of property. But it would be absurd to infer that the Legislature had intended every property on which such an offence had been committed to be liable to forfeiture to the State. A closer connection must be shown than mere presence. It must be established that the property was 'concerned' in the commission of the offence, and not merely that the offence was committed on the property.”

[34] We agree. The fact that a crime is committed at a certain location does not by itself entail that the venue is "concerned in the commission" of the

offence. An illuminating discussion of the Australian forfeiture cases (where property "used in, or in connection with, the commission or certain serious offences is subject to forfeiture) by the New South Wales Supreme Court shows that something more than mere location is essential. We consider that the same applies to our legislation. Either nature or through the manner of its utilisation, the property must be employed in some way to make possible or to facilitate the commission of the offence. Examples include the cultivation of land for the production of drug crops; the appointment, arrangement, organization, construction or furnishing of premises to enable or facilitate the commission of a crime;" or the fact that the particular attributes of the location used as a lure or enticement to the victims upon whom the crime is perpetrated (such as a houseboat whose particular attractions were used lure minors into falling prey to sexual offences).'

[46] As is evident from the approach spelt out in the *Cook* case the question whether the property is 'an instrumentality' of an offence depends on the facts of any given situation and cannot be determined *in vacuo* without assessing, in the context of the prevailing factual situation, the role that the property played.

[47] Section 2(1)(e) of the Combating of Rape Act<sup>9</sup> refers to 'coercive' circumstances and among others defines this as 'circumstances where the complainant is unlawfully detained'. In the court *a quo*, counsel for the PG emphasised this aspect and according to the judgment *a quo* submitted that complainant was 'trapped' in the car and accordingly the Polo was 'an instrumentality' of the offence. The court *a quo* dealt with the submission and held that the Polo was not 'an instrumentality' of the offence in the following terms:

'[61] It is not clear to me what Ms Kazondunge wishes to convey when she submits that the complainant was 'trapped inside the property'. The

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<sup>9</sup> No 8 of 2000.

evidence by the complainant is that the respondent pressed down both complainant's legs on the [back] seat with his legs. The complainant did not also say that she could not escape. In my view the offence of rape could have taken place without the property. In other words the property is not a means without which the offence of rape could have been committed. In my considered view the property was not instrumental to the commission of the offence; it was merely incidental thereto. The fact that the alleged offence of rape took place in the property does not make the property an instrumentality of the offence. It has not been shown that there is any reasonable direct link between the offence and the property. In my view the property was not in any way functional to the commission of the offence of rape.

- [62] It would appear from the evidence that the offence took place not because the complainant was trapped in the property but because she was subdued through punching, beating with the knife and throttling, being knocked in her ribs with a knee and punched with fists on her head and eye. She lost consciousness because of those acts. In my view, all those acts have nothing to do with the property. They could have taken place without the property.
- [63] It has been held that the fact that a crime is committed at a certain location does not by itself entail that the '*venue is concerned in the commission of the offence*'; that it provides only the venue for the crime; and that it is not enough to trigger the forfeiture provisions.<sup>10</sup> I fully agree with this view. In my considered view these principles are applicable to the present matter.
- [64] Taking everything into account, I have arrived at the conclusion that the applicant has failed to discharge the onus of proving on a balance of probabilities that the property was an instrumentality in the commission of the alleged offence of rape.'

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<sup>10</sup> RO Cook Properties and the authorities cited therein.

[48] While it is correct that the complainant could just as well have been pulled out of the car and have been raped next to it or in its vicinity and the mere fact that the rape occurred in the car is not in itself enough to make the Polo 'an instrumentality' of the offence, the car was not at the location of the rape because the respondent attended a social gathering there or because he went there to do birdwatching and encountered the complainant whilst busy with these activities. The focus on whether the complainant was trapped in the car was not the only analysis that had to be undertaken in the context of the facts.

[49] In fact the court *a quo*, in finding that the offence of kidnapping had not been established dealt with the facts as follows:

[57] The question is then: why did the respondent change the direction? According to Ms Kazondunge's argument, the respondent changed the direction in order to kidnap the complainant. I do not agree with that conclusion. It is not the only reasonable inference to be drawn from the proved facts. In my view, the reasonable inference to be drawn, and which is consistent with proved facts, is that at that juncture the respondent had decided to have sexual intercourse with the complainant. This inference is not only supported by what happened later when the alleged offence of rape took place but also by what happened when the complainant initially entered the car. On the respondent's version, when he testified during his bail application, after the complainant had entered the car, he had a discussion of 'sexual nature' with the complainant. Based on the facts before me it does not appear to me that the respondent had the necessary intention to kidnap the complainant. In my view the changing of the direction was a mere preparatory step towards the commission of the alleged offence of rape.'

[50] Apart from pointing out in passing that as the application was a civil one the PG did not have to prove any fact by way of inference on the basis that it was the

'only reasonable inference', I fully agree with the reasoning, and conclusions reached by the court *a quo* in this paragraph.

[51] The point is this. Respondent at the least, very soon after the complainant got into his vehicle decided he would rape her. He knew he could not do this where he picked her up and along the road into town with witnesses abounding and that he had to take her to a more isolated location. As is evident from what happened he knew of such a location within the premises of the Central Hospital complex. The question is, how would he get the complainant to that isolated area? He did not invite her for a barbeque to the site. She was in his car and he would use this car to take her there (misleading her as to why he took this new route) to enable him to rape her. The car was thus the instrument he used to transport the complainant from where he found her to where he intended raping her and indeed raped her.

[52] I am of the view that this is not a case where the Polo was used merely to facilitate or make the offence possible. The vehicle was functional to the commission of the crime. The Polo was reasonably directly connected to the crime and that it was the method by which respondent would transport complainant to the spot where he intended to rape her and he did rape her. There was no other way in which he could get the married stranger to meet him there. In fact he started implementing his offence by utilising the Polo to take the complainant to the area of the rape. In the words of the court *a quo*, this was part of his preparations in respect of the offence. I am of the view that the court *a quo* erred in finding that the use of the Polo in the present matter was merely incidental to the commission of the offence. As pointed out above the connection of the Polo

with the offence on the facts of this matter is such that it can be described as an 'instrumentality' of the offence as envisaged in POCA.

[53] It follows that applicant not only has prospects of success in the appeal, but that the appeal should be allowed in respect of the offence of rape.

[54] The court *a quo* held that the Polo was not an 'instrumentality of the offense of kidnapping'. This the court *a quo* did on the back of its finding that the offense of kidnapping was not established. This is putting the cart before the horse. This is so because if the offence is not established the question of 'instrumentality' of the property simply does not arise. Property can only be 'an instrumentality of an offence' if there is an offence. Be that as it may, as pointed out by the court *a quo* in the passage of its judgment quoted above, the misleading of the complainant as to where he was driving was all part of the intention to commit the crime of rape and, in context, not with the intention to kidnap. To ignore the rape so as to attempt to establish the offence of kidnapping in the present context would not be correct. The sexual assault was the sole purpose for deviating from the initial route as pointed out by the court *a quo* and but for this purpose no harm would have occurred to the complainant. I thus concur with the court *a quo* that an offence of kidnapping was not established and only an intent to rape which involved misleading the complainant as to the route taken. As the intent to kidnap was not established the question of the 'instrumentality' of the Polo in this context does not arise.

Costs

[55] As far as the costs are concerned, I'm of the view that no costs order should be granted in respect of the application for reinstatement and the appeal. I have dealt at the outset with the lethargic manner in which the officials acting on behalf of the PG acted to have the record compiled and am of the view that the appellant should not be awarded costs of the application to reinstate the appeal to show the court's disapproval of the manner in which the filing of the record was conducted. As is evident from the judgment, the merits of the appeal was essentially dealt with as part of the reinstatement application. As far as the costs of the failed application to adduce further evidence is concerned, it was declined and I can see no reason why the normal rule should not apply and the costs should follow the result. In other words, the respondent (applicant in the application to adduce further evidence) to pay the costs including the costs of one instructing and one instructed counsel.

[56] In the result I make the following order:

1. The condonation application is granted and the appeal is reinstated.
2. The application to adduce further evidence is refused.
3. The appeal succeeds and the judgment of the court *a quo* is set aside and substituted with the following order:
  - 3.1 The property which is presently subject to a preservation of property order granted by this Honourable Court under above case number on 13 March 2015 and confirmed on 24 April

2015, namely a Volkswagen VW 250 Polo 1.6 with registration number N100-289W ("the property") is forfeited to the State in terms of section 61 of the Prevention of Organised Crime Act, 29 of 2004 ("POCA").

- 3.2 That Detective Warrant Officer Johan Nico Green (W/O Green) of the Commercial Crime: Anti Money Laundering Unit in Windhoek, in whose control the property is in terms of the preservation of property order, in D/VV Green' absence, any other authorised member of the Commercial Crime Investigation Unit: Anti—Money Laundering Sub Division in Windhoek, is authorised to sell the property and pay the proceeds into the Asset Recovery Account:

Ministry of Justice- POCA

Standard Bank Account Number 589 245 309

Branch code 08237200

- 3.3 That any person whose interest in the properties concerned is affected by the forfeiture order, may within 20 days after he or she has acquired knowledge of such order, set the matter down for variation or rescission by the court.
- 3.4 This order must be published in the Government Gazette as soon as practicable after it is made.



3.5 Prayers 3.1 - 3.2 will not take effect before 30 days after the notice of this order was published in the Government Gazette or before an application in terms of section 65 of POCA or an appeal has been disposed of.

3.6 Costs to be paid by the respondent including the costs of one instructing and one instructed counsel.'

4. No order as to costs is made in respect of the application to reinstate the appeal and the appeal.

5. In respect of the application to adduce further evidence the respondent (applicant in the mentioned application) is to pay the costs inclusive of the costs of one instructing and one instructed counsel.

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**FRANK AJA**

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DAMASEB DCJ

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HOFF JA

APPEARANCES

APPELLANT:

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B Isaacks  
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