CASE NO.: CA 26/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HUBERT SHIKONGO **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: SMUTS, J *et* UNENGU, AJ

Head on: 20 September 2011
Delivered on: 14 October 2011

JUDGMENT

SMUTS, J.: [1] The appellant was charged with one count of contravening section 2 read with sections 1, 3, 4, 5, 6 and 7 of the Combating of Rape Act, Act 8 of 2000, and two alternative counts of contravening s14 (1)(a) of Act 21 of 1980 (being unlawful carnal intercourse with a girl under age of 16) and a second alternative count of contravening s14(1)(b) of Act 21 of 1980. At the conclusion of his trial in the Regional Court, Swakopmund, the appellant was convicted on count one, namely contravening s2 of the Combating Rape Act, Act 8 of 2000. He was sentenced to seven years imprisonment by that court on 23 June 2009.

[2] When this appeal originally served before this court in June 2011, the matter was postponed to 19 September 2011 and the Clerk of the Court, Swakopmund, was directed to properly compile the record of proceedings. Pages have since been re-numbered. Even though there are some discrepancies, counsel for the State has correctly pointed out that the most essential components of the record are present and that we are in a position to hear and determine this appeal

[3] The appellant was however not present on 19 September 2011 and the matter stood down and was heard on 20 September 2011. The appellant appeared in person and handed up written argument which he presented orally.

[4] The point was originally taken by counsel for the respondent that the appellant should have applied for condonation. This was on the strength of the record in possession of the State which indicates that the letter constituting the appellant's notice of appeal was submitted late. The date stamps of the prison authorities and of the Clerk of Magistrate Court on the original record however demonstrate that the letter constituting the notice of appeal was launched in time. After this was pointed out to State counsel, the point was no longer proceeded with as condonation would not be necessary.

[5] The appellant's appeal is against his conviction only. In the notice of appeal four grounds are raised. Before referring to these four grounds, I first propose to briefly refer to the underlying facts of this matter as they appear from the evidence. The complainant

gave evidence, as did her biological mother and the medical doctor who had examined her, Dr Yana. The investigating officer was also called by the prosecution. The appellant testified in his defence and called one witness, Mr Michael Mukosho.

[6] The complainant testified that on the evening of 29 May 2004, she was alone at her aunt's flat in Swakopmund when there was a knock at the door. She testified that when she opened the door, she saw the appellant. He enquired after her aunt and entered the flat. Her testimony was further that he proceeded to lock the door behind him and then announced that he was actually looking for her, the complainant. The complainant described the flat as a one bedroomed flat. She further testified that the appellant hid the key from her and proceeded to "*grab*" her by the throat. When she asked him to leave her alone, he threatened her in the following way by saying "*if you just do anything you will see what is going to happen to you*". Her evidence was further that the appellant required that she undress and took her to the bed. The complainant testified that she again refused his advances but that he did not heed her request to let her alone and proceeded to have intercourse with her. She insisted that this was against her will and that he proceeded by force which was applied to her and that she repeatedly protested. She stated that he threatened that if she screamed or did anything he would injure her and do her harm.

[7] The complainant further testified that about two hours later the appellant again had intercourse with her against her wishes. This occurred in the following way. She stated that she looked for the keys to the apartment as the appellant appeared to be

asleep. She even looked in the appellant's trouser pockets but could not find them. While she was thus looking for the keys, the appellant woke up and forcibly grabbed hold of her and pulled her down. She testified that she started to cry and that she was in pain at the time and that he again had intercourse with her against her wishes. The complainant testified that she cried repeatedly and thereafter no longer searched for the key.

[8] In the early hours of the morning, the complainant testified that the appellant again grabbed her after he awoke and again forcibly pushed her to the bed and again, for the third time, had sexual intercourse with her against her wishes. She testified that he further slept again. At about between 06h00 and 07h00 he woke up and told the complainant not to report the matter to the police or any other person and said that he would give her money. He left his cellphone with her and said that if he found money he would return to bring it to her and will then collect his cellphone from her. She testified that the appellant said that he would give her the money for being silent about him having had intercourse with her.

[9] After he had left and after agonising about the matter in church for sometime, the complainant testified that she decided to report the matter to her mother. She informed her mother that she had been raped and informed her that the person who did so stayed at the same flats where the complainant stayed with her aunt. The complainant's mother testified and confirmed that the complainant had made that report to her. She

also testified that her daughter had told her that this had occurred three times and that the person had knocked at the door and stated that he was looking for her aunt.

[10] The investigating officer, Constable Japhet Simon, also gave evidence. He confirmed that the complainant had reported the matter to the police and that he was the investigating officer. He confirmed that the complainant had told him that she knew where the accused was staying and that she was prepared to point him out. She then proceeded to point the appellant out to Constable Simon at the flats where the complainant had indicated that the appellant stayed. The investigating officer also testified that the complainant handed over a cell phone to him which she had stated the appellant had left with her.

[11] The complainant and the appellant were later that morning seen by Dr Yana. The latter testified that there was an absence of injuries on the complainant. But, as counsel for the State contended the absence would not mean that intercourse did not occur and that the rape would be excluded by the medical evidence. This was also confirmed by the Dr Yana.

[12] The appellant gave evidence at the trial, raising an alibi defence. He stated that he was in Walvis Bay on the night in question and not in Swakopmund. His alibi was however not put to any of the State witnesses. Nor was it disclosed in the plea explanation or raised with the investigating officer when he was arrested. The Regional

Magistrate correctly pointed out that it was raised by the appellant for the first time in the trial after the State had closed its case.

[13] The appellant raised four grounds of appeal. In his oral submissions, he was required to confine his argument to those four grounds.

[14] In the first instance, the appellant contended that there was no proper identification on the part of the complainant in respect of himself. But the evidence does not bear out this ground. The complainant had testified that she has seen the appellant at the flat complex previously. This was also confirmed in his evidence where he stated that he had seen the complainant before and recognised her, having seen her at the flats. Furthermore, it was clear from the complainant's evidence that she was in a position to see the appellant when she admitted him to the flat after he knocked at the door. She was also able to see and observe him in the course of what enfolded over an extended period, as I have described above. The complainant also said to both the investigating officer and her mother that she knew the appellant from the flats. The complainant also proceeded to identify the appellant to the investigating officer when he was arrested. The complainant was also unequivocal that she was able to properly recognise and have a good look at the appellant.

[15] There was also the complainant's evidence, confirmed by her mother and by the investigating officer that the appellant, upon arrest, had begged both the complainant and her mother to have the charges dropped against him.

[16] A further factor was the evidence of the investigating officer corroborating the complainant with reference to the cell phone having been handed to him by the complainant at the time of the arrest of the appellant. This would also have been consistent with the appellant approaching the complainant and the mother for the charges to be dropped against him. The evidence about the appellant approaching the complainant and her mother to drop the charges was in fact corroborated by the investigating officer. The appellant's version in evidence on this aspect was that the investigating office said to him that he should enquire from the complainant and her mother whether they may need something like cash to pay them off. But this was not put to the investigating officer when he was cross-examined. It is to be noted that the appellant was represented by counsel throughout the trial. Given the uncontested fact that the complainant was in a position to recognise the appellant who frequented the same flats and her unequivocal evidence as to recognising him and the corroboration of her version indicated above, and applying *R v Dladla and Others*[1] it follows that the first ground of appeal must fail.

[17] In the second ground of appeal, the appellant weighs in heavily against the medical evidence. He referred to the absence of injuries upon the complainant. I have already dealt with that. He also refers to the absence of any medical evidence to link himself with the rape. He is correct in that regard.

[1] 1961(1) SA 307(A)

Dr Yana's was also not able to find any trace of any injury inflicted upon the appellant or any trace of rough sexual intercourse or sexual intercourse at all. But Dr Yana did however state that, as the appellant had washed prior to the examination, she would not be able to establish from the examination of the appellant, whether there had been intercourse or not. Whilst the appellant is correct that the medical evidence did not implicate him, it would appear upon a proper analysis of the medical evidence that it also did not exclude rape or undermine the complainant's evidence or exculpate him.

[18] In his notice of appeal, the appellant also referred to a finding of the doctor that the complainant's anus was swollen (as were her female genetalia) and asserted that the swollen anus raised doubt about whether there was intercourse. But the medical evidence was however to the contrary. Dr Yana testified that the cause of the swelling would have been sexual intercourse.

[19] In short, the medical evidence, although not implicating the appellant, did not in my view assist him either. Nor did it in my view detract from the State's case.

[20] The third ground of appeal concerns the failure on the part of the investigating officer to have produced the cell phone in evidence. The investigating officer stated that it had become lost after it was handed to him by the complainant. Whilst it is entirely unsatisfactory that important potential evidence was not properly preserved after it was handed over to the police, the evidence of the investigating officer in this regard did however corroborate the complainant's version by confirming that the cell phone had

been handed to him. The complainant's version concerning the cell phone is also consistent with the evidence given by herself, her mother and the investigating officer that the appellant had later that day begged the complainant and her mother to drop the charges. This ground does not assist the appellant and must also fail.

[21] The fourth ground of appeal raised was his contention that the Regional Magistrate had wrongly rejected his alibi defence in the trial. I have already referred to the fact that it was raised for the first time at the trial after the State had closed its case, despite the fact that the appellant was legally represented throughout the trial. When I put this to the appellant in oral argument, he indicated that he had raised his alibi at an earlier stage of the proceedings and during a bail application. I afforded the appellant the opportunity of placing the reference to this before us.

[22] The appellant subsequently provided a record transcript of his bail application in the district court. It would not appear to have served before the Regional Magistrate and does not form part of the record provided on appeal. On p13 of the transcribed record provided to us (which is also numbered 38), the appellant was asked where he was on 29 May 2004 (the date of the rape). In response to that question he stated:

"*I was in Walvis Bay. My nephew, my cousin...(inaudible...)*"

The appellant went on to state that he was at the time staying in Mondesa (a suburb of Swakopmund) and confirmed that he was staying in a flat there. The very next question posed to him was as follows:

"*You said you never saw or knew the complainant?*"

The appellant's response was as follows:

"*Of course. I don't know her. I just saw her when I was arrested*."

[23] It would thus appear that the appellant did indeed raise his alibi during that bail application – at a time when it would appear that he was not represented. The issue however remains that it was at no stage put to any of the State witnesses or in his plea explanation during the trial itself, as was rightly pointed out by the Regional Magistrate. I agree with counsel for the State that the approach of Claasen J (as he then was) in *Small v Smith*[2] is apposite:

> *"It is, in my view, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, ...It is grossly unfair to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved."*

[24] A similar approach has been adopted in the context of criminal trials by the Supreme Court of Appeal in South Africa by Smalberger JA in *S v Boesak*[3] where he held:

> *"..., it is clear law the cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the*

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[2] 1954(3) SA 434 (SW) at 438

[3] 2000(1) SACR 633 (SCA) at 647 See also President of the RSA and Others v SA Rugby Football Union and Others 2000 (1)SA 1 (cc) at 36J-37E

witness implicating his client. A criminal trial is not a game of catch-as-catch-can, nor should it be turned into a forensic ambush."

[25] It would follow in my view that the learned Regional Magistrate did not in my view err or misdirect herself in rejecting the alibi defence of the appellant on the facts before her.

[26] It is significant that the further record provided by the appellant (of the bail proceedings) conflicts with his evidence at the trial. In the bail proceedings, he stated that he never knew the complainant before and only saw her when he was arrested, as quoted above. This in direct conflict with his own evidence at the trial where he in fact stated that he "recognised (her) because I know her from there at the flats, seeing her there I used to see her there and I know something about her too." (sic)

[22] Having carefully considered the grounds of appeal raised by the appellant as well as the entirety of the evidence and the oral argument raised in this appeal, I conclude that the appellant has not shown that Regional Court misdirected itself in any way. In short, the attack upon the conviction must fail.

[23] The result is that the appeal is dismissed.

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SMUTS, J

I concur

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UNENGU, AJ

ON BEHALF OF THE APPELLANT: **MR. SHIKONGO**
In Person

ON BEHALF OF THE RESPONDENT: **MS ESTERHUIZEN**

Instructed by: **OFFICE OF THE PROSECUTOR-GENERAL**