CASE NO. CA 171/06

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CORNELIUS NGHIWILEPO **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **HOFF, J *et* NDAUENDAPO, J**

Heard on: 13 June 2008

Delivered on: 22 March 2011

APPEAL JUDGMENT:

NDAUENDAPO, J: [1] The appellant and Jesaya Simeon were arraigned in the regional court sitting at Otjiwarongo on charges of rape. They were convicted and sentenced to 20 years effective imprisonment. Jesaya Simeon did not appeal his conviction and sentence.

[2] In respect of the appellant the allegations were that he is 'guilty of the offence of rape in contravention of section 2(1)(b) of the Combating of Rape Act 8 of 2000 (read with the provisions of sections 1, 2(2), 3, 4, 5, 6, 7 and 11 of the said act in that upon or during May 2004 and at or near farm Tiermansdrif, Outjo in the Regional Division of Namibia, **'the accused caused a third person to commit a sexual act with the complainant and did wrongfully, unlawfully and intentionally on diverse occasions under coercive circumstances committed or continued to commit a sexual act with Loide Nunibes, 11 years by using threats to cause harm to the complainant'.**

[3] The appellant pleaded not guilty and after trial, he was convicted and sentenced to 20 years imprisonment. He now appeals against both conviction and sentence.

[4] In this Court (as well as in the *court a quo)* the accused appeared in person and Ms. Nyoni appeared for the State.

[5] At the commencement of the proceedings Ms. Nyoni raised a point *in limine* to the effect that the appeal was noted way out of time. She submitted that the appellant was convicted and sentenced on 4 August 2005. His notice of appeal was received by the clerk of court of Otjiwarongo on 23 January 2006. That is more than 5 months after he was sentenced. The appellant, although unrepresented, was fully informed by the magistrate that he should file his notice of appeal within 14 days of his sentence. He was further informed that if he fails

to do that an application for condonation, accompanied by an affidavit, setting out the reasons why he did not file his notice within 14 days, must be filed.

[6] In this case the appellant filed his notice of appeal after 5 months after he was sentenced. His explanation for the late filing of appeal is that he is 'illiterate and was not able to note the appeal on his own and only got someone who could assist him after expiry of the 14 days period'. Ms. Nyoni submitted that the delay of 5 months is a clear indication that the appellant was not interested in noting an appeal and his explanation for the delay is unreasonable unacceptable and good cause has not been shown. In addition she submitted that the appellant has no prospects of success on the merits.

[7] As stated earlier, the appellant was fully informed of his right to appeal within 14 days form date of sentence. To merely state that he is illiterate and that is why he could not file the notice in time is not good enough. If he was really interested to note an appeal he would have taken steps to note the appeal. In the court *a quo* the appellant was informed of his right to legal representation and if he could not afford one, to apply to the Legal Aid Board. He chose to represent himself. That is the risk he took when he chose to represent himself and he cannot be heard to compliant that he is illiterate and did not know how to note an appeal. The Court has a discretion whether to condone the non-compliance with the rules. In my opinion, proper condonation will be granted if a reasonable and acceptable explanation is provided for the failure to comply with the rules and where the appellant has shown that he has good prospects of success on the merits in the appeal. These requirements must be satisfied in turn. Thus, if the

appellant fails on the first requirement, the appellant is out of court (***S v Nakapale and another 1997 NR 84).*** In this particular case no reasonable and acceptable explanation was proferred by the applicant for the late noting of the appeal and as a result he is out of court.

AD CONVICTION

[8] In any event there are no prospects of success on the merits of the appeal.

[9] The complainant, who was 11 years at the time, testified that during May 2004 she was at farm Tiermansdrif. One evening while she was asleep, the appellant removed her blanket, picket her up and told her that she will be taken to the house of the co-accused. Her mother protested against that, but appellant threatened to beat her. He also threatened to beat the complainant if she does not agree to go to the house of the co-accused. Out of fear and against her will, she was taken to the house of the co-accused. She was also warned not to return to the house of the appellant and to stay with the co-accused. The appellant also told her that she would not eat his food if she should returned back to his house from the house of the co-accused.

[10] After she was forced to stay at the house of the co-accused, the co-accused admitted that he had sexual intercourse with her on diverse occasions. The appellant does not deny that he took her to the house of the co-accused, but seeks to excuse his conduct on the basis that the complainant's mother is the

one who wanted the complainant taken to his co-accused. That was denied by the mother of the complainant.

[11] The evidence of the complainant that she was taken to the house of the co-accused against her will was also corroborated by her mother. The co-accused also testified that the appellant brought the complainant to him with the intention of the complainant becoming “his wife or girlfriend”. As pointed out above the appellant in his evidence does not deny that he took the complainant to the house of his co-accused, but seeks to excuse his conduct on the basis that the complainant’s mother is the one who wanted the complainant taken to Jesaya’s residence.

[12] Having considered the evidence presented in the court *a quo* I am of the view that the State’s proved the guilt of the accused beyond reasonable doubt and he was correctly convicted.

AD SENTENCE

[13] It is trite that sentencing is pre-eminently for the discretion of the trial court or judge. The court of appeal will only interfere if the sentence imposed is unreasonable or the discretion has not been judiciously exercised. The circumstances in which a court of appeal will interfere with the sentence imposed are where the trial court had misdirected itself on the facts (***S v Rabie 1975(4) SA 83 SA***) or where the sentence that is imposed is one which is manifestly inappropriate and, induces a sense of shock (***S v Snyders 1982(2) SA 694 (A)***)

or is such that a patent disparity exists between the sentence that was imposed and the sentence that the court of appeal would have imposed; or where there is an overemphasis of the gravity of the particular crime and under-emphasis of the accused's personal circumstances.

[14] On the facts of this case and having regard to the aforementioned principles I come to the conclusion that no grounds exist to interfere with the sentence imposed. (See ***S v ABT 1975(3) SA 214 (A); S v Hlapezula and another 1965(4) SA 439 (A); S v Van Wyk 1992(1) SACR 147 (NM); S v Moseko 1982(1) at 165 d-g SA 99(A) at 102.***

[15] In the result, the appeal is struck from the roll.

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NDAUENDAPO, J

I concur

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HOFF, J

ON BEHALF OF THE APPELLANT:	**In person**
ON BEHALF OF THE RESPONDENT:	**Ms. NYONI**
INSTRUCTED BY:	**Prosecutor-General**