



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No.: CA 108/2016

THOMSON MONOMONO

APPELLANT

And

THE STATE

RESPONDENT

Neutral citation: *Monomono v S* (CA 108-2016) [2017] NAHCMD 111 (7 April 2017)

Coram: NDAUENDAPO, J *et* LIEBENBERG, J

Heard: 14 December 2016

Delivered: 7 April 2017

Flynote: Rules of the Court – Notice of set down directed that appellant file his heads of argument six days before the hearing – Appellant filed his heads only two days before the hearing – Appellant filed an application for condonation for the late filing - Respondent does not oppose the application for condonation – No prejudice to the respondent – Satisfactory explanation for the failure to file the heads on time – The late filing is condoned.

Criminal Procedure: Appeal against conviction and sentence – Appellant convicted of inserting his finger into the vagina of an eight year old complainant when he was more

than three years older than the complainant – The complainant was asleep and woke up to the feeling of the appellant’s finger moving in her vagina – Appellant kissed complainant to prevent her from calling for help – Minor bruise found by doctor on the complainant’s genital organs – The bruise constituted redness of the para-urethral fort and was still visible after 72 hours since the incident – Penetration although slight was proven beyond a reasonable doubt – Appeal dismissed.

Summary: Appellant was convicted of rape in the Regional court. He was sentenced to 15 years of which five years were conditionally suspended for five years. The appellant alleges that the respondent had not proven penetration beyond a reasonable doubt and that he was not guilty of rape, but of indecent assault and that his sentence should not therefore be that which is prescribed by the Combating of Rape act 8 of 2000.

Held; that the labia minora, labia mijora and the para-urethral fort all form part of the complainant’s genital organs and therefore satisfy the definition of vagina in the Combating of Rape Act, 8 of 2000;

Held; that the redness on the para-urethral fort of the complainant’s genital organs was caused by the movements the appellant made with his finger when he inserted it into the complainant’s genital organs;

Held; that the respondent proved slight penetration into the complainant’s vagina as defined by the Combating of Rape Act, 8 of 2000 beyond a reasonable doubt.

Held; that the appeal against the conviction and the sentence must be dismissed.

ORDER

In the result, the appeal is dismissed.

APPEAL JUDGMENT

NDAUENDAPO, J (LIEBENBERG, J concurring):Introduction

[1] This appeal hails from the Regional Court sitting at Rehoboth where the appellant was charged with the following offences:

1.1 Contravention of s 2(1)(a) read with ss 1, 2(2), 2(3), 3, 4, 5, 6 and 7 of the Combating of Rape Act¹;

1.2 Indecent Assault.

[2] The appellant who was represented during the proceedings in the trial court pleaded not guilty to both charges. He was subsequently convicted on the charge of statutory rape and acquitted on the charge of indecent assault. The trial court found there to be substantial and compelling circumstances which justified a deviation from the prescribed minimum sentence of fifteen years and sentenced the appellant to fifteen years of which five years were conditionally suspended for five years.

[3] The appellant aggrieved by his conviction and sentence now appeals to this court against both the conviction and the sentence. On appeal, the appellant is represented by Mr. Christians, who also represented him during the proceedings in the trial court. The respondent is represented by Mr. Moyo. The appellant also seeks an order condoning the late filing of his heads.

[4] For purposes of convenience as well as the tender age of the appellant, this court will refer to the appellant as the appellant, the victim as the complainant and the witnesses will be referred to by their initials.

The Application for condonation

[5] In terms of the Notice of set down, the appellant was to file his heads of argument six court days before the hearing of his appeal and the respondent had to file its heads of argument three court days before the hearing of the appeal. The

¹ Combating of Rape Act, 8 of 2000.

respondent complied with this requirement. The appellant however, only filed his heads two court days before the hearing of the appeal. The appellant filed an application for condonation for the late filing of his heads together with an affidavit deposed to by his legal practitioner. The legal practitioner explained that the delay was due to the fact that the record is voluminous and that he had other commitments and as such was pressed for time to meet the deadline. Furthermore, that he had to negotiate with the Directorate of Legal Aid in respect of this appeal. Counsel for the respondent did not oppose the application for condonation.

[6] “It is trite that a litigant seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the granting of Condonation. Moreover, it is also clear that a litigant should launch a condonation application without delay. . . In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant’s prospects of success on appeal. . .”²

[7] In this matter, it appears that the application for condonation was filed two court days before the hearing date. Although, the respondent did not have the opportunity to peruse the appellant’s heads before preparing its own, there is no prejudice to it as it covered all grounds based on the notice of appeal. The court is not satisfied that the appellant’s legal practitioner raises time constraints as an excuse as the notice of set down was received timeously. However, the court is satisfied that the appellant’s counsel does not have control over the Directorate of Legal Aid and that he would not have been able to proceed with the appeal without the approval of the Directorate. It is for these reasons that the court condones the late filing of the appellant’s heads of argument.

The appeal against the conviction

Grounds of appeal

[8] The appellant’s first ground of appeal is ‘that the learned magistrate erred and/ or misdirected himself by finding on the available evidence, that the State proved the offence of Rape beyond a reasonable doubt.’ This ground is no ground as ‘. . . these are

² *Doeseb v The State* (CA 25-2015) [2015] NAHCMD 199 (25 August 2015).

not grounds of appeal at all but are conclusions drawn by the draftsman of the notice without setting out the reasons or grounds therefor such grounds do not inform either the State, the magistrate or this Court of the grounds on which the judgment is attacked.³ This court will therefore only deal with grounds two and three of the notice of appeal.

[9] Grounds of appeal two and three may be summarized as follows: that the trial court erred in law and or fact by finding that penetration as provided in the Combating of Rape Act, had been proven ‘in spite of Dr. Ndolo’s evidence that there were only minor bruises on the outside of the complainant’s private parts.’ Secondly that, the court erred in law and or fact ‘by finding the appellant guilty on the offence of rape in spite of the concussions by the appellant that she was not quite sure what happened to her.’

The evidence

[10] The complainant testified that, on the night in question she and her sister fell asleep on the sofa where the accused was seated after their parents had left to sleep in their room. She further testified that, while sleeping she felt the appellant shift her panty to the side and insert his finger into her vagina moving around his finger in her vagina. She wanted to call her parents but the appellant kissed her on her mouth. It was her testimony that when all this was happening, she was alone with the appellant on the couch in the sitting room. She then left the couch, went to the toilet and then to her parents’ room.

[11] The complainant’s younger sister testified that she and her sister fell asleep on the couch while watching soccer and that the appellant was seated on the same couch at the time. She felt her father’s friend trying to remove her shorts and touching her private parts so she stood up and went to her parents’ room. She was able to tell it was the appellant, because when she stood up she saw him. Further that, when she left the couch, her sister the complainant was still on the couch. The next day, she and her sister went to their grandmother’s house. At her grandmother’s house, her sister the complainant informed their cousin that their father’s friend wanted to rape them. Her

³ *S v Gey van Pittius and Another* 1990 NR 35 at 36F-G.

cousin informed their grandmother who subsequently informed their mother who took them to the clinic.

[12] State witness JRW (the complainant's cousin), testified that on 25 August 2012 when they were sitting around the fire, that the complainant told her that she was almost raped by a Zimbabwean man that came to their house. That, the appellant put his fingers into her vagina. JRW then informed the grandmother of what the complainant told her and the next day the grandmother told the complainant's mother.

[13] It was the testimony of the doctor that there were minor bruises, which bruises constituted redness on the left side of the para-urethral fort of the complainant. The para-urethral fort is found on the female genital organ when the labia majora and the labia minora are pushed away. Both the labia majora and labia minora form part of the female genital organ. The doctor further testified, that the minor bruises could be caused by a finger or any other thing. Finally, that the injuries (referring to the redness on the para-urethral fort of the complainant) fit the time and circumstances of the alleged incident. According to the doctor's testimony, the medical examination of the complainant only took place more or less 72 hours after the alleged incident.

Submissions before this court

[14] During the appeal hearing on 14 December 2016, the following submissions were made:

Counsel for the Appellant

[15] Mr. Christians conceded that an act of an indecent nature occurred on the couch on the evening in question, but was adamant that that act did not constitute penetration as provided in the Combating of Rape Act⁴ (hereafter the Act). It was his submission that the appellant should have been convicted of indecent assault and not rape. Furthermore, that the appellant should accordingly not have been sentenced to fifteen years of which five years were conditionally suspended.

⁴ Combating of Rape Act, 8 of 2000.

Counsel for the Respondent

[16] On the flip side of the coin, Mr. Moyo argued that, penetration as provided by the Act did take place and was proven beyond a reasonable doubt. It was his submission that the appellant inserted moved around his finger into the vagina of the complainant. The insertion and moving around of the appellant's finger in the complainant's vagina caused redness on her para-urethral and this redness was only visible ones the labia minora and labia mijora were opened. In support of his submission, Mr. Moyo referred to ss 1(1)(a) and (b) of the Rape Act. On the sentence, it was submitted that the trial court committed no misdirection in sentencing the appellant.

Applicable legal principles

[17] Section 1(1)(b) and (c) of the Act provides the following:

"sexual act" means-

(b) the insertion of any other part of the body of a person or of any part of the body of an animal or of any object into the vagina or anus of another person,[my emphasis] except where such insertion of any part of the body (other than the penis) of a person or of any object into the vagina or anus of another person is, consistent with sound medical practices, carried out for proper medical purposes; or

(c) cunnilingus or any other form of genital stimulation;

"vagina" includes any part of the female genital organ.'[my emphasis]

[18] Section 2 (1) of the Act provides the following:

'Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances-

(a) commits or continues to commit a sexual act with another person.'

[19] In terms of s 2(2) of the Act coercive circumstances to include, but are not limited to the following:

a) circumstances where the complainant is under the age of fourteen years and the perpetrator is more than three years older than the complainant;' and

b) 'sleep,

to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act;'

Application of the law to the evidence

[20] What is clear from the testimonies of the complainant, her minor sister, the cousin as well as the doctor is that, the complainant was eight years old at the time of the incident. That on a day in August 2012, a Zimbabwean man came to their house to watch a soccer match. In the evening of the same day, the 20th August 2012, the complainant and her sister were watching the match with their parents and the appellant. The two girls were sitting on the same couch as the appellant throughout. At some point before the match had ended their parents went to their room to sleep. The two girls and the appellant continued to watch the match. The two minors fell asleep on the couch while watching the match. It was while asleep on the same couch as the appellant, that the complainant's younger sister felt something touching her vagina so she got up and went to her parents' room. However, before she left for her parents' room, she turned around after getting up and saw the appellant and the complainant lying on the couch. After the younger sister had left, the complainant was woken up by the appellant's finger that was moving around in her private parts. She could not call for help as the appellant started kissing her. The next day they went to their grandmother's house. It was at the grandmother's house that, the appellant told her cousin about the finger that was inserted into her vagina and the narrative was relayed to the grandmother who then informed the complainant's mother who took the complainant to the clinic. The doctor found that the hymen was intact and that everything was normal apart from the redness on the para-urethral fort.

[21] The question is, can the para-urethral fort be considered to be part of the definition of vagina in terms of the Act? The definition of vagina in the Act as well as the doctor's testimony makes it clear that it is indeed part of the female genital organ. This act by the appellant could not have been a mere touching. If after 72 hours since the

incident, redness is still visible on the complainant's genital organs, that is the para-urethral fort, then this court cannot be convinced that what happened that evening was a mere touching. This court is satisfied that the appellant in fact inserted his finger although not deep enough into the complainant's vagina to cause substantial injuries or bruises, but certainly deep enough to constitute insertion into her genital organ and enough to cause redness on her genital organ.

[22] At the time of this incident the complainant was eight years old and the appellant was more than three years older than her. At the particular moment this eight year old girl was asleep when the appellant decided to take advantage of her minor age and sleeping state. She woke up to find the appellant's finger moving around in her genital organ. The complainant was not unconscious, she was able to relay that she was alone with the appellant on the couch at the relevant time, that her panty was moved aside and that the appellant inserted his finger into her although not deep enough. She was able to relay that the lights in the room were off, but the television was on, and that the appellant kissed her about five times as a result of which she could not call her mom. Perhaps she was confused because she did not understand why the appellant had inserted and moved his finger around in her vagina, but she definitely was not suffering from a concussion as the appellant alleges in his notice of appeal and heads of argument.

[23] 'Where there has been no misdirection on fact by the trial judge, the presumption is that his conclusion is correct; the appellate court will only reverse where it is convinced that it is wrong.'⁵ On the evidence before the trial court, this court is not satisfied that the trial court erred in law and or fact or that it misdirected itself at all or to such extent that it would warrant interference by this court with the trial court's conclusion.

[24] The appellant was thus correctly convicted of rape in terms of the Act⁶.

The appeal against the sentence

⁵ *R v Dhlumayo and Another* 1948 (2) SA 677 (AD) at 706.

⁶ Combating of Rape Act, 8 of 2000.

[25] Ordinarily the appellant would have been sentenced to a prescribed minimum prison term of fifteen years, however the court suspended this by five years because it found there to be compelling and substantial circumstances which justify a deviation from the prescribed minimum sentence.

[26] The appellant appeals against the sentence on the grounds that he should not have been convicted of rape, and that he was not subject to be sentenced in terms of the Combating of Rape Act⁷, but was subject to a lesser sentence. Counsel for the Respondent submitted that the sentence of fifteen years of which five years were conditionally suspended, was appropriate in the circumstances.

[27] Sentencing is within the discretion of the trial court. 'It is trite law that a Court of Appeal can only interfere with the discretion of the trial Court regarding sentence on very limited grounds, *vis* when the trial Court has not exercised its discretion judiciously or properly. This occurs when the trial Court has misdirected itself on facts material to sentencing. This will also be inferred where the trial Court acted unreasonably and it can be said that the sentence induces a sense of shock or there exists a striking disparity between the sentence this court would have passed or if the sentence appealed against appear to this court to be so disturbing or inappropriate as to warrant interference by this court.'⁸

[28] In the proceedings in the trial court, the magistrate took into account the interest of society, appellant's personal circumstances and the offence committed. The court also took into account the aims of punishment, being rehabilitation, retribution, deterrence and prevention. The court thus took into account that the appellant was a first offender, that children are vulnerable members of society and should be protected from adult invasion, that the offence of rape was a serious one and prevalent in the country and that the complainant was only eight years old at the relevant time and that the penetration by finger was slight. The court took into account that no pain was reported to the doctor and that no permanent injury was caused to the complainant. The court also took into account that the appellant was denied bail as he was a foreigner and had spent more or less four years incarcerated since his arrest. The court regarded

⁷ Combating of Rape Act, 8 of 2000.

⁸ *Kambindu v The State* (CA 4-2016) [2016] NAHCMD 256 (9 September 2016) para. 22.

this latter consideration as a substantial and compelling circumstance to warrant a deviation from the prescribed minimum sentence.

[29] In the result, this court is not satisfied that the trial court misdirected itself or exercised its sentencing discretion in a manner that can be said not to be judicious. This court is thus not inclined to interfere with the trial court's sentence in this matter.

[30] In conclusion, any act of sexual assault on another person is a heinous and unacceptable breach of that persons' dignity. However, where the victim is a child, the English language is feeble to describe such an act. It is therefore, the duty of courts to protect the most vulnerable members of our society being; women, children, those differently abled and our elderly. This is therefore such a case, where this court makes clear its stance. The court concedes that however heinous an offence may be, the ultimate and ideal situation is that the perpetrators will reform in their time away from society and become valuable members of society upon their return. This remains the hope of this court, even for the appellant in this matter.

[31] In the result, the appeal is dismissed.

NDAUENDAPO, J

LIEBENBERG, J

APPEARANCES

APPELLANT:

Mr. W. T. Christians

Instructed by: W. T Christians Legal Practitioners

RESPONDENT:

Mr. E Moyo

Instructed by: Office of the Prosecutor General