

**REPUBLIC OF NAMIBIA**

REPORTABLE



**IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**APPEAL JUDGMENT**

Case no: CA 45/2015

In the matter between:

**SIMON HAIBEB**

**APPELLANT**

And

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Haibeb v State* (CA 45/2015) [2017] NAHCMD 37 (17 FEBRUARY 2017)

**Coram:** NDAUENDAPO, J *et* SHIVUTE, J

**Heard:** 26 SEPTEMBER 2016

**Delivered:** 17 FEBRUARY 2017

**Flynote:** Criminal Procedure - Appeal against conviction on one count of rape and assault with intent to do grievous bodily harm - Penetration not proven beyond a reasonable doubt - Conviction on one count of rape set aside – Appeal succeeds.-. Assault with Intent to do grievous bodily harm proven beyond a reasonable doubt - Conviction on assault with intent to do grievous bodily harm – Appeal dismissed.

Criminal Procedure - Appeal against sentence of ten years with one year suspended - Appeal succeeds - Appellant sentenced to one year imprisonment.

Criminal Procedure - Respondent cross appealing against acquittal on two counts of rape and kidnapping - No penetration proven beyond a reasonable doubt - Appeal dismissed.

Criminal Procedure - Respondent cross appealing against the sentence on grounds of leniency - Appeal dismissed.

**Summary:** The appellant appeals against the conviction on one count of rape and assault with intent to do grievous bodily harm as well as against the sentence of ten years imprisonment of which one year was conditionally suspended. The respondent cross appeals against the acquittal of the appellant on two counts of rape and one count of kidnapping.

Held; that the respondent failed to prove penetration beyond a reasonable doubt and as such the appeal against the conviction on the one count of rape succeeds;

Held; that the learned magistrate was correct to reason that ‘given the area of the injury on her body as well as the weapon used’ the appellant indeed had the intention to do the complainant grievous bodily harm;

Held; that in light of the facts of this case, it is more probable that the complainant voluntarily went to the appellant’s house.

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## ORDER

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In the result, the following order is made:

1. The appeal against conviction count one (rape) succeeds.

2. The appeal against conviction on assault with intent to do grievous bodily harm is dismissed.
3. The sentence of 10 years of which one year was suspended on the usual condition is set aside and substituted with the following:
  - a) On the count of assault with intent to do grievous bodily harm, one year imprisonment.
  - b) The sentence is antedated to 1 April 2015.

#### Cross appeal

1. The appeal against the acquittal on the two counts of rape and kidnapping is dismissed.
2. The appeal against the sentence on one count of rape and assault with intent to do grievous bodily harm is dismissed.

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### **JUDGMENT**

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#### **NDAUENDAPO, J *et* SHIVUTE, J (Concurring)**

#### Introduction

[1] This appeal originates from the Otjiwarongo Regional Court. The appellant was arraigned in the Otjiwarongo Regional Court on three counts of rape in terms of section 2(1) (a) read with sections 1, 3, 4, 5, 6, 7 of the Combating of Rape Act, 8 of 2000, assault with intent to do grievous bodily harm and kidnapping.

[2] On 27 January 2015, the appellant pleaded not guilty on all counts and tendered no plea explanation in terms of s 115 of the Criminal Procedure Act<sup>1</sup>. On 1 April 2015, he was convicted on counts one and four and acquitted on counts two, three and five.

[3] The charges were taken together for purposes of sentencing and he was sentenced to ten (10) years imprisonment of which one (1) year was conditionally suspended for five (5) years.

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<sup>1</sup> Criminal Procedure Act, 51 of 1977.

[4] The Appellant appealed against the conviction on one count of rape and assault with intent to do grievous bodily harm. The appellant also appealed against the sentence of ten years of which one year was suspended.

### The Appeal

[5] The grounds of appeal against the conviction can be summarised as follows:

- (a) Both convictions could not be sustained by any evidence and were inconsistent with the evidence presented by the State;
- (b) The evidence of the complainant was not clear in all material respects as required by law;
- (c) The learned magistrate failed to approach the conflict of fact between State witnesses and that of the accused as required by law;
- (d) The magistrate erred in rejecting the appellant's evidence without it being demonstrated that it was false, inherently untruthful and so improbable as to be rejected as false, without having regard to the testimony of the medical doctor that there was no evidence of any recent sexual activity on the complainant;
- (e) The conviction on assault with intent to do grievous bodily harm is not supported by any factual evidence nor any objective and scientific evidence, and cannot be used to bolster the allegation that the accused assaulted the complainant with a stone, contrary to the medical examination findings;
- (f) The magistrate's reasoning is so inconsistent and contradictory that no reasonable court with such contradictory evaluation of the evidence presented.

[6] The appeal against sentence provides in a nutshell that the learned magistrate over emphasized the seriousness of the offence and the interest of society and less weight to the fact that the appellant is a first offender. Furthermore, that the sentence imposed is harsh.

## The Cross Appeal

[7] The respondent also notes a counter appeal against the acquittal of the appellant on the two counts of rape and one count of kidnapping. The respondent is also unhappy with the sentence imposed on the one count of rape and assault with intent to do grievous bodily harm.

### Respondent's grounds of appeal

[8] The respondent's grounds of appeal against the conviction are the following:

'The learned Magistrate misdirected herself, alternatively erred in law and or fact by:

- a) Not considering, alternatively not properly considering that the respondent's evidence was corroborated by independent witnesses.
- b) Reasoning that the complainant must have gone to the house of the accused willingly, when such conclusion is not properly supported by evidence.
- c) Concluding that the bar where the appellant was standing could not be closed at the time the appellant allegedly kidnapped the complainant, when such a conclusion is not backed up by evidence. By assuming that there is no reason why the bar would have been closed on a week day too early, the learned Magistrate used personal knowledge and not evidence and thereby conjecturing and speculating.
- d) Finding, the fact that the doctor found no injuries on the complainant's body is an indication that the complainant was not pulled or dragged by the appellant, when that was not the only reasonable inference that could be drawn from the evidence
- e) Finding that, the fact that the doctor did not record any injuries on the anus of the complainant, justified a conclusion that she was not raped per anus, when the doctor in her evidence testified she did not examine the anus of the complainant.
- f) Rejecting the complainant's evidence on her first attempt to escape from the appellant and by reasoning that the appellant was not a stupid person who would fall for the same trick twice, when there was no basis upon which the learned Magistrate would have come to such conclusion having regard to the facts of the matter.
- g) Failing to invoke the provisions of s 167 of the Criminal Procedure Act<sup>2</sup>, as amended to examine the complainant and appellant on specific issues which in the opinion of the learned Magistrate needed elucidation.'

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<sup>2</sup> Criminal Procedure Act, 51 of 1977.

- [9] The appellant's grounds of appeal against the sentence are the following:
- a) That the learned Magistrate erred in law and or fact by ascribing more weight to the seriousness of the offence and the interest of society and less weight to the fact that the appellant was a first offender.
  - b) That the sentence was harsh and that a different court would impose a different sentence, alternatively that a different court will set aside the entire sentence.

#### Brief Factual Background

[10] The complainant, who at the time was thirteen years old, testified that the appellant had dragged/pulled her some two to three kilometers through a residential area at around 21:00 to his house. It was her version that, she was calling for help, but to no avail. Further, that upon arrival at the appellant's house, he undressed her and had vaginal intercourse with her. She then asked to go to the toilet and upon her return he had sexual intercourse with her per anus and then per vagina in that order. She thereafter asked to go to the toilet again and was able to get away after the appellant allowed her to go to the toilet. It was furthermore her version that she ran to a neighbour's house at around 00:00, where the appellant showed up shortly after her, grabbed and hit her with a stone in her head.

[11] The appellant testified that, the complainant approached him at a drinking place around 21:00 and followed him voluntarily to his house to get tobacco. They walked to his place and on their way they met with two guys, one whom he later learned was the complainant's boyfriend. A quarrel ensued between him and these guys, but it was stopped by another guy who intervened. At his house the complainant sat on the bed and undressed herself only leaving on her bra and panty whilst he was making a zol (tobacco). She told him that she was afraid that the guys they met earlier on their way may go to her place and beat her up. The complainant got the tobacco and started rolling a 'zol' and shortly thereafter left for the toilet covering herself with a towel. Shortly thereafter, he heard the complainant running to the neighbour's house at which point he noticed his N\$ 200.00 missing from his dressing table where he had left it. He ran after the complainant infuriated about his money and grabbed the complainant and that he never hit her with a stone, but instead that she fell during a scuffle. He denied having raped her nor having slept with her.

[12] The neighbor Mr. Bones testified that in the early hours of the morning the complainant woke him with her knocks on his door. He further testified that, the complainant was naked covering herself only with a towel. Furthermore, that the complainant told him that 'a strange man wanted to rape her'. He further testified that the appellant arrived shortly after the complainant and accused her of stealing his N\$200.00, which allegations the complainant denied. Furthermore, that a scuffle unfolded as a result of which the complainant's towel fell off revealing her nakedness 'like a baby'.

#### Submissions by Counsel for the Appellant

[13] The submissions are summarized as follows:

- a) That it is not clear whether sexual intercourse took place at all, because the doctor could not find any evidence of the same;
- b) That one would expect a person dragged for over a distance of two to three kilometers to sustain bruises;
- c) That the three alleged incidents of rape should be taken as a 'unit of conduct', basically as one act. This is because of the short successive intervals between the alleged incidents of rapes;
- d) That the complainant only told Mr. Bones that she fled because the appellant wanted to rape her anally. 'One would expect the complainant to say he in fact raped me twice vaginally, but she never mentioned that';
- e) That if the complainant was raped per anus, she would have indicated to the doctor, while the doctor was examining her vagina to also examine her anus, because she was also raped per anus, but she did not inform the doctor to that effect;
- f) Regarding the conviction on one count of rape and acquittal on the other two, counsel submitted that, 'it is extremely dangerous and prejudicial to accept half of the evidence of the complainant and reject the other half as not credible unless there is a clear indication why this distinction is made'. Furthermore, that the appellant should not have been convicted on the one count of rape;
- g) That there was no evidence that the complainant was taken against her will,

- h) Furthermore, that the sentence in respect of the conviction on assault with intent to do grievous bodily harm was unfair.

#### Submissions by the Respondent

[14] Counsel for the respondent made the following submissions:

- a) That the court a quo never ascertained whether the complainant was dragged/ pulled the whole way up until the house of the appellant and in what position she was pulled/ dragged by the appellant;
- b) That the court a quo never ascertained how the appellant held the complainant with one hand and opened the door with the other hand;
- c) That the complainant was in the presence of the appellant for some time and that the rapes happened in sequence and were interrupted by her two visits to the toilet;
- d) The fact that the doctor did not conduct an anal examination on the complainant does not reduce the credibility of the complainant, in respect of the allegation that she was raped anally. Counsel further submitted that the doctor had 'no duty to examine the complainant fully. Furthermore, that the fact that the doctor did not examine her anus does not mean that the rape did not take place;
- e) That the sentence was very lenient and that the court a quo failed to consider the seriousness of the offence.

#### Discussion on appellant's appeal against the conviction on one count of rape

[15] The learned magistrate reasoned on page 156 of the transcribed record that 'the demeanour of the complainant when she(the complainant) knocked on the door of Mr Bones as well as the fact that she was not dressed was enough to convince the court that she was indeed raped by the accused in his room at least once'. Mr Bones testified that whilst asleep the complainant came knocking at his door and he opened the door. She was naked but covered with a towel and her breast were outside. He testified that she was 'like shocked, was not like we used to know her she was like someone quarrelled with her'. He testified that he opened the door and spoke with the complainant. He also testified that the complainant was claiming that an unknown man had sex with her. The learned magistrate erred on the fact in finding that 'she immediately reported the rape to him'. There is

nothing in the testimony of Mr Bones that says that the complainant reported the rape to him. There is no mention of rape. There is also nothing in the demeanour of the complainant that could remotely suggest that she was raped by the appellant. Mr Bones testified that when the complainant knocked at his door, he opened the door and that nothing in her behaviour in any way suggested that she was raped. Therefore, the finding by the learned magistrate that '*... the fact that she was not dressed is enough to convince the court that she was indeed raped by the accused in his room at least once. . .*' is clearly a misdirection. The complainant also never confronted the appellant in the presence of Mr Bones that he (the appellant) raped her. The medical evidence also does not corroborate the complainant's testimony that she was raped. In the J88, the doctor who examined the complainant commented: 'queried rape'. When asked to explain this to the court, she testified that, 'so we are not sure whether this patient was raped, that is why we are enquiring ...because this person reported she was sexually assaulted by someone, but on our clinical examination we did not find sexual act, we did not find any signs of sexual assault'<sup>3</sup>[my emphasis]. What is required for a conviction is prove beyond a reasonable doubt and the evidence presented by the State falls short of that proof.

The appeal against the conviction on assault with intent to do grievous bodily harm

[16] The evidence of the complainant that she was hit with a stone on the backside of her head was corroborated by Mr Bones who testified that he saw the appellant pulling the complainant on her hair and then hitting her with a stone on the backside of the head and then saw her bleeding in his yard. The J88 and the doctor's testimony also corroborated her testimony of assault. The learned magistrate was right to reason that 'given the area of the injury on her body as well as the weapon used, the appellant did indeed have the intent to do grievous bodily harm. The appeal against conviction on this count is without substance and is dismissed.

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<sup>3</sup> Page 19 lines 23-28 of the appeal record.

### The respondent's grounds of appeal discussed

[17] The Court a quo did not disregard the fact that some of the evidence of the complainant was corroborated by independent witnesses. On pages 155-156 of her judgment, the learned Magistrate stated the following:

'Bones in all material aspects corroborates the version of the complainant, including her being very upset when she knocked on his door. He also confirmed that she immediately reported the rape to him and that except for a towel, she was completely naked...The demeanor of the complainant when she knocked on the door of Bones as well as the fact that she was not dressed is enough to convince the court that she was indeed raped by the accused in his room at least once.'

[18] This ground of appeal holds no water, as the Court a quo clearly did not disregard corroborating evidence of an independent witness.

[19] Regarding the second and fourth grounds of appeal:

On page 154 of her judgment, the learned Magistrate reasoned that, 'It is highly improbable that the accused would have forcefully dragged her for approximately two to three kilometers through a residential area with the complainant neither attracting the attention of a passerby nor suffering any injuries along the way'.

[20] Under cross-examination on page 48, when asked whether on their way from the bar to the accused house they passed by houses and people, the complainant first testified that, 'he is lying we did not pass through people Your worship' and thereafter when the question was repeated, she testified that 'yes one has to pass through houses' and that some people were still awake and she could see them in their houses. She further testified that she was screaming and even called one lady in that street. On page 49 of the record, the complainant was asked, '. . . after having passed through all these houses you eventually arrived at respondent's house, he opened the door and you walked in voluntarily . . . you went to find the tobacco . . . you start rolling the tobacco?' to this the complainant answered 'yes Your Worship'. It was also the testimony of Mr. Bones as well as the respondent that from the bar where the two met to the respondent's house, one would find houses.

[21] In light of the complainant's testimony, the Court a quo was not wrong to conclude that, it was more probable that the complainant went with the respondent voluntarily, because had that not been the case, it is highly improbable that people in the street would

not come to the aid of a young girl being dragged and pulled over a distance of between two to three kilometers by an adult man and who was desperately crying out for help.

[22] The appellant testified that, the complainant approached him at a drinking place around 21:00 and followed him voluntarily to his house to get tobacco. They walked to his place and on their way they met with two guys, one whom he later learned was the complainant's boyfriend. A quarrel ensued between him and these guys, but it was stopped by another guy who intervened. At his house the complainant sat on the bed and undressed herself only leaving on her bra and panty whilst he was making a zol (tobacco). She told him that she was afraid that the guys they met earlier on their way may go to her place and beat her up. The complainant got the tobacco and started rolling a 'zol' and shortly thereafter left for the toilet covering herself with a towel. Shortly thereafter, he heard the complainant running to the neighbour's house at which point he noticed his N\$ 200.00 missing from his dressing table where he had left it. He ran after the complainant infuriated about his money and grabbed the complainant and that he never hit her with a stone, but instead that she fell during a scuffle. He denied having raped her nor having slept with her.

[23] When determining whether the State had discharged its burden, the Court should be guided by what was stated in *R v Difford*<sup>4</sup> namely;

'(a) No onus rests on the accused to convince the Court of the truth of any explanation which he gives. If he gives any explanation, even if that explanation is improbable the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.

(b) The Court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.'

[24] On appeal, this Court has to determine whether the State had indeed proven penetration per anus or vagina beyond a reasonable doubt.

[25] s 2 of the Combating of Rape Act provides:

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<sup>4</sup> *R v Difford* 1937 AD 370 at 373.

'2(1) 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; or
- (b) . . .

shall be guilty of the offence of rape.'

The expression 'sexual act' as used in s 2(1)(a) is defined by s 1(1) to mean:

'the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person . . .'

It is this 'insertion (to even the slightest degree)' that the State had to prove.

[26] In the circumstances, there is only the complainant's word against that of the appellant. In the J88, the doctor who examined the complainant commented: 'queried rape'. When asked to explain this to the court, she testified that, 'so we are not sure whether this patient was raped, that is why we are enquiring ...because this person reported she was sexually assaulted by someone, but on our clinical examination we did not find sexual act, we did not find any signs of sexual assault'<sup>5</sup> [my emphasis]. According to the complainant, the sexual intercourse in the anus was painful and if indeed it was the case, she would have mentioned that to the doctor and according to the doctor, she did not mention that. In cross examination she testified that, "Your Worship I fled because he wanted [my underlining] to have sexual intercourse with me in my anus, (which) is why I fled'. That evidence clearly demonstrates that the sexual intercourse in the anus or in the vagina did not take place as alleged by the complainant.

[27] The State did not prove anal penetration nor vaginal penetration beyond a reasonable doubt. It is true, the complainant was naked with the respondent only wearing

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<sup>5</sup> Page 19 lines 23-28 of the Record.

shorts on their arrival at Mr. Bones' house, however it does not prove penetration per anus nor does it prove penetration per vagina.

[28] A Court may take judicial notice of some facts without need for evidence to prove the same. Schwikkard and Van Der Merwe write that, 'facts may be judicially noticed even if they are not of general knowledge. However, the proviso is that these facts should be notorious among all reasonably well-informed people in the area where the court sits.'<sup>6</sup> This Court cannot interfere with the court a quo taking judicial notice of the general operating hours of a drinking place over weekends. It is highly unlikely that, a drinking place would close late on week days and early on weekends. Most people are not working over weekends and this is when a business (drinking place) owner would ideally hope to attract more customers and thus most likely be open for long hours than on week days. This court cannot find a misdirection on the part of the learned Magistrate on this point.

[29] Regarding the sixth ground of appeal, In *Likando v S*,<sup>7</sup> Liebenberg, J stated that;

'The powers of a court of appeal to interfere with factual and credibility findings of a trial court are limited and in the absence of any misdirection in the trial court's conclusions as to the acceptance or rejection of a witness' evidence, it is presumed to be correct. For the appellant to succeed on appeal, he must therefore convince the court of appeal on adequate grounds that the trial court was wrong in the conclusion it had reached.'

[30] This court will not interfere with the Court a quo's finding as that Court was in a better position to determine the demeanor, intelligence and gullibility of the appellant. This Court is not satisfied that the Court a quo misdirected itself on this point.

[31] The respondent argued that the learned magistrate failed to invoke s 167 of the Criminal Procedure Act<sup>8</sup> to examine the complainant and appellant on issues which needed elucidation. This section provides that:

'The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.' Furthermore, 'the

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<sup>6</sup> P J Schwikkard and S E Van Der Merwe *Principles of Evidence* 3<sup>rd</sup> Ed (2010) at p 482.

<sup>7</sup> (CA 70/2016) [2016] NAHCMD 379 (02 December 2016) at para. 11.

<sup>8</sup> Criminal Procedure Act, 51 of 1977.

power given to a court to examine, recall, and re-examine a witness is a discretionary one which must be exercised judicially [my underlining] (R v Gani 1958 (1) SA 102 (A)). A court is, however, obliged (in contradistinction to its discretionary power) to recall and re-examine the person concerned, if his or her evidence appears to the court essential to the just decision of the case.<sup>9</sup>

[32] This ground of appeal is vague, it does not stipulate what issues needed elucidation which would have necessitated invoking s 167 above. There is no reason for this Court to accept that the trial court failed to exercise its discretion judicially.

[33] In the result, the following order is made:

1. The appeal against the conviction on count one (rape) succeeds.
2. The appeal against the conviction on the charge of assault with intent to do grievous bodily harm is dismissed.
3. The sentence of 10 years of which one year was suspended on the usual condition is set aside and substituted with the following:
  - a. On the count of assault with intent to do grievous bodily harm, one year imprisonment.
  - b. The sentence is antedated to 1 April 2015.

[34] Cross appeal

4. The appeal against the acquittal on the two counts of rape and kidnapping is dismissed.
5. The appeal against the sentence on count one (rape) and assault with intent to do grievous bodily harm is dismissed.

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<sup>9</sup> *S v Malumo & Others* 2007 (2) NR 443 (HC).

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**NDAUENDAPO, J**

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**SHIVUTE, J**

**APPEARANCE:**

Ms. Esterhuizen

Mr. Visser

Office of the Prosecutor General

Stern & Barnard