REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 38/2008

In the matter between:

THEOPHILUS NDEMUFAYO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ndemufayo v S* (CA 38/2008) [2017] NAHCMD 55 (03 March 2017)

Coram: LIEBENBERG J and SHIVUTE J

Heard: **17 February 2017**

Delivered: **03 March 2017**

Flynote: Criminal Procedure – Appeal – Appeal against conviction and sentence on two counts of rape, in contravention of s 2(1) of the Combating of Rape Act, 8 of 2000 and one count of robbery with aggravating circumstances.

Criminal law – Identification – Accused disputing proper identification – Complainants positively identified accused and corroborating in accused's facial description, shoes and clothes he was wearing at the time of the incidents – Accused subsequently positively identified during identification parade.

Criminal procedure – Sentence – Court committed a grave injustice by disregarding accused's personal circumstance in sentencing.

Summary: Accused was convicted on two counts of rape and one count of robbery with aggravating circumstances. Appellant's appeal on conviction is that witnesses gave contradicting evidence in some aspects of the evidence and that the identification parade conducted prior to his trial was unfair. On appeal against sentence, appellant argued that the sentence was harsh, a reasonable court would not have come to such conclusion. Appellant was positively identified on different occasions by three complainants during the commission of the offences. They subsequently positively identified the accused during an identification parade. Contradictions exist in the witnesses' evidence as to how the police took custody of the knife found in possession of the accused, such discrepancy not material to affect their credibility and have no impact on the conviction. On that score, appeal against conviction is dismissed. The trial court however committed a serious irregularity in sentencing when it completely ignored the personal circumstances of the accused in sentencing. In the result the appeal against sentence is upheld and he is sentenced afresh.

ORDER

---

1. The appeal against conviction on all the counts is dismissed.

2. The appeal against sentence is upheld in so far as the sentences imposed on counts 1 to 3 are set aside and substituted with the following:

Count 1 – 15 years' imprisonment.

Count 2 – 15 years' imprisonment.

Count 3 – 5 years' imprisonment.

In terms of s 280(2) of Act 51 of 1977 it is ordered that 10 years on count 2 be served concurrently with count 1.

3. The sentences are antedated to 18 July 2007.

JUDGMENT

LIEBENBERG J (SHIVUTE J concurring):

[1] This appeal emanates from as far back as 2008 when the appellant was tried and convicted in the Regional Court sitting in Swakopmund and after enrolment, had been postponed several times to afford the appellant the opportunity to amend his notice of appeal and to secure legal representation. Proceedings having reached the stage where the appellant was declined legal aid and himself being unable to privately instruct a legal practitioner, the appellant decided to argue the appeal in person.

[2] Though having been afforded the opportunity to amend the notice of appeal, there is nothing on the court file suggesting that an amended notice was indeed filed. The court will therefore constrain itself to the grounds as set out in the notice of appeal. The appeal lies against the appellant's conviction on two counts of rape in contravention of s 2(1)*(a)* of Act 8 of 2000[1] and one count of robbery with aggravating circumstances.[2] He further appeals against the sentences imposed. On the rape counts he was sentenced to 17 years'

[1] Combating of Rape Act, 2000,
[2] As defined in s 1 of the Criminal Procedure Act, 1977.

imprisonment each, and on the count of robbery to five (5) years' imprisonment. The sentences were to be served consecutively.

[3] In summary, the essential grounds articulated in the notice of appeal amount to the following: That there was insufficient evidence to convict the appellant on all three counts as charged, and that he was not properly identified by those witnesses implicating him as their assailant. Regarding sentence, appellant complains that the sentences imposed are so unreasonable that no other reasonable court would have imposed those sentences.

Conviction

[4] Though the first ground significantly falls short of being clear and specific as required by the rules of court,[3] regard will be had to the trial courts evaluation and acceptance of the evidence of the respective complainants as being reliable when coming to the conclusion that the appellant was positively identified by each complainant. Coupled therewith evidence about an identification parade attended by the complainants during which the appellant was positively identified.

[5] The incidents took place at night between 27 April and 21 May 2003 at or near an open space close to a club called Jabulani in the Tamariskia residential area in Swakomund. On each occasion the attacker used a knife to force his victims into submission and during their testimonies the witnesses identified the knife in court to be similar to what had been used in the attack. Evidence was led about the knife having been found on the appellant and although there were conflicting versions as to whether he had dropped the knife prior to his arrest or whether he had it on his person, there is corroborating evidence that the knife was found with the appellant. Therefore

[3] Rule 67(1) of the Magistrates Court Rules.

not much turns on the exact position of the knife when found. A common denominator in the rape charges is that on both occasions the attacker first asked the victim for money and upon being informed that they had none on them, he pulled out a knife to instil fear in the victims.

[6] Whereas these incidents took place at night, the trial court was alive to the central issue being the identity of the attacker. To this end the court evaluated the evidence of the respective complainants, each having identified the person on his facial features, specific reference made of the shape of the nose. From the evidence of the complainants it is clear that each had sufficient time to make observations on the person's face and though this was at night, visibility was such that facial identification was possible. The court further accepted their evidence that none of them had come into contact with the appellant during court appearances prior to the identification parade; neither that they had been shown photographs of him as he claims. These witnesses identified the appellant with ease at the identification parade which the court found, had been conducted fairly. An admission by Sergeant Urikob, the officer in charge of the identification parade about him having made a mistake when filling in the accompanying forms, were not deemed material to the outcome of the parade. I have no reason to come to a different conclusion.

[7] The trial court was cognisant of the *modus operandi* employed by the attacker and concluded that it must have been the same person. The attacks took place near an open space in Tamariskia at night and in two instances he first asked his victims for money before demanding sex. He spoke in the Afrikaans language. In each instance he was armed with a big (traditional) knife and threatened to kill his victim if she were to disobey his orders. There seems to me sufficient reason to find that there is some corresponding features when looking at the approach to, and execution of crimes committed by a person who operated in a specific way, and within a very limited area, justifying the trial court's conclusion that it involved the same person.

[8] Evidence was led about the clothing and shoes the person wore during these attacks being brown shoes with buckles on the sides, a tracksuit trouser with stripes down the side while complainant in count 2 was able to discern the pattern on the underwear ('trunky') the person was wearing. She also during the identification parade recognised the tracksuit the appellant was wearing to be identical to what her attacker wore on the night in question. As for the shoes, on the night of his arrest the appellant was seen walking in the area where the crimes were committed and it was particularly his shoes with buckles on that drew the attention of witness Vernon Dausab. Whereas the police a few weeks earlier asked the public in the area to be on the lookout for a person wearing brown shoes with buckles and who was suspected of committing robbery, this raised suspicion with Dausab. He had often during that period seen the appellant passing through the open area situated right next to the basketball court where he and friends were playing and realised this might be the person the police asked the public to be on the lookout for. After reporting the person's presence to the police by phone, he and his friends decided to apprehend the person. As they approached him he started jogging away in the direction of a nearby club and threw down a traditional knife he had with him. The knife was picked up and later on handed to the police. Dausab was certain that the appellant was the person he had seen on the night in question. He made a follow-up call to the police to inform them of the direction the appellant had gone into.

[9] It is common cause that when the appellant was arrested at the club he was wearing brown shoes with buckles. The arresting officer, Constable Nawaseb, found a long knife in his possession which was confiscated. As mentioned, evidence as to how the police came into possession of the knife is contradicting, however, when considered with the whole body of evidence, it becomes immaterial. Of importance is evidence about the knife that was seen in the appellant's possession, a knife similar to what the complainants said their attacker had used to threaten them.

[10] Further incriminating evidence turns on the finding of the 'trunky' in the appellant's bag which one of the complainant's identified as being similar to the one her attacker wore on the night she was raped. She also recognised the brown shoes with buckles on, being similar to shoes appellant wore on the night of his arrest. The same goes for a jacket found with the appellant and which was equally identified by the complainant. Appellant's denial of the 'trunky' being his and actually belonging to a person with whom he shared a room, has no substance in view of the evidence adduced, and was correctly rejected by the trial court.

[11] The trial court in its assessment of the evidence of the three complainants as to the reliability of their respective versions on the identification of the appellant being the perpetrator, identified a number of outstanding features which fingered the appellant. These were the *modus operandi* used; complainant in count 2 having identified the trunky, jacket and shoes worn by the attacker to be similar to what was found in appellant's possession; the tracksuit he was wearing at the identification parade is what he wore during the attacks; his facial appearances and particularly the shape of the nose fit the description given by the complainants; that the person conversed with the complainants in the Afrikaans language; and lastly, the ease with which each complainant identified the appellant during the parade.
[12] The court in the end found the complainants' evidence to be credible and reliable. The conclusion reached by the trial court is fortified by proved facts and there is nothing to show that the court erred either on the facts or the application of the law.

[13] In its evaluation of the appellant's defence of an alibi with the view of determining whether it is reasonably possibly true when considered against the State case, the trial court was cognizant of the fact that this defence had not been raised by the appellant from the outset as it emerged only some time

after his arrest. Witnesses called by the appellant in support of his version were family members of his and did not strike the court as being credible. They were vague as to the movement of the appellant on the relevant days and from a reading of their testimonies one gets the impression that they were covering for the appellant. The notion that appellant had been in Walvis Bay during those times the offences were committed was refuted by the evidence of independent witnesses (found by the trial court to have been credible) that appellant had been seen in the vicinity where the offences were committed during the relevant times. He was also arrested in close proximity of that place. He had led the police to the place where he resided and where his personal belongings were in a room he shared with someone else. Had the appellant been residing at Walvis Bay as he and his family contends, then there was no logical explanation for him to have taken the police to this particular room. Neither why his clothes were there, the presence of which in itself refutes the contention that he had already been living in Walvis Bay for some time. The explanation about him having been in Swakopmund on that day only to fetch his clothes, in my opinion, had correctly been rejected by the trial court in view of overwhelming evidence showing the contrary.

[14] The trial court in the end found the State to have proved each charge beyond reasonable doubt, thereby in effect rejecting the appellant's alibi defence, and thenceforth convicted Appellant on all three counts.

[15] It is trite law that evidence must be weighed as a whole and the conclusion reached must account for all the evidence adduced. In the present instance the contradictions pointed out by the defence pertaining to the manner in which the police obtained the knife, are of less importance when regard is had to the evidence as a whole and should therefore not affect the credibility of those witnesses; neither would it impact on the conclusion ultimately reached by the court. I am not persuaded that the trial court misdirected itself in any manner when convicting the appellant on all three counts. The appeal against conviction is accordingly without success.

Sentence

[16] The single ground of appeal against sentence is that the sentence is unreasonable. The court in *S v Tjiho*[4] gave guidelines of instances where the appeal court would be entitled to interfere with sentence and said:

'In terms of the guidelines to which I referred above, the appeal Court is entitled to interfere with a sentence if:

(i) the trial court misdirected itself on the facts or on the law;

(ii) an irregularity which was material occurred during the sentence proceedings;

(iii) the trial court failed to take into account material facts or over-emphasised the importance of other facts;

(iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal.'

[17] Though not couched in the same legal framework, the ground noted by the appellant clearly falls under (iv) above. What has to be decided thus is whether or not the trial court exercised its discretion in sentencing properly and judiciously.

[18] To say that the trial court wasted no time in sentencing the appellant is an understatement. The court's reasons on sentence covers merely one page and clearly does not symbolise the well-reasoned judgements on sentence normally delivered by the lower courts, particularly the Regional Court. The reasons stated are twofold namely, the appellant was labelled a serial rapist

[4] 1991 NR 361 (HC) at 366A-C

wherefore the main concern to the court was the safety of women and children. In view thereof, the court reasoned, it need not concern itself with the person who was convicted. The trial court's approach to sentencing sadly falls far short from established principles applicable to sentencing and clearly constituted a serious irregularity, vitiating the sentences imposed by the court. In the circumstances the appeal court has to consider sentence afresh.

[19] I do not intend restating the applicable principles in any detail, suffice it to say that the sentencing court is obliged to consider the personal circumstances of the offender who stands to be punished, together with the nature of the crimes committed and the interests of society. As regards the objectives of punishment, the court, depending on the specific circumstances of the case, must decide what sentence will be best for the offender but, at the same time, also be fair to society who expects that people who commit crimes will be punished.

[20] Appellant was 23 years of age when he committed the offences, not married but has one child. He was employed as a security officer at the time and is a first offender. The seriousness of the crimes committed and the need to protect the most vulnerable in society against persons like the appellant, demands punishment in the form of direct imprisonment. A knife had been used on the innocent and vulnerable victims who had no choice but to subject themselves to his sexual desires and to part with their valuables on his demand. There can be no doubt that the appellant's personal circumstances are by far outweighed by the seriousness of the crimes committed and the interests of society, hence the imposition of lengthy custodial sentences becomes inevitable.

[21] The prescribed minimum sentence applicable to the rape charges is imprisonment of not less than15 years.[5] There exist in my view no substantial and compelling circumstances justifying the imposition of any lesser sentence.

[22] Given the severity of punishment to be imposed, the need arises to ameliorate the effect of the individual sentences and to this end the appropriate order will be made.

[23] In the result, it is ordered:

1. The appeal against conviction on all the counts is dismissed.
2. The appeal against sentence is upheld in so far as the sentences imposed on counts 1 to 3 are set aside and substituted with the following:

   Count 1 – 15 years' imprisonment.

   Count 2 – 15 years' imprisonment.

   Count 3 – 5 years' imprisonment.

   In terms of s 280(2) of Act 51 of 1977 it is ordered that 10 years on count 2 be served concurrently with count 1.
3. The sentences are antedated to 18 July 2007.

[5] Section 3(1)*(a)*(iii)(ff) of Act 8 of 2000.

_____

J C LIEBENBERG

JUDGE

_____

N N SHIVUTE

JUDGE

APPEARANCES

APPELLANT	In person
RESPONDENT	P Brink Of the Office of the Prosecutor-General, Windhoek.