

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT

Case no: CA 21/2013

In the matter between:

CHARLES KASAONA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Kasaona v S* (CA 21/ 2013) [2017] NAHCNLD 47 (6 June 2017)

Coram: TOMMASI J and JANUARY J

Heard: 10 March 2017 and 2 June 2017

Delivered: 6 June 2017

Flynote: Evidence – Identity and the evidence of a single witness- To be treated with caution – No medical evidence adduced – Prior knowledge of perpetrator and corroboration of his presence – No evidence that complainant sustained injuries – No merit in the grounds that the learned magistrate erred when evaluating the evidence on identity and of a single witness.

Sentence – No evidence of physical force, threats or unlawful detention as is required in terms of s 3(1)(a)(ii) – Matter erroneously dealt with under the penalty provision of s 3(1)(a)(ii) whereas s 3(1)(a)(iii) was applicable – Sentence corrected to the prescribed 5 years' imprisonment.

Summary: The appellant applied for condonation which application was granted. The appellant appealed against conviction on the grounds that the magistrate erred by failing to treat the complainant's evidence with caution; and failing to take into consideration that no medical evidence was adduced. The complainant did not testify that she sustained any injuries and the court held that the absence of the medical evidence, in the peculiar circumstances of this case, was a neutral fact.

Although the learned magistrate did not mention the need for caution the court held that the learned magistrate correctly concluded that the state proved the identity of the appellant; and that it was safe to rely on the complainant's evidence. The appeal against conviction is dismissed.

The appeal against sentence was upheld given the misdirection by the learned magistrate who applied the wrong penalty provision. In terms of section 3 (1)(a)(ii) the minimum prescribed sentence is 10 years' imprisonment where the rape is committed under any of the coercive circumstances referred to in paragraph (a), (b) or (e) of subsection (2) of section 2, (i.e. by the application of physical force, threats and unlawful detention). None of these three coercive circumstances were proven by the State and the learned magistrate ought to have applied the provisions of section 3(1)(a)(iii) which prescribes a minimum sentence of 5 years' imprisonment. Given the misdirection the sentence was set aside and substituted with a sentence of 6 years' imprisonment.

ORDER

1. The appellant is granted condonation for the late noting of the appeal.
2. The appeal against conviction is dismissed;

3. The appeal against sentence is upheld and the sentence of 10 years' imprisonment is hereby set aside and substituted with the following sentence:

The accused is sentenced to 6 years' imprisonment.

4. The sentence is antedated to 3 August 2011.

JUDGMENT

TOMMASI J (JANUARY J concurring):

[1] This is an appeal against conviction and sentence. The appeal was noted out of time and the appellant applied for condonation. The State opposed the application for condonation.

[2] The appellant was charged with having contravened section 2(1(a) of the Combating of Rape Act, 8 of 2000 in that he during the evening of 12 and 13 April 2009 committed a sexual act with the complainant. He was convicted and sentenced to 10 years' imprisonment on 3 August 2011.

[3] The first issue for consideration is whether this court ought to grant the appellant the indulgence he seeks in his application for condonation.

[4] The appellant first noted his appeal in person but Ms Mainga, instructed by the Directorate of Legal Aid, withdrew the original notice of appeal and filed a new notice of appeal. The first notice of appeal, whilst drafted within the prescribed time period was lodged a few days out of time with the clerk of court.

[5] The new notice of appeal accompanied by the application for condonation, was filed a little over 4 years after sentence was passed. The appellant explained that he applied for legal aid and it was granted on 19 June

2015. His legal practitioner obtained a copy of the record on 3 November 2015, consulted with him on 10 November 2015 and filed the new notice of appeal on 13 November 2015. Ms Mainga confirmed this.

[6] The delay is substantial. This court is however mindful of the fact that the appellant, without the assistance of a legal representative, expressed his intention to note an appeal within the prescribed period.

[7] For reasons which will become apparent further in this judgment, the court concluded that the appellant has reasonable prospects of succeeding with his appeal against sentence. Having considered the explanation given for the delay and the prospects of success, this court grants the appellant the indulgence he seeks and the appeal is thus considered on the merits.

[8] The appellant raised the following grounds of appeal against conviction:

- (1) The record of proceedings is incomplete;
- (2) The learned magistrate erred in failing to approach the evidence of the complainant with caution on account of the complainant being a single witness, in light of the fact that there was no corroboration of her version of events; and
- (3) The learned magistrate erred in law and/or in fact in that no medical evidence was presented in light of the fact that she was taken to the hospital on the date of the incident.'

[9] The appellant abandoned the first ground of appeal. The notes of the learned magistrate are therefore accepted by this court as the agreed record of the proceedings.

[10] The second and third grounds deal with the learned magistrate's evaluation of the evidence in view of the fact that the complainant was a single witness and no medical evidence was adduced.

[11] The complainant, a 67 year old woman, testified that she went to sleep with her husband outside the fence of the hut of one Major. She woke up and realised that someone was having sexual intercourse with her, first from behind and thereafter whilst she was on her back. She recognised the accused as her nephew whom she had known from childhood. She also identified him by his dreadlocks. Her husband was not there at the time. The accused ran away and she went to the house of Kamayo, a police officer, who referred her to the headman. She thereafter went to the police. During cross-examination she testified that she was screaming when the appellant was raping her. When asked why she did not report it to Major she testified that he was very old.

[12] The complainant's husband corroborates the testimony of the complainant to the extent that the accused visited him that night and gave him a pot to hide. He left the complainant sleeping and went away for a considerable period to hide the pot. When he returned his wife was not there. He went looking for her and found her in the house of Kamayo who advised them to report the incident to the headman. The appellant did not dispute that he brought a pot to the husband of the complainant.

[13] Kamayo and the Headman confirmed that the complainant reported the rape incident to them. The police officer who received the complaint testified that she was referred to the Women and Child Protection Unit. No person from that unit was called to testify and no medical evidence was adduced. The record does not reflect whether or not the complainant was subjected to a medical examination.

[14] The accused during his plea explanation stated that he does not know the place; that it was not him; and maybe it was a case of miss-identification. During his testimony, he merely denied that he raped anyone.

[15] The learned magistrate, in his judgment, does not make any reference to the fact that the complainant is a single witness or that he treated her evidence with caution. The learned magistrate referred to the corroboration of the husband that the appellant was indeed at the scene that evening. He, in light of this corroboration, rejected the appellant's statement that he did not know the place. The learned magistrate was furthermore satisfied that the complainant recognised the appellant. The learned magistrate made no reference to the absence of a medical report.

[16] It is trite that a court may convict an accused on the uncorroborated evidence of a single witness but that the court ought to approach such evidence with caution. In addition hereto the appellant raised the defence of an alibi. There was a further need for the court to apply caution to ensure that the appellant was correctly identified.

[17] The grounds of appeal do not give details why the appellant holds the view that the learned magistrate failed to apply caution. In the appellant's heads of argument it is submitted that the following are unsatisfactory aspects of the complainant's testimony: (a) that she was at all times aware that the person who was having sexual intercourse with her was not her husband yet she only mentioned during cross-examination that she screamed; (b) she opted to report the matter to a police officer rather than a person closer to the scene of crime;

- (c) no medical evidence was adduced to corroborate her allegation of rape; and
- (d) she was not able to tell what clothes the perpetrator was wearing.

[18] In *S v Shipanga & Another* 2015 (1) NR 141 (SC), Mainga JA (Shivute CJ and Maritz JA concurring) at p150, para 15, states the following:

‘Courts here and elsewhere have stated and restated in numerous cases the approach to evidence of identification and the danger inherent in mistaken identity. See for example, supra; *S v Malumo and Others* 2006 (2) NR 629 (HC); *S v Mthetwa S v Haihambo* supra; *S v Matwa* 2002 (2) SACR 350 (E) ([2002] 3 All SA 715); *S v Charzen and Another* supra; *S v Mcasa and Another* 2005 (1) SACR 388 (SCA). The general approach may be said to amount to this:

‘Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities’

[See *S v Mthetwa* supra at 768A – C.] [my emphasis]

[19] The appellant in this case was not a stranger but someone who was well known to the complainant. She mentioned that the appellant was like a son to her. The complainant had prior knowledge of the appellant and it would be reasonable under these circumstances to infer that she was able to recognise the appellant. She furthermore identified him by the fact that he was wearing dreadlocks which appear to have been a distinguishing feature. The complainant testified that although it was at night, the place was lit up and there was moonlight. The appellant was furthermore placed at the scene by the husband of the complainant and he failed to dispute same. This constitutes strong evidence of the identity of the perpetrator. The failure to describe the clothes does not detract from the positive identification of the appellant by the complainant. The learned magistrate, in my view correctly accepted that the State proved the identity of the perpetrator.

[20] The fact that no medical evidence was adduced by the State was not dealt with by the court *a quo*. I was however unable to determine from the record whether or not the complainant was in fact medically examined. The complainant merely testified that she was referred to Women and Child Abuse Centre. The absence of medical evidence simply means there is no medical evidence of any injuries sustained or of any forensic tests which were conducted. The court *a quo* only had the testimony of the complainant to consider in respect of the incident i.e. the evidence of a single witness.

[22] The issue therefore is whether the learned magistrate correctly relied on the single evidence of the complainant that she was raped. The learned magistrate was in terms of section 208 of the Criminal Procedure Act, entitled

to do so. It is trite that the evidence of the single witness must be treated with caution but it has been held that: 'it need not be satisfactory in every respect. The evidence could safely be relied upon even where it had some imperfections, provided the court could find even though there were some shortcomings in the evidence of the single witness, the court was satisfied that the truth had been told¹.

[23] The complainant, an elderly woman, was woken from her sleep when the sexual act was committed. The complainant could not, under these circumstances, have offered much resistance. It is not in all cases of sexual assault that a victim would sustain injuries. There was no evidence that the appellant had physically injured the complainant.

[24] The failure of the learned magistrate to consider the lack of medical evidence does not per se warrant an interference by this court. The absence of injuries, given the circumstances of this case, is a neutral factor.

[25] The learned magistrate accepted the husband's testimony that the accused was there that evening as sufficient corroboration of the complainant's testimony that she identified the appellant as the perpetrator, contrary to his denial that he did not know the place. The failure by the complainant to mention her screaming during her evidence in chief, does not necessarily render her evidence untrue and neither is the fact that she preferred to report the incident to a police officer. In fact reporting the matter to a police officer makes perfect sense.

¹ *S v Unengu* 2015 (3) NR 777 (HC)

[26] Given the fact that the learned magistrate had given proper consideration to all the evidence adduced, this court is not persuaded that the he erred in the evaluation of the evidence adduced. This court is of the view that that the learned magistrate correctly concluded that the State had proven the guilt of the appellant beyond reasonable doubt.

[27] I am of the view that the grounds raised by the appellant against conviction are without merit and the appeal against conviction must consequently fail.

[28] The grounds raised in respect of the sentence are as follow:

- (1) the sentence induces a sense of shock;
- (2) The appellant was not afforded a fair trial in that the import of compelling and substantial circumstances was not properly explained to him; and the learned magistrate refused to allow the appellant legal representation at the stage of mitigation;
- (3) The court a quo over emphasized the seriousness of the offence at the expense of the appellant's personal circumstances.

[29] After the appeal was heard, the court requested counsel to address it on the following issue:

'In terms of section 3 (1)(a)(ii) the minimum prescribed sentence is 10 years' imprisonment where the rape is committed under any of the coercive circumstances referred to in paragraph (a), (b) or (e) of subsection (2) of section 2, (i.e by the application of physical force, threats and unlawful detention.)

The question is whether any of these three coercive circumstances were proven by the State.'

[30] Ms Shailemo, counsel for the appellant submitted that the magistrate erred in imposing a sentence of 10 years and that the learned magistrate ought to have imposed a sentence of not less than 5 years. Mr Gaweseb submitted that it was not clear that the magistrate acted in terms of section 3(1)(a)(ii) and even if he did he submitted that this court should not interfere with the sentence as it is an appropriate sentence in the circumstances. He reminded the court that it is not precluded from imposing a sentence in excess of the prescribed minimum sentence.

[31] Having heard counsel, it is the considered view of this court that the learned magistrate did in fact erroneously sentence the appellant in respect of the provisions of s 3(1) (a) (ii). The grounds raised in respect of sentence, were, for obvious reasons, not considered.

[32] Section 3 (a) (ii) provides as follow:

'where the rape is committed under any of the coercive circumstances referred to in paragraph (a), (b) or (e) of subsection (2) of section 2, to imprisonment for a period of not less than ten years;'

The coercive circumstances referred to are;

- '(a) the application of physical force to the complainant or to a person other than the complainant;

- (b) threats (whether verbally or through conduct) of the application of physical force to the complainant or to a person other than the complainant;
- (c);
- (d) ...; and
- (e) circumstances where the complainant is unlawfully detained;”
[my emphasis]

[33] The State, in the charge sheet relied on the coercive circumstances described in section 2(a) (application of physical force) and 2(a)(f)(iii) (where the complainant is affected by 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). The only coercive circumstances which the learned magistrate could have relied on is the coercive circumstances described in section 2(1) (a) i.e. the application of physical force.

[34] I have already alluded to the fact that the complainant did not testify that she suffered any injuries. She moreover did not testify that the appellant used physical force. The complainant was woken by someone having sexual intercourse. It was only when she was turned on her back that she identified the appellant. It is not evident from the testimony of the complainant that the appellant applied any form of physical force. In the absence of this evidence the learned magistrate could not have relied on the penalty provisions of s 3(1)(a)(ii). Given this misdirection this court has interfered with and considered the sentence afresh.

[35] In *S v Undari* 2010 (2) NR 695 (HC) the court held that it was crucial that value of stock stolen should be determined as it impacts on sentence. In this case proof of the existence of any one of the three coercive circumstances was crucial to determine whether or not the sentence falls under the provision of s 3(1)(a)(ii) or s 3(1)(a)(iii). State counsel, if it wishes to rely on any of the aggravating factors described in section 3 of the Combating of Rape Act ought to make a concerted effort to adduce evidence which would prove the existence thereof to the court. If for example the victim is by reason of age exceptionally vulnerable then it would depend on the State Prosecutor to place facts before the court which would enable the court to determine whether the victim falls into this category. In this case the prosecution relied on the application of physical force as an aggravating factor but not one question was posed to the victim to determine whether the appellant in fact applied physical force.

[36] The State proved no previous offences against the appellant. The appellant stated in mitigation that he was 34 years old and, although not married, had a girlfriend and two children who were aged 3 and 2 respectively. He was employed as a cleaner and general worker at a lodge when he was arrested and he earned N\$800 per month. He also had an elderly mother whom he was supporting.

[37] The complainant was an elderly woman who is a vulnerable member of society and a close relative of the appellant. The complainant was very angry as the appellant was like a son to her. There was no evidence adduced of physical injuries but the psychological impact was evident. Rape is a heinous

crime and an evil abhorred by society. It is for this reason that harsh minimum sentences are prescribed by law. In this instance the appellant took advantage of the complainant by sexually assaulting her whilst she was sleeping only to wake to the horror of being raped by her nephew.

[38] The period of trial awaiting incarceration is considerable. It is trite that the period the accused spends in custody, especially if it is lengthy, is a factor which normally leads to a reduction in sentence. In *S v JB* 2016 (1) NR 114 (SC) Shivute CJ (Strydom AJA and Mtambanengwe AJA concurring), at page 117 -118, para 11 & 12, stressed that: 'It is necessary nevertheless to emphasise that in an attempt to make a value judgment as to whether there are substantial and compelling circumstances present in a given case, a court is required to take into account all the factors relevant to sentencing and that it should refrain from finding that a particular set of facts amount to 'substantial and compelling circumstances' just because in its view the prescribed minimum sentence appears to be harsh or because of some sympathy towards the accused or even an aversion to minimum sentences in general.

As already mentioned, in the present case the trial court determined that the fact that the respondent had spent 11 months awaiting the finalisation of his trial **alone** constituted 'substantial and compelling circumstances'. This cannot be accepted as correct. Although the period that an offender has spent in custody awaiting the finalisation of his or her trial, especially if lengthy, is a factor normally taken into account in sentencing, in the circumstances of this case such a period cannot by itself constitute 'substantial and compelling circumstances.' [my emphasis]

[39] The circumstances herein are not substantial and it does not compel this court to impose a lesser sentence. In fact the circumstances are such that this

court is of the view that a sentence in excess of the prescribed minimum sentence of 5 years is warranted. In view of the lengthy pre-trial incarceration an appropriate sentence would be 6 years' imprisonment.

[40] In the result the following order is made:

1. The appellant is granted condonaton for the late noting of the appeal.
2. The appeal against conviction is dismissed;
3. The appeal against sentence is upheld and the sentence of 10 years' imprisonment imposed is hereby set aside and substituted with the following sentence:

The accused is sentenced to 6 years' imprisonment.

4. The sentence is antedated to 3 August 2011.

M A TOMMASI
JUDGE

I agree

H C JANUARY
JUDGE

APPEARANCES:

FOR THE APPELLANT

Ms Shailemo
Of Inonge Mainga Attorneys
(Instructed by Legal Aid)

FOR THE RESPONDENT

Mr Gawaseb
Prosecutor – General's Office