



CASE NO.: CA 123/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JACOB GAOSEB

APPELLANT

and

THE STATE

RESPONDENT

CORAM: **DAMASEB, JP et SWANEPOEL, J**

Heard on: 19 September 2011

Delivered on: 16 March 2012

APPEAL JUDGMENT

DAMASEB, JP: [1] The appellant whom I shall refer to as the 'Accused', was charged with rape of a 10-year-old girl, while he was 32-years-old at the time. It is therefore alleged that he had sexual intercourse with a minor under

coercive circumstances.¹ On 17 May 2006, he was sentenced in the Regional Court of Katutura to 17 Years imprisonment. He filed his notice of appeal in 2007, well outside the 14 day period for the filing of an appeal. The State took the view when the matter was first called, that he failed to bring an application for condonation for the late filing of the appeal. The appeal was for that reason struck from the roll on the 27 February 2009. The Accused had since filed what purports to be an application for condonation for the late filing of the appeal and the State still takes the view that in such application he does not provide a satisfactory explanation for the delay in noting his appeal late and that the present appeal stands to be struck too. The appellant's explanation in the present application for condonation is that he is a layman who was legally unrepresented at this trial, and that he was not aware of the fact that he had to file his appeal within 14 days after sentencing. Ms Nyoni, for the State correctly states that the Accused was properly advised of his right of appeal by the sentencing magistrate. I will revert to the State's point *in limine* after I have discussed the merits which, in my view, are determinative of the outcome of this appeal.

¹As contemplated in section 2 read with sections 1, 2(2), 2(3), 3, 4, 5, 6 and 7 of the Combating of Rape Act 8 of 2000.

[2] Only two witnesses testified on behalf of the State, being the complainant herself and her father. According to the minor complainant, the evidence is that on the date named in the indictment, she had gone to a party with her parents and her siblings² to a township known as Kilimanjaro at the home of the friends of the parents. Whilst the family were visiting there, she left while her parents were asleep to watch a soccer match. Whilst at the stadium, she testified, the Accused approached her and asked her to accompany him. He then held her and pulled her by her arm and on the way placed a bracelet on her arm. When they got to the home of the Accused, he pulled her inside the house, locked the door, pushed her down on the bed, undressed himself and then forcibly had sexual intercourse with her. Whilst the Accused was having sexual intercourse with her, she testified, her father came and called out her name and knocked on the door to the Accused's house. The Accused allegedly refused to open. Sometime thereafter, the complainant stated, she got the key from the Accused and opened the door. The father then entered and demanded to know what was going on, upon which she told him that she had been raped by the Accused. The father then demanded that they go to the police station and whilst they were on the way to the police station the Accused ran away and it

² She does not say how many siblings, but as I will show later, there was another sister of her's who was with a baby.

was only 2 years later that he was found and charged with the crime.

[3] The father of the minor complainant also testified. His evidence was that he realised whilst they were visiting at the friend's place that the daughter, the complainant, was not present and he went to check for her at the soccer field. When he reached there he found another girl who informed him of the complainant's whereabouts. It appears from the tenor of this evidence that this girl told him that the complainant had gone to the home of the Accused. He went to the home of the Accused, and upon arriving, knocked on the door after having called out for the complainant. The door was not opened immediately but when it was, he entered and found that the complainant's panties were around her knees. The Accused was then on the bed with a knife next to him. He confronted the Accused and the complainant about what had happened, and from his evidence, it appears the complainant did not tell him what had happened. He however concluded that the complainant had been raped. This subject was raised with him by the trial court as follows:

"Court: Did your child, the girl, tell you what happened to her?"

A. Yes. So what happened is, Your Worship, the child said he did that and I asked her, what did he do? And this is when the child informed me that he threw her on the bed and twisted her arm Your Worship, and took off her panty.

Court: And did she say anything else that he did to her?

A. 'Nee' (Afrikaans for 'no') (Intervention)

Q. Just twisted her arm and took off her panty?

A. Yes Your Worship, because at that stage I was confused and I didn't want to listen to anything ...'

The father testified that he demanded that the Accused accompany them to the police station for him to report the crime but the Accused begged him not to do so and when he did not budge, the Accused ran away and had only been found two years later when he was charged with this crime.

[4] The complainant said she was pulled by force from the soccer field. From the father's evidence it becomes clear that a girl at the soccer field knew that the complainant was at the appellant's house. How she so became aware was not canvassed by the state. One thing is clear: the father does not say that that girl saw the complainant being taken forcefully or against her will and it is improbable that the complainant was taken by force without anybody noticing. In any event that girl was not called at the trial. If the Accused's version is to be accepted - and I find no reason why it should not be - that he was at home when the complainant came, it raises the inference that the

complainant came there and had told others she was going there. The state did not disprove such an inference.

[5] The complainant testified that she was dressed when she opened the door for her father at the Accused's house and that the accused was still busy dressing when the father demanded for an explanation as to what happened. However, the father said he found her panties half-way around her knees and that the Accused was lying on the bed.

The record shows that the complainant deviated from her statement to the police (and earlier discussions with the prosecutor when being precognized) when she testified in-chief as follows:

Q. Did Accused put anything in your body, anywhere?

A. Yes

Q. What?

A. His hand

Q. Are you sure?

She also testified that the Accused 'took off his trousers and his underwear and he took a blanket and he covered us both with it ... and I was about to push him off, then my father knocked at the door'. (There is no suggestion here of rape).

She was then asked a leading question contrary to her evidence as follows:

"and he put his finger into your vagina - correct to which she answered in the affirmative.

The public prosecutor then put to her:

"Q. Remember you gave a statement to police and I also spoke to you this morning?

A. Yes

Q. The time when you and the accused person were in the room, were there anything like a knife in that room.

A. No [This of course contradicts the father who says there was a knife.]

[6] As regards the reddishness on the opening of the complainant's vagina, the evidence does not state that it was only consistent with sexual intercourse and nothing really turns on that report.

[7] It is common cause that the complainant was found in the Accused's home. The door was closed. Nothing can turn on this as he said the door was made in such a way that it closed on its own. Besides, from the evidence it appears to have been a bed-sit in which he slept, cooked and used as a living room. There was accordingly, as I understand the

evidence, only one door and one would expect that in such circumstances such a door would always remain closed.

[8] The father said he knocked for several times ON the door of the Accused's home and got no answer and called out his daughter's name. It raises the question as to why she did not raise the alarm when she heard her father call out her name. The complainant further testified that she answered her father as he was calling out for her, whilst the father testified that the Accused answered him by saying: 'What is the old man looking for again'?

[9] Another inconsistency is that the complainant in her evidence-in-chief stated that she was at no stage threatened with a knife nor did she see any knife in the room of the accused. However, the father testified that he saw a knife in the room of the Accused when he entered. The complainant had further not pointed out at any stage that she was crying, while the father testified that the complainant was crying and that it is why she was unable to tell him what had actually happened. It is the complainant's version that she told the father that she was raped by the Accused, but the father testified that the complainant only told him that the Accused 'threw her on

the bed, twisted her arm and took off her panty' without any reference to her being raped.

[10] It has to be borne in mind that the complainant had quite obviously left the company of her parents without telling them where she was going. The parents had been drinking for quite a considerable period of time and it is not far-fetched to conclude they became inebriated from drink. The complainant actually testified that they were sleeping at the place where they had gone to drink. Would the father not have felt some guilty conscience when he woke up and did not find his daughter around? In respect of her sibling who was also taken along by the parents to this drinking place in Kilimanjaro, the complainant had this to say:

"So I came back and then when I came back, I saw my sister's baby that she was thrown around. And then I took the baby to the room ... and my sister left with her friends, I don't know whereto. And my sister's friend came back and she came to fetch the baby".

The father looked around for her and found her and obviously seemed upset in finding her in the Accused's presence. It is not an unreasonable inference that she might have had a guilty feeling about having left the

company of her parents without telling them where she was going.

[11] The learned magistrate took the view that the case against the appellant was strengthened by the fact that he was unable to demonstrate why the very people the accused considered as being close to him fabricated the rape charge against him. It is important to guard against putting the onus on an Accused to explain why a state witness should lie. In this regard see the following cases: *S v Makobe* 1991 (2) SACR 456; *S v Radebe* 1992(2)SACR 166(3); *S v Motloba* 1992(2) SACR 634(BA). The criminal onus has been stated as follows in *R v M* 1946 AD 1023 at 1027:

"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".

[12] In *R v Difford* 1937 AD 370 at 272 it was held:

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

[13] The accused in his evidence under oath stated that the father of the minor complainant was drunk when he came to his house and found the minor complainant there. That the father of the minor complainant and possibly his wife had been on some drinking binge on the date named in the indictment, is apparent from the evidence of the minor complainant. She refers to them first drinking at a place of an uncle and then moving to another place where they drank some more and even fell asleep. Her reference to a child of a sibling being thrown around and evidently being left unattended is even more troubling. That the conduct of the adults with whom the minor complainant was on that day was less than exemplary and bordered on debauchery leaves one with the sense that the minor complainant, not being looked after by her partying -parents may very well, as suggested by the Accused, have come to his house to look for water and ended up also asking for sugar to mix with the water to drink. After all, the Accused suggests that the child had been to his home previously and that he treated her as his own child.

[14] In order to find an Accused person guilty beyond reasonable doubt, the State must prove beyond reasonable doubt that the version deposed to by the Accused is false.

[15] Counsel for the appellant who had previously acted for the Accused had submitted in written heads of argument filed then that there were important misdirections on the part of the trial court in that it did not properly approach the issue of the Accused's right to legal representation by, without more, merely contending itself with confirming from the Accused's previous attitude that he wished to defend himself: The various options open to the criminal defendant, including applying for legal aid counsel if he could not afford to hire the services of a lawyer not being clearly explained, including the seriousness of the offence he was facing. In this regard see *S v Shikunga* 1997(9) BCLR 1321 (NM) and *S v Kandovazu* 1998(9) BCLR 1148 (NM).

[16] A further complaint in those heads of argument on behalf of the Accused, is the fact that counsel for the State improperly led the complainant to the point where counsel actually suggested answers to the complainant. Both these complaints have merit. I do not find it necessary to deal with them because on the conspectus of the evidence, I am satisfied that there exists reasonable doubt as to the guilt of the Accused as there are irreconcilable contradictions in the evidence of the state witnesses. In the premises the appeal must succeed.

[17] In *Nakale v The State*, Case NO. SA 04/2010 (unreported) delivered on 20 April 2011, Shivute CJ held (vide paragraphs 8 and 15 of the cyclostyled judgment) that, in considering whether or not to grant condonation for the late filing of an appeal - even if the explanation for the delay be suspect - the fact that the appellant has reasonably good prospects of success on the merits may well tip the balance in favor of granting leave to appeal. For the reasons that I have set out, the present appellant enjoys very good prospects of success on the merits and he ought to have been given the benefit of the doubt as the State failed to prove beyond reasonable doubt that he was guilty of the offence charged. Accordingly, his application for condonation for the late filing of the notice of appeal is allowed, and both the conviction and sentence are set aside.

[18] I therefore make the following order:

1. The appeal succeeds.
2. The conviction and sentence are set aside.

DAMASEB, JP

I agree

SWANEPOEL, J

ON BEHALF OF THE APPELLANT:

In person

ON BEHALF OF THE RESPONDENT:

Ms. Nyoni

INSTRUCTED BY:

OFFICE OF THE PROSECUTOR-GENERAL