CASE NO.: (P) I 989/98

NAMIBIA SUGAR DISTRIBUTORS (PTY) LTD

HANNAH, J.

1999/06/15

PRACTICE

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CASE NO. CA 90/98

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MICHAEL OTTO APPELLANT

versus

THE STATE RESPONDENT

CORAM: TEEK,J.P. *et* SILUNGWE, J.

Heard on: 1999.11.01

Delivered on: 1999.11.23

JUDGMENT:

SILUNGWE, J.: This is an appeal against both conviction and sentence.

The appellant was charged before the Windhoek Regional Magistrate's Court on an indictment containing two counts of rape and one of indecent assault. The first and second counts alleged that on August 3, 1997, at or near Brakwater in the District of Windhoek, the appellant unlawfully and intentionally had sexual intercourse with Johanna Basson, a 25 year old female, without her consent. The third count (whose particulars I have not been able to see) charged him with having indecently assaulted the said Johanna Basson on the same date and same place. He pleaded not guilty to all the counts. Having been tried, he was found guilty on the three counts and convicted as charged whereupon he was sentenced to 12 years imprisonment, 3 years of which were suspended on the usual conditions.

At his trial, the appellant was legally represented and his defence was a total denial of his involvement in the commission of either rape or indecent assault in this matter. He is now prosecuting this appeal in person but the respondent is represented by Ms Dunn.

The State led evidence from 6 witnesses, including Johanna Basson (hereafter referred to as the complainant), Emgard Mangani, the complainant's friend, and Dr Nadine Agnew, a senior medical officer responsible for examinations in rape cases; and performing forensic and academic autopsies.

The gist of the State case is that during the weekend of August 2-3, 1997, the complainant and her friend, Emgard Mangani, both of Okahandja, were visiting her sister, Anna Basson in Windhoek.

During the morning of Sunday August 3, 1997, the complainant and Emgard went out to Chester's shebeen. At about 12h00, they indicated to Chester their intention to look for a taxi so that they could get to the main road to catch a lift for Okahandja. Chester then approached the appellant with a request to take the two ladies up to a point where they could catch a lift back to Okahandja, an arrangement that the complainant later lived to regret. The appellant was agreeable.

The appellant drove the complainant and Emgard, overshot where they had intended to alight, went past van Eck Power Station and stopped under a tree. The appellant occupied the passenger's seat in front of the car while Emgard was in a back seat. The appellant got out of the car, went over to the complainant's side, opened the door, pulled her out and took her to the back of the car. Having torn the complainant's skirt and panty, the appellant pushed his fingers into her vagina, in full view of Emgard who had in the meantime come out of the car. When Emgard attempted to intervene, the appellant kicked her and she fled. The appellant then forced the complainant into the car and had sexual intercourse with her on the back seat without her consent. The complainant tried to struggle but to no avail.

Thereafter, the appellant took the complainant to a dry river bed where he once again had sexual intercourse with her without her consent. Subsequently, and at the appellant's behest, the complainant was made to suck his penis.

Later on, as the appellant drove in a township, the complainant, after an initial failure, succeeded in escaping and going back to her sister's house by taxi. The sister, Anna Basson, observed that the appellant looked strange and pale. On being asked what had happened to her, the complainant gave an account of her ordeal. The only attire she had on consisted of a shirt and a brassiere. Her panties were in her brassiere but the skirt was on her shoulder; she had sustained scratches; there was dust on her clothing; and she was crying. The police were alerted and the complainant was medically examined.

Emgard corroborated the complainant in material respects up to the time that she had taken to her heels and added that thereafter, the appellant picked her up in the vehicle and when she was in the back seat, she noticed that the complainant was traumatized, looking down and crying. That apparently offers an explanation as to why the complainant did not notice her presence on that occasion. When the appellant stopped and took the complainant towards the dry riverbed, Emgard seized the opportunity and once again fled.

Dr Agnew who examined the complainant at about 09h45 on August 4, 1997, observed signs symbolizing that the complainant had been sexually assaulted: the complainant's labia minora was swollen on both sides, she had a white creamy discharge, and contusions were present on her inner left thigh and on her knee.

The defence case was that, although the appellant had been at Chester's shebeen and had given a lift to the complainant and Emgard, he had neither had sexual intercourse with, nor indecently assaulted the complainant as alleged and that both the complainant and Emgard had told lies in this regard. He maintained he had driven around the township with the two ladies in an effort to obtain some money so that he could drive them to Okahandja and that, in the process, Emgard had become fed up and left the car. The appellant further maintained that there had been a conspiracy against him, involving the complainant, Emgard and Chester

because he had indicated to Chester that he had a big financial investment, their motive being that he would give them some money in return for dropping allegedly fake charges against him.

In his judgment, the learned Regional Magistrate rejected the appellant's defence and allegations of conspiracy; accepted the State evidence; and had no hesitation in convicting the appellant on all three counts.

In arguing his appeal, the appellant still maintains his defence as well as his allegations of conspiracy. I will later revert to this.

He uncharacteristically levels accusations against his legal representative whom he alleges acted without or adehering to his instructions. I feel it is wholly undesirable to make any comments on this allegation in the absence of any material to either confirm or controvert it. In any event, the presiding officer's attention was never drawn to the alleged conduct of the appellant's legal representative.

The appellant claims that the court *a quo* erred in convicting him, alleging that there were discrepancies between the evidence of the complainant and that of Emgard.

The learned Regional Magistrate was alive to this aspect as is demonstrated by the following excerpt from his judgment at (handwritten) page 183 lines 19-25:

"Furthermore there may be some difference in the evidence of State witnesses and I specially refer to the difference that the complainant was unaware that the witness Emgard was again in the vehicle before she was raped the second time. That can easily be (sic) explained and this difference in evidence of witnesses is indeed a clear (sic) indication to the Court that there is no conspiracy."

And at handwritten page 180 lines 20-30, the following appears:

"The witness Emgard's testimony confirms that of the complainant up to that point where she was kicked and she then left. From there she walked and then the accused person came from behind and again instructed her to get inside into the car. Of that the complainant was not aware that she was again in the car and that can be easily (sic) explained by the fact that the complainant was in the state of shock but she in any case witnessed the fact that the accused person dragged complainant out of the car to nearby bushes and that he again assaulted here there."

In any event, it is clear that whatever discrepancies exist between the evidence of the complainant and that of Emgard or of any other State witness are immaterial. It follows that the appellant's conviction cannot be faulted on that score.

I now return to the question whether the court *a quo* misdirected itself in its rejection of the appellant's defence of total denial and his allegations of conspiracy. This brings into focus the issue of credibility, which is pre-eminently for the trial court to decide. As a headnote in *R* v *Dhlumayo* 1948 (2) SA 677 (AD) aptly reads:

"The trial judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked."

And in *Swain v Society of Advocates, Natal* 1973 (4) SA 784 (A) at 790H - 791 A, van Blerk, JA. remarked:

"But as pointed out earlier this Court will be slow to disturb the factual findings by the Court *a quo* on oral evidence unless sound reasons justify interference."

Although there are no rules of law that define the circumstances in which a finding of fact may be reversed, it is nevertheless a matter of common sense rather than of logic that the appellate

court is impelled to recognise that the trial court is in many respects better placed to make such findings in that it is able to hear the witnesses and to observe their demeanour. Courts of appeal are thus reluctant to disturb findings based upon credibility. However, such findings may be disturbed where there has been a misdirection of fact, for instance, where the reasons given in support thereof are either unsatisfactory, in that they involve, *inter alia*, a clear *non sequitur;* or manifestly wrong, such as where a mistake of fact has been made or some relevant facts or probabilities have been overlooked.

It is evident, therefore, that where there has been a misdirection of fact, the appeal court is at large to disregard the findings of the court *a quo,* in whole or in part, according to the nature of the misdirection and the circumstances of the particular case, and to come to its own conclusion on the matter. See *R v Dhlumayo and Another (supra),* per Davis AJA at 701; and *Anchor Publishing Co (Pty) Ltd. and*

Another v Publications Appeal Board 1987 (4) SA 708(N), per Booyesen J at 731 F-G.

In the present case, it does not appear to me that there was any misdirection of fact. Hence, the court *a quo's* findings based upon credibility cannot be disturbed.

With regard to corroboration, the injuries suffered by the victim of a violent crime may furnish corroboration of his/her testimony; and so also may emotional distress shortly after the incident provided the trial court is satisfied that such emotional distress was genuine in the sense that it was indeed the result of the fact that the witness was the victim. See *R* v *Trigg* (1963) All ER 490; *R v Redpath* (1962) 46 Cr. App. R 319; *R* v *Knight* (1966) 1 WLR 230; and *S v Balhuber* 1987 1 PH H22 (A) 44.

In the matter under consideration, not only was Dr Agnew's evidence consistent with the complainant's version of having been raped, but the complainant's evidence was supported by Emgard in relation to the first aspect of her indecent assault and her emotional distress

following the commission of the first rape; and by Anna Basson with regard to her emotional distress after the commission of the crimes on all three counts. No allegation whatsoever has been made to suggest that the appellant's emotional distress was simulated. I am thus satisfied that the appellant's emotional distress was authentic.

On the facts of the case and, regard being had to the preceding discussions, I am left in no doubt that the appellant's conviction on all counts was justified and so the appeal against conviction on the said counts fails.

The only outstanding issue for consideration relates to sentence. The appellant complains that the presiding magistrate failed to take into account his personal circumstances, for instance, that he was a first offender; he was aged 40 years and that he had dependants.

However, the appellant's complaint does not rest on a valid basis because the court *a quo* treated his personal circumstances globally when it said at handwritten page 188, lines 25 -30:

"I will take into account your personal circumstances and your personal problems and I am well aware of the fact that if you are sent to jail there will be some suffering for your children and for your wife, for your whole family. But suffering and hardship (sic) are the children of crime."

Further, the appellant alleges that the presiding magistrate over-emphasized the seriousness of the crimes committed at the expense of his personal circumstances.

Once again, this allegation is devoid of merit. What the court *a quo* decided in this connection essentually boils down to the fact that he found that the nature and seriousness of the crimes committed outweighed the appellant's personal circumstances. Evidently, the complainant sustained some injuries, though not of a serious nature, as a result of the incidence of rape

perpetrated upon her by the appellant. To add insult to injury, the appellant's commission of indecent assault on the complainant was an abomination. All these crimes were taken together for the purpose of sentence. In the view that I take, the court *a quo's* discretionary imposition of the overall sentence of 12 years imprisonment cannot be faulted.

Finally, the appellant beseeches this Court to suspend one half or more of the sentence. But the nature and seriousness of the crimes committed and their prevalence which is judicially noticed - militate against the appellant's argument. In any event, I do not consider that the trial magistrate misdirected himself by the imposition of the custodial sentence without suspending any part thereof. This ground too fails.

The order that I make is this:

1. the appeal against conviction on all counts is dismissed; and

2. so also is the appeal against sentence.

SILUNGWE, J.

I agree.

TEEK, J.P.

ON BEHALF OF THF^APTFJXANT **IN PERSON**

ON BEHALF OF THF PF<u>SPONDFNT</u> **MS DUNN**

Instructed by: Office of the Prosecutor-General