



NOT REPORTABLE

CASE NO: CA 159/2007

IN THE HIGH COURT OF NAMIBIA

HELD AT WINDHOEK

In the matter between:

PIET TEM

1ST APPELLANT

SILIKA WITBEEN

2ND APPELLANT

THOMAS SIMBOA

3RD

APPELLANT

and

THE STATE

RESPONDENT

CORAM: HOFF, J *et* FRANK, AJ

Heard on: 29 May 2009

Delivered on: 29 May 2009 (*Ex tempore*)

Reasons on: 11 November 2011

JUDGMENT

1.1.

1.2. **FRANK, AJ:** [1] In this matter the appellants were convicted of rape and sentenced to 10 years imprisonment each by the Regional Court sitting in Gobabis. Although the appeal was lodged against both the judgment and sentence by all the appellants, the second appellant in the meantime has written a letter withdrawing his appeal and the appeal were thus just proceeded with by the first and third appellants. At the time of the hearing of the appeal, namely on 29 May 2009, we gave an order dismissing the appeal and indicated that the reasons would follow later. These are the reasons.

[2] [2] We should just mention at this stage that where we refer in this judgment to the appellants we refer to appellants 1 and 3 as appellant 2 was no longer party to these proceedings at the hearing of the appeal.

[3] [3] The notice of appeal in this matter was a fairly lengthy handwritten document and it is clear that the appellants received some assistance in the drafting of the notice of appeal. Despite the assistance being granted the notice of appeal contains a number of grounds which do not constitute grounds at all such as the ground that **“The learned Magistrate erred in the law and/or on the fact in finding that the stated proof the guilt of the applicants beyond a reasonable doubt”**. As pointed out in numerous cases this kind of ground does not constitute any ground at all because neither the Magistrate nor the respondent would know what findings in the judgment are actually being attacked. (See State v Wellington 1990 NR 20 (HC) at 22). Certain other grounds although constituting grounds on the face thereof were so totally without merit that they needed no further discussion and it is clear that these grounds were inserted without having insight into the record at all. For example, one of the grounds of appeal complains of the fact that the Magistrate hearing the matter did not explain to the appellants their right to legal representation and that this failure amounted to a fatal irregularity. It is however clear from the record that this ground is factually incorrect

and that the appellants were properly and fully apprised of their rights in this regard and this ground is totally without merits and could be ignored.

[4] [4] We mention one further ground which relates solely to the second appellant, namely that he was not allowed to call the witness he wanted to call and that this similarly amounted to a gross irregularity. As pointed out above the second appellant is not proceeding with his appeal and on this basis this ground need not be dealt with, although it must be stated for completeness sake that it is in any event factually incorrect.

[5] [5] In view of the number of grounds raised and not to be over fastidious it is suitable to briefly set out the facts and the findings of the Magistrate and deal with the appeal so as to put the whole matter in perspective. (See S v Zemburuka 2008(2) NR 737 (HC) at 732).

[6]

[7] [6] The complainant testified that she, accompanied by her sister and two other female friends went to a certain house which also served as a club and it was at this house that they were called aside by three young men outside who referred to them as “**cherries**”. One of the men at that stage had a kierie or stick with him. The demeanour of these three women were such that they were afraid to leave the house and especially after they at one stage attempted to

leave the house but were accosted by these three men, whereafter they ran back into the house where they stayed for a while.

[8]

[9] [7] Two of the girls met a male person whom they referred to as their uncle and left the house with their uncle. The complainant and her sister remained at the house and eventually persuaded another person who was a customer to accompany them to their house. When they alighted from the house the three men accosted them and even assaulted the person who went outside with them. The two girls managed to flee back into the house where they remained. The person who escorted them told the three men that they must leave the girls alone but they responded that the girls were theirs. However, this person then returned to the house.

[10] [8] Sometime later the girls persuaded the person who initially escorted them and another person to walk them to their home as they thought it was safe to do so because the three men that had accosted them earlier were not seen in the vicinity. These two customers then escorted the two girls up to a certain point whereafter they felt that they were near enough to their home and seeing that the three men were not in the vicinity, that they would be able to proceed further without the need of an escort. This turned out to be a mistake because as soon these two persons accompanying them had left, the three men appeared from behind the bushes and started chasing them. They screamed and started to run away.

[11] [9] The three men gave chase and one of the men tripped the complainant whereafter all three men involved grabbed her and dragged her into the yard of a house and behind the house where an old vehicle was standing. Her sister managed to run away and in the meantime went to seek assistance from the police. The men who dragged the complainant into the yard and behind the car, then in their separate ways assisted appellant no 2 to rape her. Before the rape, however, appellant no 2 sent them to the gate in the fence in the front of the house to see whether there were any people coming and when they reported that no one was coming, they assisted by holding her against the car so as to allow appellant no 2 to rape her. In the process she incurred certain injuries and after accused no 2 had raped her went to wet a cloth to stop the bleeding on her private parts.

[12] [10] She went back to her home where she immediately reported the rape. In the meantime her sister who had gone to call the police also arrived there with the police. The three accused persons were eventually arrested as being the three men involved in the rape. We need to mention here that between the accused persons one had a knife and another had stones. They threatened her to keep quiet otherwise they would cut their breasts off and even made threats that they would kill her if she resisted. She cried during the incident and also when she reported the matter after she returned

home.

[13] [11] The medical report by the doctor corroborates the version of the complainant in that she had injuries to her private parts and in the inside of her leg which was consistent with a violent sexual attack rather than consensual sexual conduct. She was furthermore corroborated by the person who initially escorted them and who also gave evidence along the lines that when he initially escorted her the three men accosted them and in fact even had an altercation with him because he was trying to protect the girls. As already indicated the complainant made an immediate report about the assault on her and in that sense her version cannot be stated to be a recent fabrication. I should just add here that all the people mentioned above as well as one of the girls who left prior to the complainant and her sister when they were accompanied by their uncle, identified the three appellants.

[14] [12] The question of identity is not really an issue because as will be come evident below, the appellants on their own version put them on the scene but in a different context.

[15] [13] The appellants' version were essentially that accused no 2 and the complainant were involved in a relationship and that he met her that evening with another man who wanted to know from him what his relationship with the complainant was. The complainant

jumped behind him to protect herself because this other man wanted to grab her claiming that she was his girlfriend and an altercation ensued. In this altercation the other two appellants appeared on the scene and dragged the parties apart, whereafter they all left on their own ways except that appellant no 2 left with the complainant and he and the complainant had sexual intercourse by consent thereafter at his house. According to him appellant no 1 and appellant no 3 went on their own way after the altercation with this other unknown person.

[16] [14] Needless to say for the Magistrate to have been able to convict the accused persons he had to reject their versions aforesaid. In our view he was fully entitled to do so and did not misdirect himself in any manner whatsoever. As already pointed out the injuries to the complainant and her conduct were totally inconsistent with consensual sex and so was the fact that she arrived at her house still bleeding and with the face cloth full of blood. As the Magistrate correctly pointed out if they were in a relationship she would have stayed with the accused until all visible signs of the sexual encounter had been removed. Furthermore it is clear that the other two appellants were on the scene and it is clear that they intended to act in concert with the second appellant. As the witnesses testified they were in a group and they attacked the first escort accompanying the girls and according to the evidence they all gave chase to the two sisters. Had complainant wished to implicate them falsely, she would have implicated them in the rape as well and in this sense would have

laid charges of a gang rape against all three of them.

[17] [15] According to appellant no 3 the complainant's parents who were against the relationship of the complainant with the second appellant laid the charges because of their opposition to the relationship. As the Magistrate correctly pointed out why would they then also lay charges against first and third appellants if they wanted to get at second appellant is nowhere explained and it is highly unlikely.

[18] [16] We are satisfied that all three the appellants were on the scene and that the events that transpired immediately up to the complainant being caught, which is corroborated by all the witnesses and the complainant's version up to that stage was correctly accepted by the Magistrate. The only question that arises is whether the complainant's version thereafter where she was a single witness should be accepted. In our view the Magistrate was fully entitled to do so despite the fact that she was a single witness. This is so because it is clear that the three appellants were together from earlier on that evening, that they acted in concert and the medical evidence corroborated the version of the complainant. Furthermore why the complainant would have wanted to implicate the first and third appellants if they did nothing to her, is simply not apparent and the fact that she did not implicate them any further than assisting the second appellant to subdue her to allow second appellant to rape her,

is in our view further indicative of the fact that the complainant was not exaggerating when giving evidence as to what was happening to her. As an Appeal Court we are not free to do as we please and the Magistrate was in a much better position to assess the evidence inclusive of the demeanour of the witnesses who appeared before him and we cannot find any fault or misdirection in the way the magistrate approached the matter and accordingly find that he was entitled to reject the version of the appellants.

[19] [17] As mentioned earlier on, the appellants were sentenced to 10 years imprisonment each and an appeal lies against the sentence. If regard is had to the fact that it was in essence a gang rape as the two appellants who did not actually take part in the sexual act clearly assisted the second appellant and in view of their prior conduct it is clear that this was the intention right from the word go we are not persuaded that the Magistrate misdirected himself in any manner whatsoever. The personal circumstances of the accused and the fact that they were first offenders, were taken into account by the Magistrate. In view of the prescribed sentences and the relevant circumstances in the matter we likewise cannot find any fault with the sentence imposed by him.

[20] [18] In the result and for the reasons aforementioned we dismissed the appeal.

FRANK, AJ

I agree

HOFF, J

ON BEHALF OF APPELLANTS:

In person

Instructed by:

ON BEHALF RESPONDENT

Adv. Nyoni

Instructed by:

Office of the Prosecutor-

General