



CASE NO.: CA 59/2010

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**DANIEL HERERO & ANOTHER**

**APPELLANTS**

and

**THE STATE**

**RESPONDENT**

**CORAM: MILLER, AJ et UNENGU, AJ.**

Heard on: 30 September 2011

Delivered on: 30 September 2011 (*Ex Tempore*)

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**JUDGMENT:**

**MILLER AJ:**

[1] It is well established that in order for an Application for Condonation for the late noting of an appeal to succeed there are two requirements which the Appellant must satisfy. The first is that there must be an acceptable and

reasonable explanation for the delay in filing the Notice of Appeal. The second requirement is that there must be reasonable prospects of success.

[2] I am satisfied that the Appellants have managed to succeed on the first requirement. It is on the second requirement that I come to the conclusion that the Appellants must fail.

[3] I am of the view that there are no reasonable prospects of success as far as the Appeal itself is concerned. Briefly state the evidence of the Complainant was to the effect that she was accosted in the street by three persons, two of those being the 1<sup>st</sup> and 2<sup>nd</sup> Appellants. She was dragged to a shack where according to her the 1<sup>st</sup> Appellant had intercourse with her and thereafter the 2<sup>nd</sup> Appellant likewise had intercourse with her. Her evidence is further to the effect that a third person who has since died also wanted to have intercourse with her, and in the process caused an open injury to her head which bled.

[4] It is common cause that 1<sup>st</sup> Appellant had intercourse with the Complainant and the only issue was whether such intercourse was with her consent or not. The issue between the 2<sup>nd</sup> Appellant and the State was whether intercourse between them took place at all.

[5] The Learned Magistrate in a well reasoned and comprehensive Judgment concluded that the State had succeeded in proving the charge beyond reasonable doubt against both the Appellants. She accepted the evidence of the Complainant as being true beyond reasonable doubt and rejected that of the Appellants as being false beyond reasonable doubt.

[6] In the absence of any misdirection on the part of the Learned Magistrate, there is no basis upon which this Court will interfere with the factual findings and credibility findings made by the Magistrate. It is apparent from a

perusal of the Learned Magistrate's Judgment that she took into account all relevant fact and the probabilities of the case. It is also clear from a reading of the judgment that the Learned Magistrate was alive to the issues and did not misdirect herself in any regard.

[7] For these reasons I conclude that there are no prospects of success and the Application for Condonation by each of the Appellants is refused and the Appeal is struck from the roll.

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**MILLER, A.J.**

I agree

**UNENGU, A.J.**

**ON BEHALF OF THE APPELLANTS In Person**

**ON BEHALF OF THE RESPONDENT**

**Instructed by:**

**Ms Esterhuizen**

**Office of the Prosecutor-  
General**