



CASE NO. CA 44/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WIGBERTH KAPINDI

APPELLANT

VS

THE STATE

RESPONDENT

CORAM: HOFF J *et* MILLER AJ

Heard on: 21 May 2011

Delivered on: 28 June 2012

CRIMINAL APPEAL JUDGMENT:

MILLER, AJ: [1] The appellant, who is represented before us by Mr. Tjituri, was convicted in the Regional Court on a charge of rape in contravention of Section 2 (1) of the Combating of Rape Act, Act 8 of 2006. He was sentenced to 10 years imprisonment of which 3 years imprisonment were conditionally suspended.

[2] The appeal lies against both the conviction and the sentence imposed.

[3] In support of the allegations made in the charge sheet, the state called several witnesses.

[4] The complainant, Annatjie Wasserfal testified that she, her sister and the appellant went to a shebeen on the day in question and returned to the home where the complainant, her sister and the complainant's brother-in-law lived.

[5] After they had spent some time together, her brother-in-law pushed the appellant out of the room and closed the door. The occupants of the house then returned to bed.

[6] Some time later the appellant returned to where she was sleeping. His intention according to her was to have sexual intercourse with her, an act she was not prepared to give consent to. The appellant pinched her thighs in order that she may open them and partially pulled down her trousers. He then inserted his finger into her vagina. The complainant raised the alarm and eventually some help arrived. The appellant then hurriedly dressed himself and left wearing his clothes inside out.

[7] Her version as to the circumstances in which the appellant was found was corroborated by the witnesses who found him there. In addition a medical report confirmed that there were bruises on her thighs.

[8] The appellant in his testimony admitted to having been in the company of the complainant earlier in the evening. He denies having returned later. He denied

having been found in the room by the witnesses who testified to having found him there.

[9] According to the appellant he had consensual intercourse with the complainant on previous occasions. The allegations leveled against him are false and because he refused to give the complainant money when she asked for it.

[10] The complainant's evidence in regard to what occurred between her and the appellant is that of a single witness. The approach adopted by Liebenberg J in ***Joel Kambala v The State CA 74/2010*** is appropriate in considering this issue. I refer to the following passage:

““Because of the inherent danger of relying exclusively on the sincerity of the single witness, this has evoked the judicial practice that such evidence should be approached with caution and only be relied upon where such evidence is clear and satisfactory in material respects. Thus, although the court in terms of s 208 of the Act may convict the accused on any offence on the single evidence of any competent witness, such evidence should be treated with utmost care and may only safely be relied upon where it is supported by some satisfactory indications that is trustworthy. However it need not be satisfactory in every respect and it may safely be acted upon even where it has some imperfections – provided that the court at the end is satisfied that the truth has been told.”

[11] The learned magistrate found in favour of the appellant that at some stage there may have existed a relationship between himself and the complainant despite the fact that the complainant denied it. The learned magistrate came to the conclusion however that on the totality of the evidence the State had succeeded in establishing the commission of the offence beyond reasonable doubt.

[12] In my view that finding cannot be faulted. The bare denial by the accused that he had touched the complainant coupled with his further denial that he was not found at the scene flies in the face of persuasive and acceptable evidence to the contrary.

[13] He was also at a loss to account for the fact that the complainant suffered bruises to her thighs.

[14] In my view the magistrate's finding that the evidence of the appellant is false beyond reasonable doubt cannot be faulted.

[15] It follows that the appeal against the conviction must fail.

[16] I turn to the appeal against the sentence imposed.

[17] The learned magistrate found that there were no "compelling and substantial circumstances" as defined in Act 8 of 2007. I agree with that

finding. Such a finding prohibited the magistrate from suspending any portion of the sentence imposed.

[18] Mr. Tjituri who appeared for the appellant submitted that in the absence of an appeal by the State, this Court is not entitled to address the issue. The submission is not well founded. I agree with Parker J who stated the following in ***William Kaluma v The State CA 6/2010***:

“The fact that the State did not appeal against the sentence does not *ipso facto* mean that the Court is prohibited from considering it, and in considering it, close its eyes to patent irregularity or misdirection committed by the trial court in the interpretation and application of the relevant provision of the Act.”

[19] In the result I make the following order:

1. The appeal against the conviction is dismissed.
2. The sentence imposed is set aside and substituted with a sentence of ten (10) years imprisonment.

MILLER AJ

I agree

HOFF J

ON BEHALF OF THE APPELLANT: Mr. Tjituri

INSTRUCTED BY: The Directorate of Legal Aid

ON BEHALF OF THE RESPONDENT: Mr. Nyambe

INSTRUCTED BY : Office Of The Prosecutor General