CASE NO.: CA 65/2010

IN THE HIGH COURT OF NAMIBIA

HELD AT WINDHOEK

In the matter between:

TITUS WILLEM
APPELLANT

And

THE STATE
RESPONDENT

CORAM: **NDAUENDAPO, J *et* SHIVUTE, J**

Heard on: 2011 July 29

Delivered on: 2012 June 15

APPEAL JUDGMENT

SHIVUTE, J: [1] The appellant person stood charged with rape in contravention of section 2 (1) (a) of the Combating of Rape Act, 2000 (Act 8 of 2000) and corruptly accepting gratification (as a reward) in contravening section 33 (b) read with sections 32, 46, 49 and 51 of the Anti Corruption Act, 2003 (Act) 8 of 2003. He was convicted of rape and acquitted on the charge of corruption or accepting gratification in the Regional Court Otjiwarongo.

[2] He now appeals against the conviction and the sentence of 15 years'

imprisonment imposed on him.

GROUNDS OF APPEAL

[3] Grounds for an appeal are state below:

The grounds of appeal against the conviction are many but they may be summarized by saying that it is contended that the trial court misdirected itself in law and in fact which misdirection led it to an allegedly wrong conclusion that the State had proved the guilt of the appellant beyond reasonable doubt.

[4] The State was represented by Mr Konga and the Appellant was represented by Mr Kauta.

SUMMARY OF EVIDENCE

[5] The evidence may be summarized as follows:

On 07 March 2007 the complainant was given a lift by the appellant who was driving a government motor vehicle on Otavi – Otjiwarongo main road between 19h00 and 20h00. The Complainant was supposed to be dropped off at Conradie Farm, located between Otavi town and Etunda Service Station in Otavi district. When the Complainant boarded the vehicle the accused allegedly asked her how much she normally paid for the trip. The Complainant indicated that she pays N$5.00 which she paid. When the Complainant reached her destination she indicated to the Appellant to stop but the Appellant failed to stop and allegedly said:

"I am not going to stop here, I am going to have sex with you today." The Appellant drove past the farm towards Etunda Service Station. But, before he reached Etunda Service Station he pulled off the road and stopped at a

resting place under a tree.

[6] He told Complainant to get off the motor vehicle, grabbed her and ordered her to take off her clothes or he would kill her. Because Complainant was scared, she obeyed the appellant's orders. The appellant also took off his clothes and they had sexual intercourse near the railway line. Whilst the appellant was having sexual intercourse with the complainant, the appellant was holding her from behind and she was in a stooping position. He had sexual intercourse with her twice. The complainant did not scream or put up a fight because she was scared of the appellant. After the appellant had had sexual intercourse with her, he ordered her to get into the vehicle and he drove towards Etunda Service Station. As they were reaching Etunda, the complainant grabbed the appellant by the shirt and started to scream. The appellant stopped the vehicle. Complainant took a logbook that was in the vehicle and jumped out.

[7] The Complainant ran away with the book. The appellant allegedly called the complainant saying that she should come back so that they could talk but the complainant kept on running and went to Etunda Service Station. At Etunda Service Station she reported to the police officer by the name Nande that she was raped by the owner of the book and gave the book to Nande. After she reported, Otavi police came to fetch her and took her to Otjiwarongo police station to identify the culprit. Thereafter the complainant took the police to the place, where she says she was raped. There they found an empty packet of condoms and two condoms one with sperm inside. After the appellant had had sexual intercourse with the complainant he threw the condoms away and a piece of green cloth which he used to clean himself. According to the complainant, she did not have consensual sexual intercourse with the appellant, she could not have any agreement with him because she did not know him before. The appellant forced her to have sexual

intercourse with him.

[8] The appellant had no right to do what he did to her as she was just a person who was looking for a lift. Through cross-examination it transpired that when the appellant left the vehicle he had a packet of condoms with him. When he ordered the complainant to take off her clothes he was opening the packet. When complainant was wearing her clothes she saw the appellant throwing a condom on the grass. Complainant was asked whether the appellant said something during the ordeal. Complainant responded that the appellant said something because he wanted to have sexual intercourse with her by anus and she said "No". He again said he wanted to have sexual intercourse with her by anus and again she refused. Thereafter he kept on saying he wanted sexual intercourse by anus but when he eventually started having sexual intercourse with her she felt that it was not by anus. The Complainant fell onto her knees and she held with her hands on the ground.

[9] The complainant denied that she stroked the appellant on his thighs. Complainant further testified that it was not correct that the appellant had refused to pay her for sexual intercourse, and that she did not get out of the car because appellant refused to pay her or he said he had no money to pay her. It was further the complainant's evidence that she had a plastic containing children's goods when she took a lift from the Appellant but she forgot to mention it in her statement. Complainant was asked the following:

> "I put it to you that the only reason why we are here is because an agreement between you and accused went sour"…Yes.

Court : *"Do you understand the question"?" ..No*

Ms Nambinga: *"I put it to you that the reason why you reported him to the police is because he failed to pay you." Yes*

Court: What is yes.

Interpreter: She confirmed what was said she said yes. I said the reason why you went to (intervention)

Court: *"Are you listening, do you understand the question."*

Repeat the question. He refused to pay you …No.

> Ms Nambinga: *"I put it to you that you went and reported him to the police because you wanted vegeance against him for failing to pay you? …No.*

It appears there was a misunderstanding between the interpreter and the complainant when the complainant answered yes to counsel for the appellant when she first asked the above question.

Complainant stated further that there was no consent and she did not run away because she was scared. In re-examination the complainant said she believed that the Appellant would carry out his threats because she had heard about people that were raped and killed.

[10] Police officer Nande testified that complainant reported to him that she had been raped. Complainant appeared to be frightened when she narrated her story to him. He also confirmed that he was given the logbook by the Complainant. R Dauseb testified that from the place where the Complainant took a ride to the place where she was supposed to be off loaded was 26.4 km. From farm Conradie gate to the place where the alleged offence took place was 2.1 km. The distance between the crime scene and Etunda Service Station is 4.7km.

[11] On the other hand the appellant testified that when the complainant came into the vehicle she offered him N$5.00 but Appellant did not accept it. When the Appellant was driving, the complainant allegedly started to caress the appellant on his thighs. The appellant told the complainant to stop but she did not want to. The appellant asked her how far the farm she was going was and she then said she would go through Etunda. As they were about 3 – 5 km from Etunda, the complainant allegedly asked whether they could not have sex. He stopped at the resting place and complainant went to see where they could have sex. Appellant stopped because complainant was allegedly insisting that they must have sex. They then both allegedly agreed

to have sex. The accused put on a condom but it was not properly put on as it was worn inside out. The appellant then sent the complainant to go to the glove box to get a condom. She brought it and proceeded to have sexual intercourse. The complainant was in a bending position when they had sexual intercourse.

[12] After they had sexual intercourse, they went to the vehicle and drove on the main road. Complainant wanted N$200.00 because she had sex with him. The appellant told her that he did not have N$200.00; he only had N$50.00. She said she was going to Etunda and he must stop at Etunda. The Complainant refused to accept the N$50.00. She appeared to be angry. Before the appellant stopped at Etunda, she opened the door and the glove box and grabbed a book from there, the appellant did not try to stop her because there was an oncoming vehicle. Appellant drove up to Otjiwarongo. The appellant further testified that the logbook was not on the dashboard it was in the glove box because if you put it on the dashboard it would fall off. The appellant denied having threatened the Complainant. When the Appellant was asked in cross-examination why he did not ask the complainant to get out of his vehicle when she started to caress him, the appellant responded that “it was dark, it is a woman and it is not safe”. The appellant further testified that he did not follow the complainant in order to get his book because he thought he would just get another book for the vehicle. The appellant did not comment when it was put to him that he failed to follow the complainant when she ran away with the logbook because he had a guilty conscience; he knew that he raped the Complainant; he was afraid that should he follow her or run after her, the people at Etunda were going to get

him and arrest him for the rape.

[13] It was again the appellant's testimony through cross-examination that when he failed to give the complainant the money, she said the Appellant would see what she would do.

[14] The appellant called a witness, Mr Engelbrecht, who testified that he had driven the motor vehicle that was being driven by the appellant before and that it was not possible to put the logbook on the dashboard because it sometimes falls off when the car turns. They usually kept it in the glove box. However, I must point out immediately that this witness was not in a position to tell where the logbook was placed that day because he was obviously not present. His evidence could therefore not take the appellant's case any further.

ARGUMENTS OF COUNSEL

[15] It has been argued by the appellant's counsel that the learned magistrate made two factual and legal findings which were wrong namely: That the appellant did not reduce the speed and that is why the complainant jumped out of the vehicle and that Constable Nande's evidence corroborated the complainant's version. The factual finding relating to the speed and the basis why the complainant jumped was wrong and had no foundation in evidence. The fact that Constable Nande corroborated the complainant was wrong in law.

> *"But the fact that the complainant's evidence accords with the evidence of other state witnesses on issues not in dispute does not provide corroboration."*

This Court was referred to the case of *S v Gentle* 2005 (1) SACR 420 at 421 paragraph (18) for the above proposition.

[16] With regard to the aforementioned argument, there is no evidence on record which indicates that the appellant did not reduce the speed and that is why the complainant jumped out of the vehicle. In fact it was the complainant's testimony that when she saw the service station, that is when she got the courage to grab the accused on his shirt or jersey and screamed because they had already by passed the farm where she was going and the appellant was going in a different direction and she was thinking about where the appellant was taking her.

The learned magistrate misdirected herself by saying that the appellant did not reduce the speed and that was the reason the complainant jumped out. The appellant in fact stopped. However, there is evidence that she opened the door whilst the car was moving.

[17] Concerning the argument that the magistrate misdirected herself by finding that constable Nande corroborated the complainant was wrong. I do not agree with counsel for the defence. What Nande testified about was not in accord with the evidence of the defence. It was about issues such as whether the complainant had made a report and the appearance of the complainant when she made a report to him. The proposition of Gentle's case *(supra)* is not correct. Nande's evidence amounts to the corroboration of complainant's evidence and it is relevant to show consistency on the part on the complainant.

[18] Counsel for the appellant further argued that the learned magistrate erred in fact by finding that the appellant pulled the Complainant out of the vehicle and took the condoms. This inculcated the learned magistrate's mind that there was coercion and therefore no consensual intercourse. The learned magistrate made no attempt to assess the two versions concerning the condoms. The appellant's version being that he took one condom which he used at the first instance of consensual sexual conduct but he wrongly put it on. The Appellant stated that he sent the complainant to retrieve it from the vehicle.

[19] The learned magistrate did not misdirect herself by finding that the appellant pulled the complainant out of the vehicle and took the condoms. Complainant testified that the appellant told her to get off the motor vehicle, grabbed her and ordered her to take off her clothes. This became clear through cross-examination at page 30 when Ms Nambinga put the following to the complainant.

"You indicated that the accused pulled you out of the car and then

> *threw bushes next to the railway track. He pulled you out of the car I want to know, between the car and the railway line what was his demeanour towards you? "Did he hold you? The complainant answered that "the accused grabbed me on my clothes and then he pulled me out, but after he ordered me to undress and from that point to the railway line I was scared and I just walked on my own together with him".*

[20] Concerning the condoms it was the version of the complainant that the appellant had the packet of condoms with him when he left the vehicle. See record page 26 line 27. In the light of the above it could not be said that the learned magistrate had misdirected herself on this point. Furthermore, the appellant alleged that he sent the complainant to collect a condom from the motor vehicle, this piece of evidence was never put to the complainant through cross-examination in order for her to be afforded an opportunity to confirm or to dispute. Counsel for the defence by implying that the fact that the magistrate made a finding that the complainant was pulled out of the vehicle inculcated the learned magistrate's mind that there was coercion and therefore no consensual intercourse, appears to be misplaced because coercive circumstances in this case does not only lie on the fact that the complainant was pulled out of the vehicle. Complainant also testified that the appellant threatened to kill her should she refuse to have sexual intercourse with him. As counsel for the respondent rightly pointed out that in terms of section 2 (2) (b) of the Rape Act, "coercive circumstances" includes: threats (whether verbally or through conduct) of the application of physical force to the complainant or to a person other than the complainant.

[21] The argument went on that, based on incorrect factual foundation the learned magistrate essentially rejected the version of the appellant and she again misdirected herself by finding that the complainant jumped out of a moving vehicle. The learned magistrate further drew an incorrect inference that the reason why the appellant did not pursue the complainant when she ran out with the logbook was because he had something to be scared of. It was again the argument of counsel for the appellant that the *court a quo* failed to apply the two cardinal rules of logic as set out in *R v Blom* 1939 AD at 202-3 and in *S v HN* 2010 (2) NR 429 at 430 (A-B) and 443 G-I.

[22] It is clear from the evidence that the learned magistrate misdirected herself by making a finding that the complainant jumped out of a moving vehicle because it is not supported by evidence. Having found that the learned magistrate misdirected herself as earlier stated, the question to be considered is whether the nature of irregularity vitiates the conviction. When there is a misdirection by the *court a quo*, the appeal court is at large to look at evidence afresh.

[23] The explanation by the appellant why he did not follow the complainant to retrieve the book that he would get another book is farfetched. The log book has been assigned to his vehicle and he must account for it. There was an opportunity for him to retrieve it because he knew the person who removed it and where she could be found. The fact that he did not follow the complainant to get the book is an indication that he had something to hide. He wanted to stay clear of the complainant. For these reasons I do not find any misdirection on the part of the learned magistrate by concluding that the appellant by failing to pursue the complainant was because he had something to be scared of.

[24] Counsel for the appellant argued further that logic dictates that it is incredible that a rapist will provide transport to a person he just raped to a safe haven, in this case Etunda Service Station and then allow the victim to alight with his identification, namely a log book. The only inference to be drawn under these circumstances is that the appellant did not seek to hide anything because:

(a) there was no point in retrieving the log book as he could get another one at his employment.

(b) even if he had followed the complainant, in view of their discussion about money the absence of banking facilities would have made it impossible

for him to pay.

(c) if the appellant has chased after the complainant, the inference would have been that he was trying to hide his criminal conduct. The appellant was not scared but cooperative.

[25] With regard to counsel for the appellant's argument that the appellant took the complainant to a safe haven. It is not correct to say he took her voluntarily to a safe haven. The appellant stopped the vehicle only after the complainant opened the door whilst the vehicle was in a moving motion.

Counsel for the appellant suggested that even if he had followed the complainant, in view of discussion between the appellant and the complainant about money the absence of banking facilities would have made it impossible for the appellant to pay the complainant. There is no evidence on record which says that there were no banking facilities at Etunda Service Station. Furthermore the explanation by the appellant that the complainant demanded N$200.00 from him after they had sexual intercourse is farfetched. The appellant is implying that the complainant pretends to look for lifts in order to ambush drivers and induce them to have sexual intercourse for reward. If that was the intention of the complainant to get money from drivers in return of sexual intercourse she could have demanded the money before she had sexual intercourse with the appellant.

[26] Again counsel for the appellant argued that the only inference that could be drawn if the appellant had chased the complainant to retrieve his log book would have been that he was trying to hide his criminal conduct. The appellant was scared but cooperative. If the appellant had followed the complainant to retrieve his log book it would have showed innocence in that if the complainant had accused him of rape he would have denied it before Nande and others. Furthermore I failed to understand how the appellant was said to be cooperative towards the complainant if he refused to drop off the complainant at Farm Conradie where she was going.

[27] It was again a point of criticism by counsel for the appellant that the *Court a quo* did not warn itself that the complainant was a single witness. With this misdirection and considering the legal position with regard to single witness, the State had failed to prove its case beyond reasonable doubt. The

correct approach is to test her version by searching for corroborating facts. Corroborating evidence must emanate from an independent source, and not from complainant as that would amount to self-corroboration. Corroborating piece of evidence in this matter is the medical report. The learned magistrate allegedly ignored this evidence. The complainant being a single witness, the learned magistrate misdirected herself in not assessing whether the medical report which was handed in by agreement corroborated that she was raped. In assessing corroboration it is important to assess whether there was forced penetration or any other injuries and the general condition on the complainant in this case, her clothing. If the complainant was raped twice and she had fell on her knees she was supposed to have injuries. According to the medical report the conclusion was inconclusive with respect to rape. Furthermore the learned magistrate failed to deal with the issue of the "children's" clothes which is a non corroborating factor. Counsel for the appellant proceeded to argue that the complainant in her testimony used phrases like "he had sexual intercourse with me", he inserted his male organ into my female organ", and that he" slept with me". The complainant never used the word rape. The complainant did not scream or put up a fight. She did not run away at the railway line or when she alighted from the motor vehicle. She undressed herself. The complainant only refused anal sexual intercourse. The complainant laid the rape charge only because the appellant failed to pay her. She did nothing to indicate to the appellant that she was not consenting to sexual intercourse.

[28] Although the learned magistrate did not say explicitly that she warned herself to the evidence of a single witness, she looked at the entire case, the credibility of the appellant and the complainant as well as the probabilities. She said the version of the appellant has too many question marks. It raises a lot of doubt and came to the conclusion that it was false. The appellant and the complainant did not know each other. The probabilities are highly unlikely that the complainant would propose to have sexual intercourse with the appellant. The criticism directed to the complainant that she consented because she did nothing to resist the appellant from having sexual intercourse with her and that she did not scream, these people met along the road at night. It was pointless for the complainant to scream. As the appellant put it "it was dark she is a woman and it was not safe". Who would have come to her rescue? One should not be an armchair critic.

[29] It is absurd to say that the complainant only refused to have sexual intercourse by anus and consented to do it otherwise and the fact that the complainant never used the word rape. Complainant testified that the

appellant threatened to kill her should she refuse to have sexual intercourse with him. She believed that the appellant was capable of killing her because she had heard stories of people who had been raped and killed. The complainant essentially submitted she could not resist because she was afraid. Whether the complainant had mentioned that she was raped this would not prove the charge of rape by mentioning the word rape alone. Rape is a technical word. It is up to the trier of facts to assess and evaluate the entire evidence and come to a conclusion whether the evidence before her amounts to rape.

[30] Counsel for the appellant argued that in assessing corroboration she failed to assess the medical report whether there was forced penetration or any injuries and the general condition on the complainant and her clothing. The complainant is a mother of three children she testified that she did not resist the appellant when the appellant was having sexual intercourse with her. She was afraid. She submitted to the threats of violence, in those circumstances one does not expect injuries due to forced penetration because she simply gave in. Concerning the appearance of the complainant, the learned magistrate found corroboration in the evidence of Nande when he said the complainant appeared to be frightened and disturbed. Concerning the injuries which was supposedly to be on her knees, that does not seem to be strange because even when she jumped out of the vehicle there is evidence from the appellant that she fell on the road but there is no evidence on record that she sustained injuries. The argument that the medical evidence was inconclusive to rape seems to loose sight of the provisions of the Rape Act. Sexual act as defined in section 1 of Act 8 of 2000 includes the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person. It is not a requirement for one to suffer injuries to be said that she was raped. It is common cause that it is not disputed that sexual intercourse took place. Concerning children’s clothes this piece of evidence is not material.

[31] Having considered the whole evidence of this matter and having considered the misdirection of facts by the learned magistrate as earlier stated, the irregularities committed by the magistrate do not vitiate the conviction. I am satisfied that the magistrate applied her mind properly in considering the evidence of the single witness and she properly evaluated two mutually destructive evidence and decided that the complainant was a truthful witness. In the presentation of complainant’s testimony there was no material contradiction that could lead to her evidence being unreliable.

She chose the version of the complainant at the expense of the other. This court is satisfied that there is sufficient evidence to warrant a conviction and did not find misdirection on the part of the learned magistrate by convicting the appellant.

[32] With regards to sentence, counsel for the appellant continued to argue that the learned magistrate failed to take into account the personal circumstances of the appellant, that he was a first offender; employed; married and that there was no violence in this matter. Therefore the sentence imposed was unreasonable that no reasonable court would have imposed it.

[33] Counsel for the respondent argued that the magistrate misdirected herself by sentencing the appellant to 15 years' imprisonment as the circumstances under which appellant was convicted provided for a minimum of 10 years' imprisonment as it falls under category mentioned in Section 2 (1) (a) and 2 (1) (b) of the Act. The magistrate ought to have imposed, 10 years' imprisonment as the circumstances under which the appellant was convicted does not fall within the ambit of being given 15 years' imprisonment.

[34] The argument by counsel for the respondent appeared to be misplaced because the provisions of the Act provided for the minimum sentence of imprisonment of not less than 10 years. This does not mean that the court should impose a sentence of 10 years' imprisonment. The court is at liberty to impose any sentence from 10 years and above depending on the circumstances of each case.

[35] In *S v Tjiho* 1991 NR 361 (HC) at 364G-H Levy J pointed out that a trial court had a judicial discretion in sentencing the accused. The learned Judge went on to state as follows:

> *". This discretion is a judicial discretion and must be exercised in accordance with judicial principles. Should the trial court fail to do so, the appeal Court is entitled to, not obliged to, interfere with the sentence. Where justice requires it, appeal Court will interfere, but short of this, Courts of appeal are careful not to erode the discretion accorded to the trial court as such erosion could undermine the administration of justice."*

Conscious of the duty to respect the trial court's discretion, Levy, J in *S v Tjiho*

(supra) at 366A-B listed the following guidelines which will justify such interference. The appeal court is entitled to interfere with the sentence if:

i) "the trial court misdirected itself on the facts or on the law;

an irregularity which was material occurring during the sentence proceedings;

the trial court failed to take into account material facts or overemphasized the importance of other facts;

the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that would have been imposed by the court of appeal."

[36] In this matter there are no substantial and compelling circumstances placed before the court. I do not find any misdirection on the approach of the *Court a quo* on the contended ground. Rape is a serious offence irrespective whether the complainant had suffered injuries or not. The complainant's human dignity has been seriously violated and her privacy has been invaded. The fact that the appeal court could have imposed a different sentence does not mean that the learned magistrate did not exercise her discretion judiciously. In the light of the provisions of the Rape Act, regarding sentence; the magistrate in this case may impose a sentence from 10 years imprisonment up to 15 years' imprisonment. It could not be said that the sentence imposed is so startlingly inappropriate that it induces a sense of shock or unreasonable. I would therefore dismiss the appeal.

[37] In the result the following order is made:

The appeal is dismissed.

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SHIVUTE, J

I agree

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NDAUENDAPO, J

ON BEHALF OF THE STATE	Mr Konga
Instructed by:	Office of the Prosecutor-General
ON BEHALF OF DEFENCE	Mr Kauta
	Dr Weder, Kauta & Hoveka Inc.