NOT REPORTABLE

CASE NO: CA 83/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ROBERT KATJIRUOVA **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: HOFF, J *et* SWANEPOEL, J

Heard on: 23 January 2009

Delivered on: 23 January 2009 (*Ex tempore)*

Reasons on: 20 March 2012

APPEAL JUDGMENT

HOFF, J: [1] The appellant was convicted in Regional Court sitting in Gobabis of contravening section 2 of the Combating of Rape Act, 8 of 2000 in that he raped the victim under coercive circumstances at Grobelaars post, Otjimbinde in the district of Gobabis. He was sentenced to 15 years imprisonment.

[2] The appellant appealed against his conviction and sentence. This Court on 23 January 2009 upheld the appeal and set aside the conviction and sentence. These are the reasons.

[3] The victim according to the charge sheet was 9 years old when the incident occurred and I shall refer to her as the victim.
The State called five witnesses.

[4] The first witness, Ella Kawami testified that she is the biological mother of the victim who was born on 4 May 1995. During the school holidays of December 2003 to January 2004 she was sent to visit her father who resided at farm Grobelaars post also known as post Oshurushanja, Otjimbinde communal area in the district of Gobabis. When the schools opened in January 2004 she was informed by her eldest daughter, Nancy Kawani that the victim had reported to Nancy that she had been raped. This report was made to her (i.e. the biological mother) on 23 February 2004. When confronted, the victim confirmed this, stating that it was the appellant who had raped her behind her father's homestead. She subsequently took the victim to a clinic and to a gynaecologist.

[5] During cross-examination this witness testified that the appellant had admitted to her and her husband that he had raped the victim and that he would make amends but later reneged stating that he would not do what they requested and that they could proceed to inform the police should they wish to do so. The appellant denied that he admitted that he raped the victim.

[6] The second witness was the victim who was eleven years old when she testified and was admonished by the Court to tell the truth.
She testified that on the day of the incident she was alone at her father's house when the appellant arrived there. He pulled her on her arm to the back of the house where he

pulled off her panty and removed his trouser. He had her mouth covered with his hand. The appellant pushed her to the ground, was on top of her and inserted his penis into her vagina. Afterwards she could not walk properly and staggered. Her leg and bladder pained. She was alone at home because her father and others went to a horse racing event at Tallismanus. She did not tell her father and stepmother because she was shy. After the holidays on their way back to school she told her elder sister in Tallismanus that she had been raped by the appellant . The incident had occurred during midday.
During cross-examination the appellant denied that he had visited her father's homestead and denied raping her.

[7] The third State witness was Nancy Kawami, the elder sister, who testified that she came to know about the rape when she was called by her stepmother, at Post Oshurushandja, and was instructed to have a look at the victim's private parts because the stepmother had detected a bad smell. She observed lacerations on the victim's private parts. She asked her what had happened but the victim refused to tell them. The victim was crying. Her stepmother took the victim to the clinic at Tallismanus. Later during the holidays on their way back to school the victim told her that she had been raped by the appellant.

[8] Flora Makari the fourth witness, testified that she is married to the victim's father. The appellant is known to her as the uncle of her husband. The appellant resided at the same post. During the school holidays she and her husband attended a horse racing event in Tallismanus and sent the children including the victim to their grandmother's house. The grandmother had to look after the children in their absence. They returned from Tallismanus on the same day i.e. the Saturday and the next day she detected a bad smell coming from the victim. She observed that the victim was limping. She enquired from the victim why she was limping and was informed by the victim that there was a thorn in her foot. She informed her husband about the bad smell and the limping, and the

husband instructed her to call Nancy to have a look at the victim. The victim first refused to pull off her panty when instructed to do so by her elder sister. When she was confronted about why she was refusing to pull off her panty she decided to pull off her panty. She inspected the private parts and observed that it was reddish inside. She informed her husband about this observation who confronted the victim. The victim was crying. The victim was then taken to Tallismanus where a nurse examined her. The nurse informed them that the victim had an infection and treated the victim.

[9] During cross-examination she testified that the horse-racing event was on 3 January 2004.

[10] The last State witness was Godfried Hoveka, the father of the victim. He confirmed that during the school holidays he went to a horse racing event and left the children at home. After they had returned from Tallismanus his wife informed him about a bad smell emanating from the private parts of the victim and that the victim was limping. The victim was taken to the clinic and he was informed by his wife that the victim had an infection in her private parts which could have been due to environmental factors since it had rained and the bushes were wet. The victim was treated in accordance with a prescription they received at the clinic. The victim subsequently returned to school in Windhoek. Afterwards he was informed by the mother of the victim that the victim had been raped by the appellant. He confronted the appellant about this allegation. The appellant denied that he had raped the victim but offered to assist regarding the medical treatment because they were relatives. According to him the appellant was prepared to travel to Windhoek to give money to the mother of the victim. He however did not keep this promise.

[11] During cross-examination the appellant put it that they were not on speaking terms since November 2003 because the appellant had loaned money to the witness for the

purchase of goats and the witness subsequently refused to repay him. This was denied by the witness.

It was also put to the witness that he had informed the appellant that he would put the appellant in trouble from which he would be unable to escape. This was denied by the witness. The appellant also questioned the period of time (i.e. eight months) it took for the charge of rape to be laid against him.

[12] The State then closed its case. This was on 26 October 2006. The presiding magistrate then questioned the prosecutor about the availability of the medical doctor who had examined the victim. The prosecutor informed the magistrate that the victim was examined in Windhoek by a doctor and the case was then postponed until 21 November 2006.

[13] On 21 November 2006 the prosecutor informed the Court that the State would call no further witnesses but wished to hand up two health passports which related to the victim in this case. These documents were handed up in terms of the provisions of section 4 of the Criminal Procedure Amendment Act, Act 24 of 2003 which reads as follows:

> "4. Section 212 of the principal Act is amended by the insertion of the following subsection after subsection (7):
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> 7(A) (a) Any document purporting to be a medical record prepared by a medical practitioner who treated or observed a person who is a victim of an offence with which the accused in criminal proceedings is charged, is admissible at that proceedings and *prima facie* proof that the victim concerned suffered the injuries recorded in that document."

[14] The Court marked those two documents as exhibits whereafter the prosecutor for a second time indicated that the State was closing its case. The matter was then postponed until 27 March 2007.

The appellant testified and denied that he had raped the victim. He stated that the victim's father owed him money regarding goats purchased by the victim's father. On the day of the incident he was accompanied by one Issie Kamutwetwe on their way to attend a horse racing event in Tallismanus. They returned the next day around 10h00. He repeated that the victim's father had informed him that he would get him into trouble and that is why he thought that the charge of rape was laid against him. He testified that he was confronted in Windhoek where they (i.e. the biological mother and father) demanded payment of seven head of cattle in order not to report the matter to the police. According to him he informed them that he would not pay seven head of cattle for something which he knew nothing about.

[15] Issie Kamutwetwe confirmed that he accompanied the appellant on horseback to Tallismanus where they attended the horse racing event, that they overnight there, and that they returned the next morning.

[16] The magistrate in her judgment summarised the evidence of the State witnesses and that of the appellant and his witness. The magistrate referred to the conflicting evidence between the appellant and his witness. She pointed out that they could not provide the date when they so travelled to Tallismanus for the horse racing event and that their versions differed as to where they had spent the night. She recounted that the victim was able to explain in detail how and where she was raped. The magistrate referred to the uncontested evidence about the bad smell emanating from the victim and that at some stage the victim had difficulty walking.

[17] The magistrate remarked that the appellant's version that the charges were laid because of a misunderstanding between the father of the victim and the appellant didn't make sense because the father only heard about the allegations of rape after the victim and her sister had left for Windhoek. The magistrate further found that the victim could not have been mistaken regarding the identity of the appellant who was well known to her. She remarked that it was not the victim's father who had indeed laid a charge of rape but the victim's mother. She found that there was enough evidence that the complainant had been sexually molested and referred to the health passports of the victim. The health passports contain information regarding observations during the various occasions the victim had been examined by the same medical practitioner over a period of some months, including the fact that her hymen was not intact. The magistrare rejected as unreasonable the appellant's explanation that a misunderstanding could have been the reason why a charge of rape was laid against him.

[18] Mr P Kauta who appeared on behalf of the appellant, submitted that the presiding magistrate rejected the appellant's evidence for two reasons namely because of the contradictions between his evidence and the evidence of his witness and secondly because the appellant and his witness were related. He further submitted that despite the fact that the victim was a single witness there is no indication on record, that the magistrate had applied the cautionary rule, in assessing her evidence especially in the light of the fact that the victim initially was reluctant to tell that she had been raped. It was further submitted that the reasons for judgment contained no findings regarding the credibility of witnesses, their demeanour, trustworthiness and the probabilities. It was further submitted that even if the magistrate found the State witnesses to be truthful it does not mean that the appellant should have been convicted. It was further submitted that the contradictions between the evidence of the appellant and that of his witness related to the colour of the horses which they rode to Tallismanus and the place where they had slept, but that the magistrate in her reasons for judgment never rejected as false

that the appellant had on the day of the incident rode to Tallismanus and returned the next day. It was also submitted that the magistrate misunderstood the appellant's defence in the sense that the defence was an alibi and not that the victim's father framed the appellant as this was at best an explanation regarding the motive or reason why the appellant was charged.

[19] There is much merit in these submissions.

In *S v Singh* 1975 (1) SA 227 (N) at 228 F – H the following appears:

> "... it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witness and that of the accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses, that, therefore, the defence witnesses, including the accused, must be rejected.
>
> The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the State and defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the above-mentioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses."

[20] Except for referring to the contradictions referred to *(supra)* the magistrate made no finding regarding the alibi of the appellant. It was never rejected as false. Instead the magistrate rejected the appellant's "defence" of having been framed by the appellant as unreasonable and untruthful. This in my view is a misdirection by the magistrate to which I shall revert again.

[21] There is no indication in her reasons for judgment that the magistrate applied the cautionary rule in respect of the testimony of the victim who was a single witness regarding the incident of rape. This rule is still part of our law.

[22] In *S v Monday* 2002 NR 167 (SC) at 192 E – F, O'Linn AJA remarked as follows in this regard:

> "There is no indication in the record that the Court, in assessing their evidence, applied the cautionary rule relating to witnesses of their age in considering their testimony.
> This Court has ruled in a recent decision that the cautionary rule in regard to complainants in sexual offences is outdated and should no longer be applied in Namibian Courts.
> However, it pointed out that the cautionary rule in regard to single witnesses and in regard to very young witnesses remained."
> (See *S v Katamba* 1999 NR 348 (SC) at 359).

[23] Regarding the defence of an alibi the following was said in *R v Biya* 1952 (4) SA 514 (AD) at 521 C – D:

> "If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime."

[24] I have indicated *(supra)* that the magistrate had made no finding regarding the alibi defence of the appellant in the sense of rejecting it and her reasons for so rejecting that defence. Regarding her rejection of the explanation by the appellant regarding a possible motive for the laying of the charge of rape, which was emphasised by the magistrate, and one of the reasons for rejecting this testimony as untruthful the following must be highlighted.

[25] The appellant proffered the issue of the loan and the non-payment thereof as a possible reason why the father of the victim had informed him that he would get the appellant into trouble and why a charge of rape was laid against him.

In *S v Lesito* 1996 (2) SACR 682 (O) the accused said that the dagga found in his house had been planted by the police. He did not see the police planting the dagga but he inferred the planting from other facts. The magistrate found that it was inherently improbable that a police officer would falsely incriminate a member of the public and rejected the defence of the accused that he was not a dealer in dagga. On review the court held as follows (as per headnote):

> "While it could be accepted that it was generally unlikely that a police officer would falsely incriminate someone, more than a general improbability was needed before the accused's version could be rejected. The Court held further that even if the accused's allegation that the dagga had been planted could be rejected as being false, this did not mean that his denial of knowledge of the dagga was also false. *In casu*, the accused's allegation that the dagga had been planted had been an *inference* he had drawn. It would have been another matter altogether if he had testified that he had in fact seen the dagga being planted and the court had specifically rejected that allegation. In such a case it could justifiably be concluded that the rest of his evidence was also false. However, if the court rejected an *inference* made by the accused, that did not justify the conclusion that all his evidence was false."
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> (Emphasis added).

[26] In this appeal the magistrate misdirected herself in this regard as is apparent from the following passage from her judgment (at p. 157 of the record):

> "... the accused person's defence of having been framed by the complainant's father is so unreasonably and cannot be seen as the truth. And as a result the Accused is found guilty of rape ..."

[27] The appellant during his cross-examination of the victim's father clearly stated that he recognised the fact that it was not the victim's father who had laid the charge of rape against him.

[28] During cross-examination of the father of the victim by the appellant the magistrate stopped the appellant from exploring the issue of the loan and directed him to concentrate

on the charge of rape. However during cross-examination of the appellant by the prosecutor, the magistrate allowed the prosecutor a free reign on this very issue and eventually rejected the appellant's version on this issue on the answers he gave during cross-examination.

[29] In *S v Appelgrein* 1995 NR 118 one of the grounds of appeal was that the magistrate refused to allow the appellant to conduct relevant cross-examination. Mtambanengwe J at p. 122 D – E remarked as follows:

> "Incidentally, in his application for leave to appeal the appellant stated as one of his grounds that the trial magistrate was biased. He seems quite justified in that belief when one finds that the magistrate stopped him to ask questions as indicated above, yet, later on when the appellant gave evidence the prosecutor cross-examined him extensively on the very aspect that the magistrate said was not important or relevant."

[30] This was a irregularity which prejudiced the appellant.

[31] Mr Kauta further submitted that the medical evidence on which the magistrate finally relied on was admitted in "controversial circumstances". I have indicated *(supra)* that after the State has closed its case the matter was postponed ostensibly to lead the evidence of the medical doctor who had examined the victim on various occasions. A court may in terms of the provisions of section 186 of the Criminal Procedure Act, 51 of 1977 at any stage of criminal proceeding subpoena any person as a witness at such proceedings and in certain circumstances has a duty to subpoena such a witness.
It appears from the record that the medical doctor was not called to testify, but instead the prosecutor was allowed to hand in two health passports containing information relating to the examination of the victim by a medical doctor. The magistrate must have been aware of the fact that the State had previously closed its case. The State could not in these circumstances without further ado just hand in these health passports without laying a

basis why these passports could not have been handed in prior to the closure of the State's case.

The magistrate in her reasons for convicting the appellant relied on the information contained in these passports *inter alia* that the hymen of the victim was not intact during one of the examinations.

The general rule (with a few exceptions) is that in the interests of finality a party who has closed its case cannot afterwards claim the right to lead any further evidence.

Evidence sought to be led out of time may only be received once the court has exercised its discretion in favour of hearing such evidence. Such evidence would ordinarily only be received where a party can show that the evidence could not, by the exercise of due diligence, have been led at the appropriate time. Normally a court would allow such evidence to be led where for example after the closure of the State's case and in the course of the defence case a new matter is introduced which the prosecution could not have expected to foresee. The State would then be permitted to lead evidence in rebuttal after the closure of the defence case.

(See *Hoffmann and Zeffert, The South African Law of Evidence*, 4th Ed. p. 475).

[32] In the circumstances of this case the State was allowed to present additional evidence after the closure of the State's case but before the appellant could present his case. The prosecutor provided no motivation for such unusual course of events and the magistrate demanded no such motivation.

[33] The accused was not legally represented and it is common cause that he is an illiterate person. The acceptance of the two health passports as evidence in this case gravely prejudiced the appellant since the magistrate relied on the contents of those health passports in order to convict the appellant. This was an irregularity which vitiated the proceedings and in particular the conviction of the appellant.

[34] Mr Kauta referred to further shortcomings in the State case which was not considered by the trial magistrate. I am of the view that in the light of the reasons provided aforementioned that it is not necessary to examine those shortcomings.

[35] The irregularities and misdirections referred to *(supra)* were sufficiently grave in my view and affected the fairness of the trial in the court *a quo.* The conviction in respect of the crime of rape therefor cannot be allowed to stand.

[36] These are the reasons why the conviction and sentence were set aside by this Court on 23 January 2009.

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HOFF, J

I agree

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SWANEPOEL, J

ON BEHALF OF THE APPELLANT: **MR P KAUTA**

Instructed by; **DR WEDER, KAUTA & HOVEKA INC.**

ON BEHALF OF THE RESPONDENT: **ADV. LISULO**

Instructed by: **OFFICE OF THE PROSECUTOR GENERAL**