



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CA 48/2013

KAMBATUKU IMMANUEL

versus

THE STATE

Neutral citation: *Kambatuku v The State* (CA 48/2013) [2014] NAHCMD 41
(12 February 2014)

Coram: SHIVUTE, J *et* SIBOLEKA, J

Heard: 12 November 2013

Delivered: 12 February 2014

Fly note: Constitutional law – Human Rights – Right to legal representation
– Not sufficient to explain – Court should afford such right to be
exercised – Failure by judicial officer to afford appellant a second

opportunity to exercise this right to legal representation – amounts to fatal irregularities – Resulting in unfair trial.

Summary: Constitutional law – Human rights – Rights to legal representation is a fundamental human right – It is not sufficient for a judicial officer to explain rights to legal representation but the offender should be afforded the opportunity to exercise it – Failure by the court to afford the offender to exercise his rights to legal representation amounts to fatal irregularities resulting in unfair trial.

ORDER

1. The Appeal is upheld.
2. The conviction and sentence are set aside.

JUDGMENT

SHIVUTE J:

[1] The accused was convicted of rape in contravention of s 2 (1) (a) read with ss 1, 3, 4, 6 and 7 of the Combating of Rape Act 8 of 2000 in the Regional Court sitting at Windhoek on the 27 September 2011. He was sentenced to 15 years' imprisonment, the court having found no substantial and compelling circumstances,

on 2 May 2012. He is now appealing against his conviction as well as sentence. Mr Kumalo appears on behalf of the Respondent and the appellant appears in person.

[2] It is alleged that on 26 January 2010 at Okahandja in the Regional Division of Namibia the appellant did wrongfully, unlawfully and intentionally and under coercive circumstances namely by putting a plastic bag over the complainant's head, throwing her against a Hi-fi system and that the complainant was 16 years of age and by reason of age, exceptionally vulnerable, continue to commit a sexual act with the complainant by inserting his penis into her vagina.

[3] Appellant's appeal is based on the following grounds:

In respect of conviction:

That the trial court misdirected itself in the law or on the facts:

- By finding that the State had proved its case against him beyond reasonable doubt.
- By not seeing to it that the appellant was legally represented considering the fact that the accused was facing a serious charge.
- By failing to assist an unrepresented accused.
- By failing to approach the evidence of a single witness without caution.
- By failing to make a negative inference of the delay of the complainant to report the case.
- By failing to make a negative inference of the failure of the police to take the appellant for medical examination after his arrest.
- In rejecting the version of the appellant.
- In failing to make a negative inference of the failure of the State to call a medical practitioner who examined the complainant.
- By failing to conduct the trial in accordance with justice.

In respect of sentence:

It is contended that the learned magistrate erred by failing to assist the appellant during sentencing and by failing to consider the period of 2 years and 3 months the appellant spent in custody awaiting his trial.

[4] It was contended by the appellant that the *court a quo* had failed to see to it that the appellant was legally represented. This it allegedly did by its refusal to enable the appellant to obtain a legal representative. It is further argued that the magistrate infringed the accused's rights to legal representation in terms of Article 12 (1) (e) of the constitution which failure allegedly resulted in an unfair trial.

[5] According to the record, when the appellant appeared in court on 9 December 2010 he was properly advised that he had a right to get a legal representative of his choice or to apply for Legal Aid. The appellant exercised his right to apply for Legal Aid. The matter was postponed several times until 6th June 2011 when the prosecutor informed the Court that the accused had received an acknowledgement letter of receipt of his application from Legal Aid. The matter was postponed to 29 July 2011. On that date the appellant informed the Court that he was going to conduct his own defence. Although it is not very clear from the record, it appears the appellant had also requested for a disclosure because counsel for the State informed the Court that appellant will be provided with a disclosure on 29 July 2011.

[6] The matter was then postponed to 16 August 2011 for plea and trial. On that date, counsel for the State told the Court that the appellant had received a disclosure but; he wanted to be provided with an Occurrence Book as he was disputing the date of his arrest. The matter was thereafter postponed to 13 September 2011 for plea and trial. However; the appellant informed the Court that he was not in a position to

plead because firstly, he requested to be provided with the Occurrence Book and secondly he wanted to obtain Legal Aid. The learned magistrate inquired from the appellant why he had informed the Court on 29 July that he was going to conduct his own defence. He replied that he wanted to conduct his own defence because he applied for Legal Aid during December 2010 but no response was forthcoming. He further told the Court that it would be better for him to re-apply and keep on waiting.

[7] The learned magistrate told the appellant that the Court could not keep on postponing the matter indefinitely without knowing when Legal Aid would be available. He further scolded the appellant by saying that he was wasting the Court's time he could not keep on changing his attitude. The appellant informed the Court that he was not provided with the Occurrence book he had requested for. The Court a quo informed the appellant that it would not postpone the matter for Legal Aid but; he would postpone it for the appellant to be provided with the Occurrence Book.

[8] The matter was postponed to 27 September 2011 for plea and trial. The trial was conducted without the accused being represented until 27 April 2012 when counsel came to represent the appellant at the stage of mitigation in respect of sentence.

[9] Counsel for the respondent argued that the accused was afforded the right to be represented. However, he abandoned it. It was only on the trial date when he informed the Court again that he wanted to be represented. The Court found the accused's decision to state that he wanted legal aid at that stage to be a ruse aimed at delaying the proceedings and exercised its discretion to refuse a postponement. He further argued that this right is not absolute one and the court retained its discretion to refuse or to allow a postponement.

[10] Counsel argued that the right is a right to apply for legal aid and not to be afforded legal aid. The appellant was already afforded the opportunity to exercise that right. The Court could not see to it that the appellant was legally represented. It can however afford the appellant the opportunity to exercise that right and that is what it did.

[11] Article 12(1) (e) of the Constitution provides:

'All persons should be afforded adequate time and facilities for the preparation of their defence, before the commencement of and during their trial and shall be entitled to be defended by a Legal practitioner of their choice.'

[12] The rights provided by the constitution in the above article are there to ensure that all the offenders charged with criminal charges and appearing before the criminal Court are afforded a fair trial. The right to be represented is a fundamental right. Whether the failure of the accused to be afforded the opportunity to be represented results in a failure of justice this is a question of fact which depends on the circumstances of each case. In this matter although the appellant was afforded the opportunity to apply for Legal Aid, he abandoned his right to be represented because Legal Aid took too long to respond to his request. However, on the trial date after he was presented with the disclosure of the docket and the charge, he realised that he was facing a serious charge and he informed the Court that he was unable to plead as he required the services of a legal representative. When the Court inquired from him why he earlier on stated that he was going to conduct his own defence, he informed the Court that this was due to the fact that the Directorate of Legal Aid took too long to decide and that he even wanted to re-apply. This was a clear indication that the appellant did not waive his right to be represented. However, the court refused a postponement to enable the appellant to get a response from Legal Aid.

[13] The learned magistrate by stating that the appellant was wasting the Court's time and that the Court could not keep on postponing the case indefinitely without knowing when the Legal representative was going to be available and by giving an impression that the appellant was employing delaying tactics, I found it to be irregular in the circumstance. There is information from the prosecutor that there has been an acknowledgement of receipt from Legal Aid. How could the Court suggest that the appellant was employing delaying tactics? The appellant had applied for Legal Aid. He was in custody and he had no control over the Director of Legal Aid to decide or to know whether legal aid was going to be provided to him or not. It was for the learned magistrate to assist the accused by instructing the clerk of Court to inquire as to what progress has been made but instead he did nothing. It is not

sufficient for the court to explain rights to legal representation, but the offender should be afforded reasonable opportunity to exercise this right.

[14] The appellant was facing a serious charge of rape committed under coercive circumstances where the mandatory sentence of imprisonment of not less than 15 years is involved. Although the appellant was informed of his rights to get a legal representative he was not afforded the opportunity to exercise that right after he insisted that he wanted to be represented. I understand the learned magistrate's frustration that the matter had to be postponed and witnesses had to be warned to come back again. Unfortunately the appellant being entitled to a fair trial, he was supposed to be afforded a reasonable time until he heard from Legal Aid whether his application was approved or not as it is evident from the record that the appellant's request was not a delaying ruse. This is an exceptional case where the appellant could have been afforded a further opportunity to get a legal representative and to be afforded assistance to follow up on his application for legal aid.

[15] In this subject matter the failure for the learned magistrate to afford the appellant the second opportunity to get a legal representative from Legal Aid as he had already applied and received acknowledgement of receipt of his application and was again willing to re-apply, resulted in fatal irregularities which amounts to unfair trial. Although the learned magistrate had assisted the appellant during the trial, he was denied his right to legal representation and if he had a legal representative he could well have conducted his defence differently. I am therefore satisfied that the magistrate misdirected himself and that the nature of the irregularity is such that it vitiates the conviction and sentence.

[16] It therefore, follows that the conviction and sentence cannot be allowed to stand. As for the other grounds of appeal, it is not necessary to deal with them as the matter has been resolved on the above ground.

[17] In the premises the following order is made.

1. The Appeal is upheld.

2. The conviction and sentence are set aside.

Shivute J

I agree

Siboleka J

APPEARANCES

APPELLANT : In person

RESPONDENT : Mr Kumalo
Office of the Prosecutor-General