REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CA 2/2016

PHILANDER WILLEM **APPELLANT**

versus

THE STATE **RESPONDENT**

Neutral citation: *Willem v The State (*CA 2/2016) [2016] NAHCMD 174 (17 June 2016)

Coram: NDAUENDAPO, J et SHIVUTE, J

Heard: **25 April 2016**

Delivered: **17 June 2016**

Flynote: Appeal against conviction- Appellant charged with rape in contravention of s 2(1) (a) Act 8 of 2000 – Appellant correctly found not guilty of rape – But guilty of attempted rape – Court relying on evidence of single witness whose evidence not clear and satisfactory – Evidence riddled with contradictions and discrepancies – Court found to be misdirecting itself – Court finding – Appellant ”possibly” attempted to rape complainant – Court misdirecting itself by taking wrong approach to the burden of proof – Standard required beyond reasonable doubt – Conviction and sentence set aside.

ORDER

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(1) The appeal is upheld.

(2) The conviction as well as the sentence are set aside. If the accused is in custody he should be released forthwith.

APPEAL JUDGMENT

SHIVUTE, J (NDAUENDAPO, J CONCURRING)

[1] The appellant was arraigned in the Regional Court on a charge of rape in contravention of s 2(1) (a) of the Combating of rape Act 8 of 2000. However, he was convicted of attempted rape and sentenced to four years' imprisonment of which one year was suspended for five years on condition that accused is not convicted of the crime of rape or attempted rape committed within the period of suspension.

[2] The appeal lies against the conviction. The appellant contended that the learned magistrate erred in finding that: The appellant's evidence corroborated the complainant's version; the alleged rape took place at the precise place in the riverbed pointed out to the police by the complainant; her underpants were removed, her skirt was pulled up and that she was screaming whilst she was lying in the riverbed.

[3] Furthermore, although the learned magistrate found that the appellant's version of events was an insult to the court's intelligence, he erred in making the following findings:

‘I have very serious reservations about the quality of evidence at my disposal. The most obvious being the medical evidence which was adduced’ instead of giving the appellant the benefit of doubt as he was enjoined to do.

[4] It is further the appellant’s ground of appeal that the court erred by making a finding that the appellant forcibly attempted to have sexual intercourse with the complainant despite the fact that neither the complainant nor witness Annatjie Hamman testified that the appellant ever attempted to have sexual intercourse with the complainant.

[5] The grounds of appeal continue in the contentions that the learned magistrate erred in finding that; the appellant’s acts of pinning the complainant down removing her underpants and pulling up her skirt constituted an act of consummation of the offence, and not merely an act of preparation. Furthermore the learned magistrate erred in selectively extracting parts from the appellant’s evidence to find corroboration for the state case, instead of holistically evaluating all the evidence adduced before him and at the same time characterising appellant’s evidence on which he relied for a conviction, as an insult to his intelligence.

[6] Before considering the grounds of appeal, I will first deal with the summary of the relevant parts of the magistrate’s judgment. The magistrate found that there was an agreement on the part of one Charmaine, Ms Hamman also known as Annatjie and the accused to procure a girl (the complainant) for the accused in exchange for some money. The complainant was not privy to the earlier discussion contrary to what the accused wanted the court to believe, namely that the complainant initiated the whole sexual idea for money. The accused’s version that after he rebuffed the alleged suggestion by Annatjie and Charmaine coercing the accused to have sexual intercourse with the complainant, the complainant stood up and marched off into the direction of the riverbed, removing her underpants and hitching up her skirt is pure fiction and untenable. The scenario which the accused wanted the court to accept is an insult to the court’s intelligence.

[7] The accused's earlier agreement with Annatjie and Charmaine to procure him a girl to intimate with which he had paid either in part or in full whether through cash or through alcohol, was a clear indication that the accused was determined to compel the complainant to fulfil his earlier agreement. The accused by suggesting that there was a pre-planned plot by the complainant, Annatjie, Charmaine and one Errol to incriminate him was a fabrication. Furthermore, the version of the alleged plot was not put to the complainant and Annatjie throughout cross-examination.

[8] The magistrate further expressed opinion that he had very serious reservations about the quality of evidence at his disposal, the most obvious being the medical evidence. The doctor found nothing remotely suggesting recent sexual activity on the complainant. The magistrate was alive to the fact that not every sexual act would result in injuries to the genitalia of the female and the definition of rape as provided for by s 2(1) of the Combating of rape Act, that penetration even if it is to the slightest degree suffices for a conviction of rape. However, he found that in this case the above mentioned principles were of limited use because according to the complainant and Annatjie, the alleged sexual intercourse between the accused and the complainant was for a protracted period of time. It only stopped after Annatjie ran for a distance and came back after she sought for assistance from one Errol also known as Korkie, who was at a place called Lovers Dream a considerable distance away and who interrupted the accused whilst he was on top of the complainant both lying half naked.

[9] The victim was said to be 13 years old. However, despite the prolonged and alleged forcible sexual intercourse, she did not sustain even the slightest injuries. Her hymen was still intact albeit with two old tears according to the gynaecological examination. The doctor in his conclusion remarked that penetration was difficult to prove. If there was recent sexual intercourse the doctor could have found some evidence to that effect. The doctor consciously searched for evidence of recent

vaginal penetration but he could not find any. The doctor observed some vaginal discharge however, according to the medical report no indication as to what that discharge might have been. If it was fresh semen the court was of the view that the doctor would have been able to identify it. To make matters worse the doctor was not called to testify. It was for the above reasons that the court was not satisfied that the question of penetration had been proved beyond reasonable doubt.

[10] The court then proceeded to discuss the issue where the sexual act if that was the case took place. The court was confronted with three different positions. Firstly, the complainant pointed out a spot to the police the very next day after the incident. This place is in the middle of the riverbed. This spot also coincided more or less with the spot suggested by the accused as the place where the complainant removed her underpants, hitched up her skirt lied down and started screaming. Secondly, complainant pointed out another spot on the opposite side of the riverbed next to the small tree during inspection in loco. Thirdly, Annatjie took the court to a different tree along the same riverbed but some 50 to 60 metres further up north from the spot or tree which the complainant pointed out.

[11] Although the state argued that the differences between the positions pointed out are attributed to the time lapse, this in the court's opinion did not explain the disparity of the complainant's own account as there was a difference between the sandy riverbed and the bank of the river. However, as earlier alluded to the accused's own account in so far as the position of the alleged rape corroborated the version of the complainant which she told the police the following day after the incident. Notwithstanding the prevarications and ambivalence on the part of the complainant regarding the spot of the alleged sexual attack, the court found it to be true because it is common cause that the alleged sexual act took place in the riverbed as opposed to the bank of the river as pointed out by the complainant and Annatjie.

[12] The court further stated that the complainant's version found support not necessarily from Annatjie but from the accused himself. The accused corroborated the complainant that the complainant's underpants were removed, her skirt was pulled up, the complainant was lying on her back in the riverbed and that she was screaming whilst she was lying down.

[13] The court rejected the accused's version that he took a couple of steps towards the complainant whilst she was lying and screaming mimicking to be raped and reached the conclusion that the accused pinned the complainant down, removed her underpants and pulled up her skirt. It rejected the accused's version as false that the complainant out of the blue put up such a show. The complainant's conduct after the alleged incident showed that she was traumatised when she ran off quickly to her mother. The court was alive to the fact that the defence correctly referred to several discrepancies in the evidence of the state witnesses which the state could not wish away. However, the court stated that the whole case hinges on the crucial minutes from the time the group was drinking alcohol to the time the complainant and the accused were on the dry riverbed. The court concurred with counsel for the defence that penetration was not proved beyond reasonable doubt and found the accused not guilty of rape. However, the court concluded that the accused did "possibly" attempt to have sexual intercourse with the complainant after he viewed the evidence in its totality.

[14] Having summarised the court's judgment I will proceed to deal with arguments advanced by counsel. Counsel for the appellant argued that there were discrepancies in the complainant's evidence especially when the complainant pointed at two different spots as the points where the alleged rape took place. Counsel for the appellant further pointed out the contradiction in complainant's version that the appellant chased her for a considerable distance, caught up with her and raped her. The version she gave to the police was in contradiction to the version she gave in court that she could not remember the appellant chasing her. I pause to mention that when the complainant was cross-examined again about the appellant

chasing her, she responded that the appellant chased her and Korkie grabbed him and said to her she must run away. Again in court the complainant testified that appellant tripped her, she fell to the ground and had sexual intercourse with her.

[15] The complainant had also contradicted herself as to whether the appellant had a knife or not. She could not give a satisfactory explanation for her contradictions. However, in respect of the other above contradictions she said that these were attributed to the fact that she was in shock, that it was her first time that such a thing had happened in her life and that she was confused.

[16] It was a point of criticism by counsel for the appellant that if the court had found that there are contradictions and discrepancies' in the complainant's case, how would it be possible for the court to find the complainant to be a credible witness? It was again counsel for the appellant's argument that the court by saying it had very serious reservations about the quality of evidence at its disposal and by making a finding that it would be stretching the bounds of credulity to suggest that the alleged victim would not sustain even the slightest injury after the alleged protracted and prolonged rape, was an expression of doubt by the court in respect of the evidence adduced before it. Counsel further argued that the court by finding that the appellant attempted to rape the complainant because her underpants were removed, her skirt pulled up the complainant was lying on her back and that she was screaming was a misdirection even if it were to be accepted that the learned magistrate was correct, this did not amount to rape but a mere preparation.

[17] On the other hand, counsel for the respondent argued that the court did not misdirect itself when it held that the complainant's evidence was quite clear, cogent and credible because the complainant explained that the contradictions were due to shock, fright and at the age of 13 she was still young. Counsel further argued that the court did not consider the evidence of the complainant in isolation but considered medical evidence and the appellant's version as well as the evidence in its totality. Furthermore, the court held that in light of what was testified by the two witnesses

when it came to the issue of penetration, the state presented poor evidence as the medical report did not support the version of the complainant and Annatjie.

[18] Counsel for the respondent again argued that from the evidence adduced, the only reason why the appellant did not complete what he intended to do, in other words, to rape his victim was because he was interrupted by Errol by pulling the appellant from the complainant whom he had undressed and was lying on top of her whilst he had also undressed himself. Both counsel referred me to trite authorities which I have considered.

[19] This court is called upon to determine whether the appellant was correctly convicted of attempted rape or whether the court a quo misdirected itself in arriving at this verdict. The state called three witnesses namely the complainant, Annatjie Hamman and the mother to the complainant. The mother to the complainant was not present when the incident took place. However, she testified that the complainant made a report to her that she was raped. According to her observation the complainant appeared to be dirty, scared and was crying. The only two witnesses who were present when the incident took place were the complainant and Annatjie.

[20] From the court's judgment the court did not convict the appellant on the strength of the evidence given by Annatjie but on the strength of the complainant's version allegedly corroborated by the appellant.

[21] The state in an irregular procedure attempted to apply for Annatjie to be declared as a hostile witness and Annatjie was discredited by counsel for the state through cross-examination. Although Annatjie was not declared a hostile witness, I am of the opinion that the court was correct for not relying on Annatjie's version as she was not a credible and reliable witness judging from the record of proceedings.

[22] However, in disregarding Annatjie's version the court is only left with one witness for the state in respect of what happened at the scene. The complainant is a

single witness in respect of the allegation of attempted rape. Therefore, the trial court ought to have been cautious when it came to a case involving a single witness.

[23] In terms of s208 of the Criminal procedure Act, 51 of 1977 the court may convict “an accused of any offence on the single evidence of any competent witness’. However, this section should only be relied upon where the evidence is clear and satisfactory in every material respect. In S v Noble 2002 NR 67 at 71 G-I Maritz J stated the following:

> “Whether a judicial officer considers the evidence of a single witness with reference to that salutary guide or not, he or she must approach such evidence with caution. He or she should not merely pay lip-service to the existence of a cautionary rule in such cases, but it should be apparent from his or her reasoning that he or she, mindful of the inherent dangers of such evidence, treated it with circumspection.” (emphasis provided)’.

[24] The complainant in this matter contradicted herself in material respects as pointed out by counsel for the appellant in his written arguments namely that the complainant told the police that the appellant chased her for a considerable distance, caught up with her and then raped her. In court she denied the appellant ever chasing her. She contradicted herself with regard to the issue whether the appellant had a knife or not. She pointed out different spots as to where the alleged offence took place, just to mention a few. This is an indication that the complainant’s evidence was not clear and it was riddled with discrepancies.

[25] Concerning the corroboration of the complainant’s evidence that it was corroborated by that of the appellant, although the appellant pointed to a spot that is more or less the spot pointed out by the complainant as the alleged spot where sexual intercourse allegedly took place, the appellant denied to have pinned down the complainant, pulled her skirt up and taken off her underpants. The accused also denied having sexual intercourse with the complainant or to have lay on top of her. When a court considers issues of corroboration, it should be considered in light of the cautionary rule which refers to corroboration that incriminates the accused in the commission of the offence.

[26] The court in its judgment stated that the accused 'possibly' attempted to rape the complainant. It is necessary to reiterate that the court a quo took a wrong approach to the standard of proof required in the criminal trial. The state bears the burden of proof and the standard required is that of beyond any reasonable doubt. No onus whatsoever lies on the part of the accused to prove his innocence. Furthermore, when the court looks at whether the state had proved its case beyond reasonable doubt the locus classicus in our Namibian jurisprudence is the case of R v Difford 1937 AD 370 AT 373 and R v M 1946 AD 1023 at 1027 where it was said respectively:

"(a) No onus rests on the accused to convince the Court of the truth of any explanation which he gives. If he gives any explanation, even if that explanation is improbable the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.'

(b) 'The Court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true."

[27] Although the circumstances are that there is a possibility that the appellant might have done something that resulted in the complainant being naked or prompted her to scream, unfortunately this is not proof beyond reasonable doubt to warrant the appellant to be convicted of attempted rape.

[28] Although the court a quo had the benefit to observe the complainant testifying in court and observing her demeanour, I find that complainant's evidence is riddled with material inconsistences and contradictions in the state case which negatively impacted on the reliability of the complainant's version being a single witness to attempted rape.

[29] Accordingly I am of the view that the court a quo did not analyse and evaluate the evidence properly. It further misdirected itself by failing to exercise caution on the

evidence of a single witness who was not credible and reliable. Therefore this court is at large to interfere with the decision arrived at by the court a quo.

[30] In the premises the following order is made:

(1) The appeal is upheld.

(2) The conviction as well as the sentence are set aside. If the accused is in custody he should be released forthwith.

N N Shivute

Judge

N Ndauendapo

Judge

APPEARANCES

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