

NOT REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT**

CASE NO: CA 67/2015

In the matter between:

GIDEON APOLLUS

APPELLANT

vs

THE STATE

RESPONDENT

Neutral citation: *Apollus v S* (CA 67-2015) [2016] NAHCMD 213 (22 July 2016)

Coram: SIBOLEKA J and USIKU J

Heard on: 13 June 2016

Delivered on: 22 July 2016

Flynote: Criminal law: A written plea of guilty covering the elements of the offence drawn up by counsel in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 signed and confirmed on record by the accused himself – stands

as an unequivocal plea of guilty.

Summary: The appellant signed and confirmed a guilty plea drawn up by his counsel in the Court *a quo* in terms of section 112 of Act 51 of 1977. He was convicted thereon for rape and sentenced to 15 years imprisonment.

Held: There was no miscommunication or misdirection in the conviction and sentence.

Held: In the result the appeal against conviction and sentence are dismissed.

ORDER

In the result the appeal against conviction and sentence is dismissed.

APPEAL JUDGMENT

SIBOLEKA J (USIKU J concurring):

[1] This is an appeal against conviction and sentence. Mr. Nambahu appeared for the appellant and Mr. Muhongo for the respondent. This court appreciates both counsel's arguments on the matter.

[2] The grounds of appeal are as follows:

"AD CONVICTION

1. The court erred in law and/or fact by accepting the accused's guilty plea regardless of the apparent miscommunication between the accused and his counsel.
2. The court erred in law and fact by accepting the accused plea which is indeed vague and embarrassing in that is simply a restatement of the allegations contained in the charge sheet without elaborating on his admissions and/or admitting any element thereof and/or stating the specific circumstances and

manner in which the offense was committed.

3. The court erred in law and fact by holding that the state has proven its case beyond reasonable doubt.
4. The court erred in convicting the appellant of rape committed between 25 December 2008 and 2 November 2009 when in fact no admissions were made to that effect.

AD SENTENCE

5. The court, in aggravation, erred in law and/or fact by accepting that the complainant got pregnant as a result of this offence without the accused admitting same.
6. The court erred in law and fact by convicting the appellant with rape under coercive circumstances if same were not admitted in his plea and/or elsewhere during the proceedings.”

[3] Ms. Dreyer appeared for the now appellant in the Regional Court, Otjiwarongo on the following charges:

Rape, in contravention of section 2(1)(a) read with the provisions of section 1, 3, 4, 5, 6 and 7 of The Combating of Rape Act, Act 8 of 2000;

Unlawful sexual intercourse with a child under the age of sixteen in contravention of section 14(a) read with sections 1, 12, and 14(2) of Act 21 of 1980 as amended by Act 7 of 2000; Committing an immoral act with a child under the age of sixteen in contravention of section 14(1)(b) read with sections 1 and 12 of Act 21 of 1980 as amended by Act 7 of 2000.

[4] The appellant pleaded guilty to the main count and not guilty to the two alternative counts: The main count reads:

“The State vs Gideon Apollus

Case No: R/C 63/10

ANNEXURE

That the accused is guilty of contravening section 2(1)(a), read with the provisions of Section 1, 3, 4, 5, 6 and 7 of the Combating of Rape Act, Act 8 of 2000: RAPE

RAPE

In that between **25th day of DECEMBER 2008** and **2nd NOVEMBER 2009** and at or near **MOOIPLAAS FARM** in the Regional Division of Namibia, the accused, did wrongfully, unlawfully, intentionally and under coercive circumstances to wit:

COMPLAINANT IS UNDER THE AGE OF 14 TO WIT: 12 YEARS OLD, AND ACCUSED IS MORE THAN THREE YEARS OLDER THAN COMPLAINANT TO WIT: 31 YEARS OLD

Commit or continue to commit a sexual act with another person, the complainant namely **ELIZABETH GAOSSES**. The sexual act consisted of the accused **INSERTING HIS PENIS INTO HER VAGINA.**"

[5] A statement was prepared on behalf of the appellant in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 which was read into record, signed and confirmed by the appellant, and it reads:

"IN THE REGIONAL DIVISION OF NAMIBIA HELD AT OTJIWARONGO

CASE NO: OTJ-CRM-722/2010

In the matter between:

THE STATE

versus

GIDEON APOLLUS

ACCUSED

OF THE CRIMINAL PROCEDURE ACT

I, the undersigned

GIDEON APOLLUS

Do hereby state in terms of the aforesaid section as follows:

1. I am the Accused in the above matter.
2. I am being charged with:

Rape in contravention of Section 2(1)(a) of the Combating of Rape Act, Act 8 of 2000, read with the provisions of Section 1, 2, 3, 4, 5, 6 and 7 of the said act and it is alleged that between 25 December 2008 and 02 November 2009 and at or near Mooiplaas Farm in the Regional Division of Namibia, I did wrongfully, unlawfully and intentionally under coercive circumstances, to wit: complainant is under the age of 14 to wit: 12 year old, and accused is more than three years older than the Complainant to wit: 31 years old commit or continue to commit a sexual act with another person, the Complainant, named Elizabeth Goases by inserting my penis into the Complainant's vagina.

3. I plead guilty to the charge. I admit the following facts and tender my plea of guilty on the basis thereof:

3.1 I admit that between May 2009 and June 2009 I was at or near Mooiplaas farm in the Regional Division of Namibia.

3.2 I admit that I wrongfully, unlawfully, intentionally and under coercive circumstances committed a sexual act with Elizabeth Goases.

3.3 I admit that I knew at the time of my actions that the complainant was under the age of 14 years to wit 12 years.

3.4 I admit that I was more than three years older than the Complainant to wit 31 years.

3.5 I admit that the sexual act consisted of me inserting my penis into the vagina of the Complainant.

3.6 I admit that I knew at the time of my actions that such action was wrongful and

unlawful and punishable by law.

3.7 I admit that this plea was made freely and voluntarily and that I was not unduly influenced.

4. In view of the foregoing I plea guilty to the crime as alleged in the charge sheet.

DATED at OTJIWARONGO this 17th day of JUNE 2011

GIDEON APPOLUS

”

[5] After the guilty plea statement was handed in to form part of the record, the Prosecutor and the Magistrate pronounced themselves as follows:

“PP Mr Lino: Yes your worship the State accepts the guilty plea on the main count.

Court: The Court satisfied that you have admitted all the allegations of the offence of Rape on the main count and finds you guilty ...”

[6] The above explanation by the appellant in the Court *a quo* about what he did to the complainant is an unequivocal plea of guilty to the crime of rape as contemplated in section 2(1)(a) of the Combating of Rape Act 8 of 2000. In my view there was no prejudice occasioned to him when he was convicted as he pleaded.

[7] Some of the instances where the date and time of the commission of the crime is of essence are the following:

A plea of not guilty coupled with an alibi where the accused pertinently alleges that he was not present at the scene of crime on the alleged date and time. During the trial of such a matter the prosecution would have to consider leading evidence in order to place the accused at the scene of crime on the alleged date and time.

[7.1] Another instance relates to offences of driving a motor vehicle on a public

road while under the influence of alcohol. Here the time frame within which the suspect's blood has been drawn for tests, is of essence.

[8] In the present case here is how the legislature promulgated the offence of Rape in the Combating of Rape Act 8 of 2000:

“Rape

2(1) Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances –

- (a) commits or continues to commit a sexual act with another person; or
- (b) cause another person to commit a sexual act with the perpetrator or with a third person shall be guilty of the offence of rape”

[9] It is my considered view that the guilty plea tendered by the appellant in the Court *a quo* fully satisfied all the required elements of the offence of Rape. The verdict of “Guilty” handed down by the Court *a quo* was in accordance with the law and cannot be interfered with.

[10] On sentence, section 3(1) of the Combating of Rape Act 8 of 2000 reads:

“Penalties

3. (1) Any person who is convicted of rape under this Act shall, subject to the provisions of subsection (2), (3) and (4) be liable

(a) in the case of a first conviction –

(i) ...

(ii) ...

(iii) where –

(aa) ...

(bb) the complainant –

(---) is under the age of thirteen years; to imprisonment for a period of not less than fifteen years;

[11] Taking into account the above penalty provisions, this court is unable to

find fault in the sentence of fifteen years the trial Court imposed on the appellant.

[12] In the result the appeal against conviction and sentence is dismissed.

A M SIBOLEKA
Judge

D N USIKU
Judge

APPEARANCES

APPELLANT : Mr C. G. Nambahu
Directorate of Legal Aid

RESPONDENT : Mr M. H. Muhongo
Office of the Prosecutor-General, Windhoek