



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT

CASE NO: CA 28/2017

In the matter between:

DAVID CHARLES EIXAB

APPELLANT

vs

THE STATE

RESPONDENT

Neutral citation: *Eixab v S* (CA 28/2017) [2017] NAHCMD 192 (17 July 2017)

Coram: SIBOLEKA J and UNENGU AJ

Heard on: 26 June 2017

Delivered on: 17 July 2017

Flynote: Two sexual assaults, and panga victims were both perpetrated by a well known assailant – victims versions medically corroborated – convictions are in accordance with the law.

Summary: A sixty six elderly lady and her granddaughter were sexually attacked

by the appellant who had earlier on come to apologize for another untoward behavior. The panga victim suffered a serious injury on the head.

Held: The decision of the Court a quo on conviction and sentence cannot be faulted.

ORDER

In the result I make the following order:

The appeal against both conviction and sentence is dismissed.

APPEAL JUDGMENT

SIBOLEKA J (UNENGU AJ concurring):

[1] The legally represented appellant was convicted by the Regional Court Windhoek, on two counts of rape, and attempted murder and was sentenced as follows: first count 15 years imprisonment, three years were suspended, second count 10 years imprisonment and the three years on the third count was wholly suspended on the usual conditions of good behavior. He is now appealing against both conviction and sentence.

[2] The grounds of appeal are as follows:

“The learned Magistrate erred in accepting the evidence of the two complainants in the first charge of Rape, when such evidence was not credible. The learned Magistrate therefore erred in accepting the evidence of the complainants when there were several shortcomings in the State’s case. This is so in the light of the fact that the two complainants’ testimonies contradict each other in particular in the following respects:

[2.1] The wrestling between the appellant and the first complainant took place

while the latter held the assailant's stick in one hand and his private parts in the other. How could she have managed to crawl to the bedroom on her knees while holding as aforesaid. Why the second complainant who was in the same room did not corroborate that version.

[2.2] The second complainant testified about her grandmother, the first complainant, running to the room during the attack, while the first complainant herself testified about crawling to the room on her knees while holding the stick in one hand and the appellant's private parts in the other hand. The second complainant further testified that the first complainant was hit twice with a stick but the victim herself did not testify about it.

[2.3] The first complainant said they were three at the scene of crime ie. the two complainants, and the second complainant's daughter. The second complainant testified that it was only the two victims at the scene on the day of the incident: This is not correct because the version of the second complainant is that her daughter was present. She only left when the attack started.

[3] The facts of the matter are as follows:

[4] On the day of the incident at about sunset the appellant who is disabled in one hand came at the residence of the victims. They know him very well, he is the son of their neighbor. He knocked at the door, Lydia Tsauses, the second complainant opened and saw that it was him. She allowed him to come inside and sit down. Lydia Tsauses was with her school going child by the name of Yolande Lydia Van Der Byl and grandmother, who is the first complainant Katrina Snyders. The victims already had a misunderstanding with the appellant the previous week. He has a relationship with the daughter of the first complainant's son.

[4.1] After the appellant had taken a seat he told the victims he had come to

ask for forgiveness and it was accepted. He said he was having nightmares for not seeing his girlfriend with whom he was very much in love. As the appellant was talking he started raising up his voice, he was a little bit under the influence of alcohol. Lydia reprimanded and told him it appeared that he did not come to ask for forgiveness, but to quarrel and look for trouble. She told him to go away. The appellant said it was okay. He stood up, walked toward the door, opened it and stretched out his hand and took his stick. That was when Lydia realized the appellant had a weapon with him. He closed the door as if he was leaving the scene as requested, but he instead reopened the door, came in and started attacking the first complainant.

[4.2] When the appellant raised the stick to beat her, she grabbed it, and with the other hand grabbed the appellant's private parts to disable him which according to her she succeeded to do. It is the wrestling between the two which resulted in the first complainant to crawl to the nearby room while maintaining her hold on the appellant. She only let him free when she sought refuge underneath a bed whose height was extended with bricks in the bedroom of the first complainant where the latter was already hiding. When the first complainant released her hold on the appellant, the latter pulled her by the legs, lowered her underpants and inserted his fingers into her vagina. The insertion was relatively deep, coupled with to and forth movements. The appellant only stopped when she told him that he was injuring her. The second complainant materially corroborated this evidence by testifying that she saw the appellant stretching out his hand underneath the first complainant's dress. She said she could however not see where the appellant's hand ended up. The doctor who examined the first complainant found that she was indeed sexually assaulted, stating that her private parts showed signs of forcible penetration with an object. The elderly lady managed to escape and ran away.

[4.3] According to the second complainant after the first complainant had ran away, the appellant turned on her. He held her by the throat with one hand, with

the other he lifted up her skirt and inserted his fingers in her vagina. According to this complainant, the appellant did this to her after he had failed to get on top of her for a formal sexual intercourse. The appellant failed to get on top of her because she was under the bed. Although no injuries of the sexual assault were detected during medical examination, the doctor clearly stated that it did not mean that the sexual assault did not take place at all.

[4.4] During cross-examination Snyders testified that as a result of old age (66 years) she is experiencing loss of memory and she is undergoing treatment therefore. That is the reason why she is unable to remember some of the events related to the incident. According to her when the appellant came back with a stick, she was standing. While she was still on her feet he struck her with a stick behind the shoulder underneath her arm. At that moment Snyders grabbed the appellant's private parts with one hand, and she held the stick the appellant had used to beat her with her other hand.

[4.5] While Snyders was maintaining that hold she crawled on one knee for a very short distance to the bedroom, up to the bed where she let go of the appellant and went underneath the bed for safety with the stick. She had disarmed the appellant. The appellant was weakened by the grabbing of his private parts, which enabled Snyders to effectively disarm him as aforesated.

[4.6] Snyders was of the view that what had happened was a police case and not an issue which she would take up with the appellant's parents. The police officer attending to the matter also sent an ambulance because she was complaining of pain. She was examined by the doctor that same evening.

[4.7] According to Snyders, the second complainant Lydia Tsauses is disabled, she walks with the help of crutches. That is the reason why she only went underneath the bed in her room. She could not jump out through the window as suggested by the defence counsel during the trial.

[5] During cross-examination Lydia Tsauses testified that, the appellant's girlfriend Theresia Afrikaner is the daughter of her brother. She usually ran away from where she was residing with the appellant due to the fighting between them. Their relationship was not good because there are numerous, endless misunderstandings between them. Theresia would then come and stay with her for safety, when the appellant came to fetch her she would reprimand both of them.

[5.1] The appellant and his girlfriend have a child, and because of numerous upsets in their relationship, the appellant at times came to them and ask for forgiveness. They would both be reprimanded. Tsauses testified that she would thereafter drop everything thinking that their relationship will improve which did not happen. Whenever Theresia went back to the appellant's residence problems would start again. According to Tsauses her cellphone was inside her bag at all times. She does not recall her cellular being thrown out of the window, Tsauses testified that the attack may have confused the elderly lady Snyders.

[5.2] Both Tsauses and the appellant were slender in build, that is how the appellant was able to put half of his upper torso on top of her while she was laying on her back under the bed. She could not turn around while there as the bed could not permit that. Underneath the bed the appellant's one hand was on her throat and the other was stretched into her private parts. She did not feel well inside her private parts after the assault. However, the doctor who examined her did not find serious injuries. However, it was found that the surface of the vagina was red and accordingly penetration could not be ruled out due to tenderness. According to Tsauses, her daughter was asleep inside the bedroom when the appellant arrived. She only ran out through the window when the appellant started to attack them.

[6] In his reasons for conviction the trial Magistrate conceded that there were contradictions between the evidence of the first complainant Snyders, and the

second complainant Tsauses and they related to the following: how the attack started; how the two complainants moved to the bedroom; the presence of the daughter of the second complainant during the attack; the position of the two complainants under the bed and what happened when the appellant had left.

[7] In my view apart from the above minor contradictions the trial Court found that the two complainants corroborated each other on the following facts: Lydia Tsauses saw the appellant putting his hand inside the panty of the first complainant. The appellant had a stick with him. Medical examination found injuries inside the vagina of the first complainant, as well as injuries related to her falling and laying on her left side during the attack.

[7.1] In respect of the second complainant Lydia Tsauses, the medical examination found bruises on her back and knees indicating her encounter with hard surface such as a floor where she was not laying still.

[7.2] It therefore follows from the above that the contradictions on the rape charges in my view are not of a material nature when regard is had to the findings of the medical doctor. It is highly unlikely that the two victims of sexual assault would have inflicted the injuries detected by medical examination on themselves just to falsely implicate the appellant.

[7.3] On the third count of attempted murder the medical examination found a cut on the head of Theresia. The appellant's defence on the charges of Rape was an alibi which the trial Court in my view correctly rejected as false as all the victims know him very well and are neighbors to his parents. There could not have been the issue of mistaken identity in the circumstances of the matter.

[8] In view of the above credible medical findings coupled with the fact that the sixty six years elderly lady only came to testify on the incident six years after its occurrence. Her age and loss of memory in my view have also played a roll

leading her to forget some of the finer details of the event. It is my considered view that the appellant was correctly convicted on counts 1 and 2 respectively.

[9] On the third count the appellant testified during the trial that he injured the victim by accident and in self defence. These were also in my view correctly rejected by the trial Court, because the evidence of the third complainant on the third count was very clear and credible. It did not leave any room for doubt.

[10] On sentence, I will make the following observations:

[10.1] In the first count of rape, the trial Court took the 66 years of age of the victim; the injury to her private parts and that by reason of her age she was a vulnerable victim. The appellant received 15 years imprisonment, three years were suspended for five years.

[10.2] On the second count of rape, the trial Court took into account the physical disability of the second complainant who walks with the help of crutches, and sentenced the appellant to ten years imprisonment.

The penalty provision in the Combating of Rape Act 8 of 2000 provides the following:

“Penalties

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

(a) In the case of a first conviction

(i) ...

(ii) where the rape is committed under any of the coercive circumstances referred to in paragraph ... or (e) of subsection (2) of section 2 to imprisonment for a period of not less than ten years

(iii) where –

(aa) ...

(bb) the complainant –

(A) ...

(B) is by reason of age exceptionally vulnerable;

to imprisonment for a period of not less than fifteen years.”

It is clear from the above provisions that the reasoning of the trial Court regarding sentencing on the two counts of Rape falls within the penalty provisions in section 3(1)(a)(iii) (B) in respect of the elderly sixty six years old first complainant and section 3(1)(a)(iii) in respect of the second rape victim who was sexually assaulted in coercive circumstances, while she is physical disabled to wit she walked with the help of crutches.

[10.3] On the third count of attempted murder, the trial Court took into account the fact that the complainant suffered a very serious injury after being cut with a panga. The appellant was sentenced to three years imprisonment wholly suspended for five years. I am unable to find fault with the suspension of the whole sentence because of the cumulative effect it could had when added to the sentences in counts 1 and 2 respectively.

[11] In view of the above observations the sentences which the trial Court has imposed on the appellant in all three counts cannot be tempered with as it is in accordance with the law.

[12] In the result I make the following order.

The appeal against both conviction and sentence is dismissed.

A M SIBOLEKA
Judge

P UNENGU
Acting Judge

APPEARANCES

APPELLANT : Mr M. Siyomunji
Directorate of Legal Aid

RESPONDENT : Mr S. T. Kanyemba
Office of the Prosecutor-General, Windhoek