



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

CASE NO: CA 110/2016

In the matter between:

LEMMY CHAKA LITEBELE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Litebele v S* (CA 110/2016) [2017] NAHCMD 237 (23 August 2017)

Coram: SIBOLEKA J and USIKU J

Heard on: 30 June 2017

Delivered on: 23 August 2017

Flynote: Criminal law: Appeal – against conviction and sentence on Rape. Two assailants - only appellant known to complainant – Those who responded to her screaming came at the door of her house while the two assailants were still

inside. Nothing could be done as they were armed with a knife - conviction solid.

Summary: During the night while the complainant was asleep she heard a knock at the door. When it appeared she was afraid and hesitant to open for strangers, the appellant mentioned her and his name. On that basis she opened the door of her house only for the appellant and another unknown man to come in and sexually assault her at knife point.

Held: From the corroborated evidence of the complainant, the conviction is in order while the sentence of sixteen years exceeded the prescribed penalty of fifteen years imprisonment.

ORDER

In the result I make the following order:

The appeal against both conviction and sentence is dismissed.

APPEAL JUDGMENT

SIBOLEKA J (USIKU J concurring):

[1] The legally represented appellant appeared in the Regional Court Katima Mulilo on a charge of Rape in contravention of section 2(1)(a) read with sections 1, 2, 2(3), 3, 4, 5, 6 and 7 of the Combating of Rape Act 8/2000. He pleaded not guilty, after the trial he was convicted and sentenced to 16 years imprisonment. He is now appealing against both conviction and sentence.

[2] At the hearing of this appeal the appellant was in person, he elected to prosecute his own case.

[3] In his notice of appeal the appellant stated the following:

“His conviction was solely based on the evidence of a single witness being the complainant herself. There is no medical proof of the alleged sexual assault. The sole evidence of the complainant was uncorroborated and accordingly the appellant has not been sufficiently linked to the crime of Rape”.

[4] I will now look at the prosecution evidence.

[5] Irine Akamunwa Simalundu is the complainant on the matter. She knows the accused as Lemmy Litebele, her husband is his uncle. At the time of the incident she was a resident of Cow Boy Compound, Katima Mulilo. On the day of the incident she slept in one room with her son who was turning eight years that same year July 2007. Her house had two bedrooms and a sitting room. At about 02h30 during the night she heard a knock on the door but she did not respond. The knocking continued and the person called her by name “Irine”. She took some time before she responded by asking who it was that was knocking, and the person said he was Litebele, the appellant before court.

[5.1] When the appellant was asked what he wanted at that late hour, he told her he has lost track of the cattle he had brought to the Quaranteen. He was looking for a place to sleep so that he can track them the following morning. She was at first hesitant to open for him, but latter she thought the reason he gave for coming to her house was reasonable, and she switched the lights on and opened the door for him. After opening the door it was immediately pushed open and she noticed that the appellant was together with another unknown man. One of them wanted to close the door but the other refused saying they still need to go out and buy beer.

[5.2] The unknown man asked for something to eat, but there was nothing. They stood up to leave and she also did the same in order for her to see them off so that she can lock the door. Suddenly the unknown man closed, locked the

door and put the key in his pocket. He took out a long knife and asked her to choose either to be killed or to have sexual intercourse with them. The complainant started crying, her son woke up and sat in the sitting room and also joined her in crying. The appellant told the boy to go back and sleep, but he refused.

[5.3] The appellant told the complainant to comply with what she has been told, but she refused. The two then pulled her into the bedroom and threw her onto the mattress. Without wasting time the unknown man came on top of her, he lifted up her skirt and petticoat, removed her panty, and opened her thighs. He removed his trouser and inserted his penis into her vagina and was having sexual intercourse with her.

[5.4] When one was sexually assaulting her the other stood at the door of the bedroom. When the unknown man was done the appellant started having sexual intercourse with her. When he finished the unknown man came over and sexually assaulted her for the second time. While he was still busy with her, there was a knock at the door of the complainant's house, and her name "Irine – Irine" was called out. She realized the voice was that of her aunty Patricia Maliwa, but the unknown assailant refused her to respond. The appellant then told the unknown man to bring the keys of the house, because there were some people at the door. The appellant opened the door and the two men remained inside the house, while the complainant ran outside, leaving her assailants inside.

[5.5] Outside her house the complainant met the following people to whom she immediately reported that she has been raped. These were Patricia Maliwa and her husband Jimmy Maejaha, Kasuka and Samunzala. Among these people was also a police officer Victor Sibigile. The complainant asked to be escorted to the police station and in the meantime the two assailants were coming out of the house. When the appellant heard that the complainant was talking about opening a case he remarked:

“What is your problem Irene are you mad? Police for what”.

[5.6] The two assailants ran into the bushes. The police officer started calling the police, but it did not help. The complainant and those who were with her, Patricia Maliwa, her husband Jimmy Maejaha and Ben walked with her to the police station. The police assisted and took her to the hospital, and later she opened a case.

[6] During cross-examination the complainant testified that the unknown man took the knife which he used to threaten her from where she kept her dishes.

[7] Cletius Muhamuthi Samunzala confirmed knowing the complainant. He testified that he rented at her house in June/July 2007. On the day of the incident between 01h00 – 02h00 while asleep he heard the complainant’s voice crying and calling him for assistance. She was saying “... they want to stab me with a knife.” Samunzala was scared to go there alone. He instead woke up the neighbor Patricia. They both went to the complainant’s house. Samunzala was still afraid to go and knock at the door as he did not know how the intruders were armed. Patricia however was not frightened, she went and knocked at the complainant’s door.

[8] Patricia confirmed knocking at the door of the complainant’s house in her evidence. It was her knock that brought an end to the continuation of the sexual assault on the complainant. When the door opened, the complainant was the first person to come out crying and looking tired. She was followed by the two men unknown to her. She could not see their faces properly as it was dark and they ran away into the bushes. Without being asked, the complainant reported to her that the two men had sexually assaulted her. Patricia also confirmed escorting the complainant to the police where the matter was reported.

[9] The complainant's evidence was confirmed by Const. Tuli Namundjebo of Women and Child Protection Unit who investigated the matter. Tuli took the complainant to the hospital where Dr. Vanegas examined and gave her some medication. Later the complainant made a statement to her where she gave an account of how she was sexually violated in the same detail as she testified in the trial Court. Tuli testified that she arrested the appellant nine days after the incident.

[9.1] During investigations the appellant told the officer that he was in the company of Shozi Manyando, the assailant who was unknown to the complainant. The appellant was however not aware of his co-assailant's whereabouts. That is the reason why Shozi Manyando was only arrested six months after the incident.

[9.2] Manyando handed to her the black handled silver blade knife that he used to threaten the complainant during the sexual assault. The knife was accordingly booked in the Pol. 7 Register entry no. 213/07.

[10] Lemmy Chaka Litebele, the appellant in this matter is a resident of Muviza Village in the Zambezi Region. He testified that he knows the complainant as she was married to his uncle Kabila Allen Mushe, and she was residing at his aunt's place New Cow Boy Compound. Before he was granted bail on another case in May 2007, he was in the same Cell with the complainant's husband. He was given a letter to give to the complainant which he did after being granted bail. He visited the complainant at 10h00 in the morning and gave her the letter. The complainant requested the appellant to escort her to a witchdoctor in Zambia on his next visit to her. The appellant did not tell his counsel about this whole case hence it was never put to the complainant during cross-examination to give her an opportunity to react to it.

[10.1] The trip to Zambia was to go and ask the witchdoctor to kill her husband's

co-accused in order to destroy their case completely, which the appellant refused to entertain. According to the appellant it was this request that persuaded him not to visit the complainant anymore. On the day of his arrest, the appellant was at Court waiting for his name to be called out. That was where Const. Tuli Namundjebo saw and asked him to come outside Court. There she told him about the rape matter for which him and his friend were being sought for. According to the appellant he knew nothing about the rape. The appellant was asked by the officer who his friend is and it was then that he said it was Shozi Manyando. That is how the two were arrested on the rape matter.

[10.2] The appellant further testified that on the night of the incident he was not at the complainant's house at all. He was at Gilbert Chaka's Village at Muviza with two herd boys Fillemon and Innocent, but he never called them to testify in support of his case.

[10.3] The trial Court's credibility finding that the evidence of the complainant Patricia Maliwa and Samunzala corroborate each other is in place and is valid. In view of the above it is my considered view that the trial Court correctly rejected the version of the appellant as false beyond reasonable doubt.

[10.4] On this matter the complainant had delivered two times. The doctor's findings were that there was no hymen, the examination was easy it allowed two fingers, there was no discharge. Although no forced entry was found the victim's evidence and that of the witnesses who rescued her credibly shows that she was sexually violated on the night on the incident.

[10.5] The conviction of the appellant on rape has therefore been credibly established beyond reasonable doubt.

[11] On sentence the prosecution asked for a sentence of fifteen years imprisonment. The trial Court from its reasons for sentence relied on the surrounding circumstances of the incident and imposed sixteen years which is

still within the prescribed minimum sentence provided in section 3(1)(a)(iii) which provides as follows:

“(iii) where –

(aa) ...

(bb) ...

(cc) ...

(dd) ...

(ee) The convicted person is one of a group of two or more persons participating in the commission of the rape; or

(ff) The convicted person uses a firearm or any other weapon for the purpose of or in connection with the commission of the rape;

to imprisonment for a period of not less than fifteen years; ” my own underlining

[12] The words “... of not less than fifteen years;” outlaws any sentence below fifteen years. Depending on the circumstances of a particular case the same words allows the sentencing Court a judicial discretion to impose a sentence of more than fifteen years.

[13] In sentencing the appellant the trial Court has taken the following aggravating circumstances into account: the victim was threatened with a knife; she was sexually assaulted three times by two assailants; the sexual assault was done in the presence of the victim’s eight year old son.

[14] It is for the above reasons that the sentence of sixteen years imprisonment will not be tempered with.

[15] In the result I make the following order:

The appeal against both conviction and sentence is dismissed.

A M SIBOLEKA
Judge

D N USIKU
Judge

APPEARANCES

APPELLANT : In Person
Windhoek Central Prison

RESPONDENT : Ms. K. Esterhuizen
Office of the Prosecutor-General, Windhoek