

REPUBLIC OF NAMIBIA

NOT REPORTABLE



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

CASE NO: CA 81/2016

In the matter between:

NDJEKWA DUSCAN NJEKWA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Njekwa v S* (CA 81/2016) [2017] NAHCMD 93 (20 March 2017)

Coram: SIBOLEKA J and USIKU J

Heard on: 05 December 2016

Delivered on: 20 March 2017

Flynote: Criminal law: Appeal – conviction and sentence, Victim forcibly pulled away amid requests to leave her alone resulting in her being sexually assaulted – evidence corroborated and the sexual assault reported accordingly. Appeal dismissed.

Summary: During the early hours of the morning on the day of the incident and in full view of witnesses that testified, the appellant forcibly pulled away the screaming complainant for a distance out of sight into the darkness and sexually assaulted her. The trial court found substantial and compelling circumstances in the appellant's personal circumstances persuading it to depart from the prescribed minimum sentence in favour of a lesser sentence.

Held: The appeal against conviction and sentence has no merit and is dismissed.

ORDER

In the result the appeal against conviction and sentence has no merit and is dismissed.

APPEAL JUDGMENT

SIBOLEKA J (USIKU J concurring):

[1] The appellant appeared before the Magistrate's Court, Katima Mulilo, Zambezi Region on charges of Rape, assault with intent to do grievous bodily harm and common assault. He pleaded not guilty to all of them, after the trial he was convicted and sentenced to: 13 years imprisonment, and 3 months imprisonment on each of the assault counts respectively. He now appeals against both conviction and sentence.

[2] The appellant conceded in his appeal documents that the rights to appeal and in particular the 14 days' time frame within which an appeal should be noted was explained to him by the trial Court. He however still delayed for seven months before filing his notice of appeal. The reason furnished is that he is a lay person without knowledge of how to go about with the appeal. This is not a reason because the law applies generally and equally to all persons without exceptions. Knowledge of the law or ignorance thereof is not an excuse at all. There is no rule of law that says lay litigants ought to be treated differently from others. The guiding factor in the exercise of the court's discretion in considering the late filing of such an application is fairness and justice to both parties, (all litigants). This appeal deserves to be dismissed on this aspect alone. However, for the sake of completeness I will look at the merits of the matter as well.

[3] At the hearing of this matter the appellant appeared in person. Rule 67(1) of the magistrate's court's rules has not been complied with since no proper notice setting out the grounds of misdirection's by the trial court regarding the conviction and sentence have not been articulated. This is required to enable the other parties to know the case they are facing and to enable them to prepare their arguments.

[4] The appellant's reasons of dissatisfaction on conviction are that:

- a. The Magistrate erred on the facts or the law in convicting him on the Rape charge based on the complainants version alone in the absence of the evidence of a medical doctor;
- b. The Magistrate erred on the facts or the law in convicting the appellant when in fact it was only the complainant that was taken for medical examination without him; and
- c. The evidence of the photos taken at the scene of crime were not produced as evidence in Court.

[4] Although Mr Ngara was the appellant's counsel off record right through the trial proceedings in the court below, the appellant still stated in his notice that the magistrate erred on the facts or the law when he failed to order that he be legally represented during trial because he was facing a serious case.

[5] Tracy Mabuku Mwale is the complainant on this matter. She testified that the appellant fathered a child with her friend Kunyima Queen, and she thus knew him. On the day of the incident she was sleeping together in the same house with Kunyima Queen. At about 01h00 during the night she went outside to pass water, and while doing so, she saw the appellant standing in front of her. When she finished the appellant held her by the hand and she started screaming for help leave me, leave me; Duscan leave me please but it did not help. The appellant instead continued pulling her away and clapped her to stop screaming. This evidence and the sexual assault report is materially corroborated by Kunyima Queen whom the complainant informed about going outside to pass water.

[5.1] Kunyima came out and asked the appellant to leave the complainant alone but to no avail. He instead threatened to beat her if she came near him. The appellant's mother Eliza Maimbolwa came out and told the appellant she will report him to the police, but he just ignored her and continued pulling the victim away. Maimbolwa confirmed this evidence under oath. The complainant further testified that at the scene the appellant caused her to fall down. He undressed her and did the same to himself. He took out a knife and told her she will be killed if she dared to tell anyone else. The complainant had no choice but to co-operate and was accordingly sexually assaulted.

[5.2] The incident took place during the night, the complainant went to Anna Ganseb and asked to be escorted to the police. She was however advised to do the next day. The following day early in the morning, Kunyima came and was told about the sexual assault. The matter was reported to the police. It is unlikely that

the appellant would have pulled away the complainant at night in the presence of Kunyima, if they were still in a love relationship. During cross-examination the complainant confirmed that the two were separated at the time. This was also testified to by Kanyima under oath.

[6] On medical examination Dr Bwalya found that the complainant had a missing hymen, and a thick whitish discharge which could have been semen or an infection.

[7] On his part the appellant testified in the Court a quo that he only grabbed Kanyima's cellphone which the complainant had in her hand when it became evident to him that there was a text message on it. He did this to view and know what the message was all about. He denied all the wrongdoing levelled against him. During mitigation the appellant made a U-turn and conceded that what he did to the complainant was wrong and asked for forgiveness because he was drunk at the time.

[8] From the evidence placed before the trial court I am satisfied that the appellant was correctly convicted.

[9] On sentence the trial Court found substantial and compelling circumstances such as being under the influence of alcohol at the time; being a first offender, and having spent 19 months in custody. He lost his father at an early age, dropped out of school in Grade 10. That was why the Court a quo departed from the prescribed minimum sentence of 15 years to 13 years imprisonment on rape, and three months imprisonment on each of the assault charges.

[10] In the result the appeal against conviction and sentence has no merit and is dismissed.

A M SIBOLEKA
Judge

D USIKU
Judge

APPEARANCES

APPELLANT: In Person

RESPONDENT: Mr P J L Brink
Office of the Prosecutor-General, Windhoek