REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 83/2016

In the matter between:

ADRIANO ELBERTO BOTH **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Both v S* (CA 83/2016) [2018] NAHCMD 239 (10 August 2018)

Coram: LIEBENBERG J and SIBOLEKA J
Heard: **06 August 2018**
Delivered: **10 August 2018**

Flynote: Criminal Procedure –Trial – Absence of clinical evidence – In absence thereof neutral weight to be given – Factors to be considered together with all evidence adduced.

Criminal Procedure – Trial – Single uncorroborated evidence of complainant – Evidence of single witness shall be clear and satisfactory – Evidence of complainant clear and no inconsistency in testimony – Complainant credible witness – No basis for appeal court to interfere with trial court's finding.

Criminal Procedure – Duplication of convictions – Test – Distinguished and applied – Two distinct sexual acts committed – Acts closely related in time – First sexual act preparatory in nature – Accused acted with single intent – Misdirection to convict on both counts.

Summary: The appellant was convicted on two counts of rape and sentenced to 15 years' imprisonment on each count which sentences' ran concurrently. The appellant appealed to this court on the grounds that the trial court misdirected in finding against the appellant in light of the fact that there was no clinical evidence of vaginal penetration or bruising. The other ground was that the trial court misdirected when it chose the complainant's version as being the truth over the appellant's one. Besides the appeal grounds the appeal court raised *mero moto* the question as to whether the issue of duplication of conviction did not arise when taking into account that the appellant was convicted on two counts of rape.

Held, that, in as much as the lack of clinical evidence does not corroborate the complainant's evidence, neither does it exonerate the appellant. It is nothing more than a neutral factor to be considered together with all the evidence adduced.

Held, further that, there is a significant difference in the respective versions that the appellant gave in his warning statement and his testimony in court, and therefore the appellant was not a credible witness.

Held, further that, the complainant's single evidence was consistent and clear and therefore she was a credible witness.

Held, further that, accused acted with single intent to have sexual intercourse with the complainant and therefore the single intent test finds application. The trial court misdirected itself to convict the accused on both counts.

ORDER

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1. The application for condonation of the appellant’s non-compliance with the rules is granted.
2. The appeal against conviction on count 1 succeeds and the conviction is set aside.
3. The appeal against conviction on count 2 is dismissed.

JUDGMENT

LIEBENBERG J (SIBOLEKA J concurring):

[1] The appellant was tried and convicted in the Regional Court sitting at Otjiwarongo on two counts of rape, read with the provisions of the Combating of Rape Act[1] and sentenced to 15 years’ imprisonment on each count. The court ordered the sentences to run concurrently.

[2] Appellant noted an appeal against conviction and sentence within the prescribed period without stating any grounds and explained that his erstwhile lawyer who lodged the appeal on his behalf, did not represent him in the trial and that grounds of appeal could therefore only be formulated once the record of proceedings became available. Subsequent thereto the appellant filed further notices of appeal in person which, for purposes of the appeal, are of no consequence as an amended notice of appeal was filed on his behalf on the 04th of April 2018. The appeal in the last instance lies against the convictions only.

[1] Act 8 of 2000.

[3] In view of the amended notice of appeal having been filed outside the prescribed time-limit, application is made for condonation of appellant's non-compliance with the rules of court. Whereas the respondent opposes the application only in so far as it concerns the prospects of success, the court reserved its ruling and invited the parties to argue the appeal on the merits.

[4] Of the four grounds of appeal enumerated in the amended notice of appeal there are only two discernible issues for consideration, namely:

(a) The court convicting on the single evidence of the complainant in spite of Dr Mutombo's testimony that there was no clinical proof of recent vaginal penetration, evidence that supported the appellant's version; and
(b) Whether the court, when considering the two mutually destructive versions, came to the correct conclusion by accepting the complainant's evidence while rejecting that of the appellant.

[5] In addition to these grounds and before hearing the appeal, this court *mero motu* raised the issue of a possible duplication of convictions and invited counsel to file additional heads of argument in this regard. The court is indebted to counsel for the appellant who adhered to the request and the arguments presented herein. Though no supplementary heads were filed by the respondent, Mr *Moyo*, did advance oral submissions in this regard.

[6] Appellant, who was represented in the trial pleaded not guilty to both counts and elected not to disclose the basis of his defence. The matter proceeded to trial with the state presenting the evidence of four witnesses, while the appellant being the only witness for the defence.

[7] The complainant, aged 17 years at the time, testified that on the evening of the 08th of June 2014 she was at home when receiving a text message from a friend, Carlo Booysen,[2] inviting her to meet up with him at a nearby club. After a brief meeting she returned home to finish her homework and retired to

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[2] Throughout the trial he was referred to by his nickname, Tosh.

bed. At around 01h00 he again called her and this time she joined and got into the vehicle driven by the appellant. Carlo said they would only be driving around for a while where after she would be dropped off at home. They proceeded to a filling station and while the appellant was inside the shop to buy a lighter, Carlo started falling asleep. Upon his return the appellant drove out on the main road leading to Otavi but turned off just outside of town and, after driving some distance, stopped the vehicle. By then Carlo was sound asleep and complainant unable to wake him. He ordered her outside and after she disembarked she moved a short distance away. He wanted to kiss her and offered her oral sex which she declined. The appellant became agitated and grabbed her on both arms, wanting to know why she was rude to him. She asked him to take her home, but as she got into the rear seat of the vehicle he pushed her down and removed her slacks and underwear. He started licking her genitalia while she hit him on the head with open hands. While pinning her down, he undressed himself and came on top of her and penetrated her with his penis. She forced him off her and after both got dressed he took her home. On the way he apologised to her and said he did not know what came over him and that he would phone her during the day as to find out how she was doing. Complainant was back home between 03h00 and 04h00 when she sent a text message to her boyfriend in which she related what had happened to her. According to her, on his insistence, she laid a complaint with the police later that same day (09th). This person was however not called as a witness.

[8] It is not in dispute that the complainant was medically examined by Dr Mutombo later in the day, while the appellant was medically examined by the same doctor on the 17th of June 2014. Medical reports issued by the doctor as regards his findings made on the complainant as well as the appellant during a medical examination, were received into evidence. In respect of the complainant it was noted that she was sexually active and that there was no clinical evidence of recent vaginal penetration. No bruising or abrasions were visible. In his testimony the doctor explained that the complainant, having bathed after the incident; the use of a condom; and sexual stimulation prior to the sexual act, are all factors that could possibly explain the absence of any

signs of coercive sexual intercourse committed with the complainant. In cross-examination the doctor concluded that there was no clinical evidence to either prove or disprove that there was sexual penetration.

[9] Evidence pertaining to the doctor's findings on the complainant thus appears to be neutral. As for the appellant, nothing of significance arose from his medical examination.

[10] In light of the absence of clinical evidence supporting the complainant's testimony of forceful vaginal penetration, appellant contends that the trial court committed a misdirection by not finding in favour of the appellant who denied having had sexual intercourse with the complainant. Moreover, in circumstances where the complainant gave single evidence. In support of his argument, the appellant cited the case of *Willem v The State*[3] where the clinical evidence, as per the medical examination report handed into evidence by agreement, did not support the complainant's evidence. In that case the complainant was 13 years of age and despite an alleged prolonged and forcible sexual intercourse, she did not sustain 'even the slightest of injuries', while during the gynaecological examination her hymen was found to be still intact. In conclusion the medical report reads that penetration was difficult to prove. The doctor was however not called to testify on the findings made and noted by him in the report. Though the trial court found that penetration had not been proved, it convicted on attempted rape saying that the appellant 'possibly [attempted] to have sexual intercourse with the complainant'. On appeal the court found that the complainant's evidence was not clear and riddled with material discrepancies, and that the trial court committed a misdirection by failing to exercise caution when evaluating the single evidence of the complainant.

[11] As will be shown for reasons to follow, the facts in the *Willem* case are clearly distinguishable from the present facts and cannot be relied upon as authority in support of appellant's contentions.

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[3] (Unreported) Case No CA 2/2016 [2016] NAHCMD 174 (17 June 2016).

[12] In the present case the trial court in its assessment of the evidence presented related to, and accepted, the explanation advanced by Dr Mutombo during his testimony as to why there could be no visible signs of sexual intercourse in the present circumstances, even if it had taken place. Unlike in the *Willem* case the doctor was called upon to give his medical opinion on the effect of other or external factors where the complainant was sexually active and where there was sexual stimulation prior to penetration. Based thereon, he concluded that there could have been penetration, notwithstanding the absence of visible injuries. The complainant is four years older than the other victim and her hymen was absent, an indication of sexual activity. Though the complainant tried to push the appellant off her, there is no evidence showing that a 'prolonged and alleged forcible sexual intercourse' took place as in the *Willem* case. Furthermore, in the latter case the trial court did not find the complainant a credible witness, contrary to the present matter where the complainant's testimony was found to be credible and reliable.

[13] Though the court *a quo* did not expressly state the weight to be accorded to the medical evidence adduced, it is clear from a reading of the judgment that it came to the conclusion that it was neither here nor there. In other words, it did not corroborate or contradict the complainant's evidence; it was neutral. This was clearly consequential to the doctor's opinion.

[14] On the medical evidence alone it is not possible to find in favour of the appellant that, in the absence of clinical evidence of recent vaginal penetration, it should have raised sufficient doubt in the court's mind to lead to the appellant's acquittal. In as much as it does not corroborate the complainant's evidence, neither does it exonerate the appellant. It is nothing more than a neutral factor to be considered together with all the evidence adduced. We are accordingly unable to fault the trial court in its assessment of the medical evidence presented.

[15] The court next looked at the evidence of the complainant's mother who arrived from Grootfontein after learning about her daughter's ordeal, and concluded that it added little to the state case, except for stating that the

complainant appeared distraught. As for Carlo Booysen, the same conclusion was reached because of his state of drunkenness and him having been asleep in the front seat during the alleged incident of rape. It is evident that nothing significant turned on the evidence of these two witnesses.

[16] Appellant's narrative of events that night stands in sharp contrast with the complainant's testimony. He confirmed that she accompanied him and Carlo to the filling station where after they drove for a short distance out of town before turning off the main road and stopped on the side of the road. According to him this was at the request of Carlo, apparently to afford him some time alone with the complainant. He left them in the vehicle and after a while the complainant approached him reporting that Carlo was asleep. He returned to the vehicle and indeed found Carlo asleep. Complainant then invited him to have sexual intercourse with her, which he declined, claiming to be a married man. As he was about to close the door, she tried to kiss him and started fondling his penis. She pulled him towards her and because he was drunk he lost his balance and fell inside the vehicle on top of her, where after she started kissing him. He again declined her advances and proposed that he rather take her home. On the way she remarked that she felt rejected. He was arrested on charges of rape two weeks later. His warning statement was handed into evidence by agreement and its contents not being in dispute.

[17] A different version of events that took place at the vehicle between the complainant and the appellant however emerged from his warning statement. There he said that after they unsuccessfully tried to wake Carlo she invited him to have sexual intercourse, as she had already been paid where after he got out of the vehicle and walked to the rear where she was seated. They started kissing and while she was laying on her back she opened his trouser and started fondling his penis. As he felt cold and was without a condom he stood up and returned to the driver's seat. He drove off and dropped her off at the place where she was picked up.

[18] Whilst under cross-examination he was asked to explain the material inconsistencies alluded to and said that when making the statement, he was

suffering from emotional trauma as a result of his arrest. Notwithstanding, he claimed that his testimony was the same as what has been recorded in the warning statement. It clearly is not the case, as there are significant differences in the respective versions not only as regards the sequence of events that took place, but which are materially different and cannot be ignored. In the absence of a reasonable explanation, these discrepancies in his evidence are likely to impact on his credibility. Though the appellant did not attribute the inconsistencies between his testimony and witness statement to his state of drunkenness at the time, this could possibly have been a contributing factor. During an inspection *in loco* the appellant was required to demonstrate how the complainant pulled him inside the vehicle from a standing position, from which the court deducted that this would only have been possible had the appellant stooped forward. This conclusion is consistent with his explanation recorded in the warning statement, but not with his testimony in court. What is evident from the record is the appellant's inability to come up with some explanation that would satisfactorily explain the two irreconcilable versions he advanced in his defence. In the absence thereof it seems inevitable to come to the conclusion that the appellant was not a credible witness.

[19] In its evaluation of the single uncorroborated evidence of the complainant, the court below was alive to relevant case law where the test has been laid down namely, that the testimony of a single witness should be clear and satisfactory in all material respects, and that the guilt of the accused must be proved beyond reasonable doubt. In *S v Unengu,*[4] concerning the evidence of a single witness, the following was said:

'[5] As stated, both the complainants gave single witness evidence in respect of the alleged assaults and rape incidents, hence the need to approach such evidence with caution; though it was said that it should not be allowed to displace the exercise of common sense (*S v Snyman* 1968 (2) SA 582 (A); *S v Sauls and Others* 1981 (3) SA 172 (A)). In *S v HN* 2010 (2) NR 429 (HC) at 443E – F the court in this regard stated the following:

[4] 2015 (3) NR 777 (HC) at 779E-F.

> "Evidence of the single witness need not be satisfactory in every respect as it may safely be relied upon even where it has some imperfections, provided that the court can find at the end of the day that, even though there are some shortcomings in the evidence of the single witness, the court is satisfied that the truth has been told." '

[20] When considering the two mutually destructive or irreconcilable versions, the court was guided by the approach followed in *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others,*[5] and which had been endorsed in this jurisdiction.[6]

[21] In its final analysis the court found the complainant, despite being a single witness, credible with no inconsistencies in her testimony. She was found to have testified in a clear and coherent manner, full of detail as to what transpired on the night in question. Regard was also had to the testimony of the complainant's mother and the doctor who examined her, observing that she appeared emotionally distraught the following day. The trial court's finding is supported by the facts and we are unable to fault the court's reasoning and application of the law in coming to this conclusion.

[22] Dealing with the appellant's evidence, the court *a quo* considered the internal contradictions in his evidence, which remained unexplained, as well as external contradictions where his evidence was in conflict with established facts. The court came to the conclusion that the appellant under cross-examination adapted his evidence to account for the improbabilities in his version, as put across by the prosecutor.

[23] The court in the end, and after considering the two inconsistent versions, was satisfied that it could safely rely on the complainant's testimony while rejecting that of the appellant as being false. As for the probabilities, the

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[5] 2003(1) SA 11 (SCA).

[6] *Sakusheka and Another v Minister of Home Affairs* 2009(2) NR 524 (HC); *S v BM* 2013(4) NR 967 (NLD).

court found appellant's notion that he was falsely incriminated purely for having rejected the complainant's sexual advances, absurd.

[24] From the trial court's judgement it is evident that proper consideration was given to the fact that the complainant gave single evidence and, when considered in light of all the evidence, the court was satisfied that the complainant was credible and her evidence being reliable. As borne out by the record, the appellant was not an impressive witness and contradicted himself on crucial aspects of his evidence for which he was unable to give a plausible explanation. Though the complainant's decision to accompany Carlo and the appellant at that late hour of night is incomprehensible, it does not detract from the veracity of her evidence. It is not in dispute that she had been in their company at the relevant time. As for the contradicting evidence of Carlo, on his own admission, he was drunk and fell asleep in the vehicle whilst they were still at the club. To this end, the complainant's evidence should be more credible than that of the witness.

[25] It is settled law that a court of appeal will not readily interfere with findings of fact and credibility of the trial court unless there is reason to do so. In this regard the court in *S v Hepute*[7] said the following:

'Sitting as a Court of appeal and without the numerous advantages a trial magistrate enjoys in assessing the credibility of witnesses, this Court is normally reluctant to upset the trial magistrate's findings of fact (see *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 to 706). However, if it is apparent that the magistrate has misdirected him- or herself and that that misdirection materially impacted on the conclusion he or she arrived at on the guilt or innocence of the accused, this Court is charged with the duty to reassess the evidence and at liberty to make its own findings on the facts.'

[26] When applying these principles to the present facts, we are not persuaded that the trial court committed any misdirection on its evaluation of the evidence. The trial court, in our view correctly, followed a holistic approach

[7] 2001 NR 242 (HC) at 243G-H.

in its assessment of the evidence and in the end was satisfied that the appellant had raped the complainant.

[27] What remains to be decided is whether the trial court was correct to convict the appellant on two counts of rape.

[28] The Supreme Court in *S v Gaseb and Others*[8] approved the two recognised tests which the court should apply when determining whether or not there is a duplication of convictions, and cited with approval these tests as summarised in the Full Bench decision of *S v Seibeb and Another; S v Eixab*[9] where the following appears at 256E-I:

'The two most commonly used tests are the single evidence test and the same evidence test. Where a person commits two acts of which each, standing alone, would be criminal, but does so with a single intent, and both acts are necessary to carry out that intent, then he ought only to be indicted for, or convicted of, one offence because the two acts constitute one criminal transaction. See *R v Sabuyi* 1905 TS 170 at 171. This is the single intent test. If the evidence requisite to prove one criminal act necessarily involves proof of another criminal act, both acts are to be considered as one transaction for the purpose of a criminal transaction. But if the evidence necessary to prove one criminal act is complete without the other criminal act being brought into the matter, the two acts are separate criminal offences. See Lansdown and Campbell South African Criminal Law and Procedure vol V at 229, 230 and the cases cited. This is the same evidence test. Both tests or one or other of them may be applied and in determining which, or whether both, should be used the Court must apply common sense and its sense of fair play. See Lansdown and Campbell ((supra)) at 228.'

(Emphasis added)

[29] In the present instance there were two clearly distinguishable sexual acts committed as defined in the definition of 'sexual act' in section 1 of the Combating of Rape Act 8 of 2000. These are:

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[8] 2000 NR 139 (SC).
[9] 1997 NR 254 (HC).

‘(a) the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person; or

(b) …

(c) cunnilingus or any other form of genital stimulation; …’

[30] On the strength of the complainant’s evidence it was argued by the respondent that the appellant’s actions, though closely related in time, constituted two different offences; while it was submitted on behalf of the appellant that, if the court is satisfied that an offence of rape had indeed been proved, then the appellant had acted with intent to have sexual intercourse with the complainant, and the single intent test finds application.

[31] As referred to earlier, the appellant pushed the complainant down after she got into the rear seat of the vehicle where after he removed her slacks and underwear, and started licking her private parts. There is no indication for how long this lasted, but while she was hitting him on the head with open hands to stop, he undressed himself and came on top of her. His actions were of an ongoing nature and the genital stimulation was merely precursory or in preparation of penetrating her private parts. In the circumstances, although he committed two separate acts, he clearly acted with a single intent namely, to have sexual intercourse with the complainant.

[32] A conviction on both counts in these circumstances, in our view, would amount to a duplication of convictions. The court *a quo* misdirected itself by convicting on both counts and in the circumstances, should have acquitted the appellant on count 1.

[33] Having come to this conclusion, it is evident that there are indeed prospects of success on appeal and the application for condonation should therefore be granted.

[34] In the result, it is ordered:

1. The application for condonation of the appellant's non-compliance with the rules is granted.
2. The appeal against conviction on count 1 succeeds and the conviction is set aside.
3. The appeal against conviction on count 2 is dismissed.

JC LIEBENBERG

JUDGE

A SIBOLEKA

JUDGE

APPEARANCES:

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