

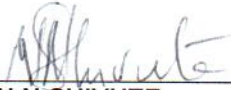
“ANNEXURE 11”

IN THE HIGH COURT OF NAMIBIA

Case Title: Leonard Tangeni David v The State	Case No: NLD (CC) 10/2009
	Division of Court: High Court
Heard before: SHIVUTE J	Delivered on: 21 August 2018
Neutral citation: <i>David v S</i> (CC 10/2009) [2018] NAHCMD 250 (21 August 2018)	
The order: <ul style="list-style-type: none">(a) Application for condonation for the late filing of a notice of appeal is refused.(b) Application for leave to appeal is dismissed.	
Reasons for order:	
<ol style="list-style-type: none">1. The applicant was sentenced on 22 April 2010 on a charge of rape contravening s 2(1) (a) of the Combating of Rape Act 8 of 2000. Before the applicant was sentenced he filed what is purported to be a notice of appeal. The court does not regard this as a notice of appeal because one can only appeal after conviction and sentence. The proper notice for leave to appeal in terms of s 316(1) of the Criminal Procedure Act against conviction and sentence was only filed on 3 April 2018. This application for leave to appeal is filed way out of the prescribed time of 14 days. The applicant had also filed an application for condonation for failure to comply with the 14 day period.2. Although several lawyers attempted to bring the application for leave to appeal since 2011, it was brought on accused's notice of leave to appeal that was filed before he was sentenced. There was also no application for condonation for failure to comply with the rules.	

3. I allowed counsel to argue on the application for condonation as well as on the merits for leave to appeal. Applicant's explanation of failure to file his notice within the prescribed time is that, he had the intention to appeal since his conviction and sentence, however the delay was caused by administrative hick-ups and an incomplete record.
4. Although there were administrative hick-ups and an incomplete record there was no proper notice of application for leave to appeal until 3 April 2018. Therefore, the explanation given by the applicant is not reasonable and satisfactory and it is rejected.
5. With regard to prospect of success, counsel argued that the applicant was wrongly convicted because the court found that coercive circumstances existed. Counsel referred to circumstances that are listed in s 2 of the Combating of Rape Act. However, counsel for the respondent correctly argued that coercive circumstances includes the ones listed in the Act but not limited to them. The applicant spoke in an angry voice when he called the complainant to go and sleep in his bedroom. The angry voice made the complainant to go to his room.
6. Counsel for the respondent again argued that the court erred by finding that although there were discrepancies in the state witnesses' evidence those discrepancies were not material. Furthermore, the court failed to consider material contradictions in the complainant's testimony, her testimony at the police and the rest of the witnesses.
7. I found the above argument unmeritous. As counsel for the respondent correctly argued, that although there were some discrepancies in witnesses' testimonies these were not material. The fact that the witness contradicted herself or by other witnesses does not show that the witness is a liar or her evidence should be wholly rejected. *S v Roger Mberira* case no.: CA 88/2003 delivered on 12 August 2005.
8. I have evaluated the evidence and considered the nature of the contradictions, their number and their importance. I had also considered their implications in relation to the rest of the evidence and arrived at the conclusion as per the court's judgment.

9. With regard to the ground that the court erred in law or on fact by finding that the applicant failed to give conclusive reasons why the complainant would falsely accuse him, this ground is without merit as the paraphrasing has been changed. The applicant suggested some reasons why the complainant allegedly made false allegations against him. The court in its judgment at p 641 paragraph 10 line 9 stated that the accused does not really have conclusive reasons why the complainant should falsely implicate him. The court arrived at this conclusion because the accused stated among other things that complainant implicated him maybe because he had beaten her. The court also did not just end there with its reasoning concerning this issue. It stated at page 642 lines 9-15 '...as a witness the complainant was quite impressive credible and reliable. Therefore, this court has no reasons to reject her evidence, on the other hand the accused did not impress the court as a witness, the explanation he gave as to the motive of the complainant to falsely implicate him is unconvincing.'
10. Counsel by suggesting that there was a reverse onus on the applicant does not carry any water. I am, therefore of the view that as far as the conviction is concerned, the applicant has no reasonable prospect of success when prosecuting his appeal.
11. With regard to the grounds on sentencing, the applicant argued that the sentence is shocking and inappropriate. It was further argued on behalf of the applicant that there were substantial compelling and compelling circumstances. These grounds are without any merit. The sentence imposed is in line with the provision of s 3(1) (a) (iii) (cc) of the Combating of Rape Act. The complainant was under the age of 18 years and the perpetrator is the complainant's parent. Furthermore, the applicant was legally represented. No substantial and compelling circumstances were placed before court, for the court to deviate from the mandatory minimum sentence provided for by the Act.

	
	N N SHIVUTE JUDGE

CASE NO.: NLD (CC) 10/2009

IN THE HIGH COURT OF NAMIBIA

WINDHOEK, TUESDAY, 21 AUGUST 2018

BEFORE THE HONOURABLE MRS JUSTICE SHIVUTE

In the matter between:

LEONARD TANGENI DAVID

APPLICANT

and

THE STATE

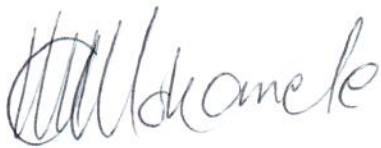
RESPONDENT

Having heard **Ms Kishi**, Counsel for the Applicant and **Mr Kumalo**, Counsel for the Respondent.

IT IS ORDERED

1. Application for condonation for the late filing of a notice of appeal is refused.
2. Appeal for leave to appeal is dismissed.

BY ORDER OF THE COURT



REGISTRAR

/vs

TO: Ms Kishi (Dr Weder Kauta and Hoveka)

Office of the Prosecutor General (Mr Kumalo)