REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2021 /00061

In the matter between:

BRADLEY COLEMAN **APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation: *Coleman v State* (HC-MD-CRI-APP-CAL-2021 2021/00061) [2022] NAHCMD 31 (4 February 2022)

Coram: SHIVUTE, J et JANUARY J
Heard: **5 November 2021**
Delivered: **4 February 2022**

Flynote: Criminal Procedure – Trial – Single witness evidence of complainant – Treated with caution – Court should weigh evidence – Consider merits and demerits – Decide whether trustworthy despite contradictions and shortcomings in testimonies – Complainant credible witness – No basis for appeal court to interfere.

Mutually destructive versions – Proper approach – Court to apply its mind to merits, demerits of State, defence witnesses' evidence and probabilities of case – Court not to isolate each piece of evidence – Court to look at evidence holistically and to consider whether defence's case has a reasonable possibility of being substantially true – Evidence in its totality supported by inherent probabilities proves that accused person raped complainant.

Criminal Procedure – Duplication of convictions – Test – Distinguished and applied – Single evidence test – Committing two criminal acts with single intent – Both acts necessary to carry out that intent – Same evidence test – Evidence required to prove one criminal act involves proof of another criminal act – Rape and Kidnapping – Two distinct offences committed – Evidence required for offences differ – Accused not acting with single intent – No misdirection found

Summary: The accused person was charged with 2 counts of rape contravening s 2 (1) *(a)* of the Combating of Rape Act, 8 of 2000 and Kidnapping. The State rested its case on evidence of the complainant who was a single witness. Evidence of a single witness to be treated with caution. The court should weigh evidence, consider its merits, demerits and decide whether it is trustworthy despite contradictions and shortcomings in the testimonies – Complainant credible witness – No basis for interference by appeal court.

Mutually destructive versions – When the court is confronted with mutually destructive versions, the proper approach is for the court to apply its mind to the merits, demerits of both State, defence witnesses' evidence and to inherent probabilities of the case. The court must not isolate each piece of evidence but must look at the evidence holistically

and consider whether the defence case has a reasonable possibility of being substantially true. Consideration of evidence in its totality supported by inherent probabilities proves that accused person raped complainant.

Appellant alleging that conviction on rape and kidnapping amounted to a duplication of convictions. The tests to be applied are the single evidence test and same evidence test. The court found that rape and kidnapping are two distinct offences, with separate elements. The evidence required to prove the elements of rape and those of kidnapping materially differ. Accused did not act with single intent when committing the two offences. The court found no misdirection.

ORDER

The appeal on each conviction and sentence is dismissed.

JUDGMENT

SHIVUTE J, JANUARY J (Concurring)

Introduction

[1] The appellant was arraigned in the Windhoek Magistrate's Court on two counts of Rape in terms of section 2(1) (a) read with sections 1, 2(3), 3, 4, 5, 6, and 7 of the Combating of Rape Act, 8 of 2000 and kidnapping.

[2] The appellant pleaded not guilty to all the counts and tendered formal admissions in terms of section 220 of the Criminal Procedure Act. In respect of count 1, he admitted the date of the offense, the location it took place in and that he was in the company of the complainant. He further admitted to having sexual intercourse with the complainant but raised the defense that it was consensual. On count 2, he admits the date and place

in which the offence took place, but denies that he had an unlawful and intentional sexual act with the complainant.

[3] He was sentenced to fifteen (15) years' imprisonment on count 1 (rape) and (15) fifteen years' imprisonment on count 2 (rape) of which 3 years' are suspended for a period of 5 years, on condition that the accused is not convicted of committing the offense of Rape, read with the provisions of the Combating of Rape Act during the period of suspension. On count 3 (kidnapping), he was sentenced to 12 months' imprisonment.

[4] Dissatisfied with the outcome, appellant appealed against the conviction on each count of rape and on kidnapping. He also appealed against the sentence on all three convictions.

Grounds of Appeal: Conviction

[5] The grounds of appeal against the conviction can be summarised as follows:

(5.1) the learned magistrate erred and or misdirected herself in law and facts when she convicted the appellant on both counts of rape without there being credible evidence supporting rape;

(5.2) the conviction of kidnapping on count 3 amounted to a duplication of conviction based on the principle of the same evidence rule;

(5.3) the learned magistrate failed to assist the accused who was in custody to subpoena a crucial witness for the defence;

(5.4) the learned magistrate erred by paying lip service and failing to apply the cautionary rule in terms of section 208 of the Criminal Procedure Act of 1977;

(5.5) the learned magistrate attached too much weight on the conduct and demeanour of the complainant during her testimony when she continuously and unnecessarily cried without justification

[6] The appellant's grounds of appeal against the sentence are as follows:

(6.1) that the learned Magistrate erred in concluding that no substantial and compelling circumstances exist to allow deviation from imposing the mandatory minimum sentence on each count of rape;

(6.2) the seriousness of the offence and the interests of society was overemphasized by imposing an effective term of imprisonment of 28 years;

(6.3) the personal circumstances of the appellant were not adequately taken into consideration;

(6.4) the principle of mercy and individualization was not adequately applied and the sentence is harsh and shockingly inappropriate as it disregarded the principle of reformation of the offender.

Brief Factual Background

[7] The complainant, testified that the appellant was her older sister's boyfriend, he was known to the family and she described their relationship as similar to that of a brother and sister. On 1 February 2019, the appellant invited the complainant to view a surprise for her older sister. The appellant took her to a guesthouse in Khomasdal, they went upstairs into a room and he stood by the door and confirmed that the room was the surprise for her sister. Complainant requested to leave after seeing the surprise but appellant unexpectedly pulled out a knife which was kept under the mattress and ordered the complainant to lay on her stomach on the floor, the complainant screamed and jumped to the other side of the bed. The complainant thereafter complied by laying on her stomach and the appellant proceeded to tie her hands and feet with cable ties and sellotaped her mouth.

[8] The appellant placed the complainant on the bed, asked her not to try anything stupid and left her in the room for 30 minutes. He returned with alcoholic beverages and untied the cable ties so that she can have a drink. He informed her that he was sexually frustrated, did not have sex for 5 months and that he was horny. He further informed her that he will come fast. He then proceeded to remove her jeans and underwear and inserted his penis into her vagina without consent. The appellant and complainant slept in the room for the night. The next morning, the appellant again inserted his penis into the complainant's vagina from the back while she was tied up. The appellant ordered breakfast in the guesthouse but complainant did not eat. Thereafter, complainant informed appellant about her doctor's appointment. The appellant untied her. She washed her face and they left the room. On their way out of the guesthouse, the appellant informed the receptionist at the guesthouse that they will be back. The appellant thereafter took the complainant to her dental appointment.

[9] When the complainant reached the dentist's office, she informed the dentist about being held hostage and raped by the appellant. She further informed her mother via telephone. The police were alerted of the incident and appellant was arrested. The medical report handed up as evidence indicated that the patient was sensitive to touch and the alleged rape incident could not be excluded.

[10] The appellant in his testimony, admitted inviting the complainant to the guesthouse to comment on the surprise and that he tied her legs up with cable ties and sellotaped her mouth. He admitted leaving her in the room for 30 minutes. His version however differs from that of the complainant when he testified that after returning to the room, he came back to his senses and realized what he was doing. He testified further that he obtained a knife from the owner of the guesthouse and used it to cut the cable ties on the complainant's right hand. He then gave the complainant the knife so that she could cut the remaining cable ties.

[11] The appellant testified that, he conversed with the complainant in the presence of the lady working at the guesthouse. The lady asked if they were ok. Appellant further

testified that the complainant gave him N$ 200 which he used to buy alcohol. The appellant and complainant watched television and drank alcohol while in the room. The appellant thereafter kissed the complainant on the cheek. She kissed him on the lips. He viewed this gesture as tacit consent by the complainant to have sexual intercourse. Thereafter, they each undressed themselves. Complainant turned around and he inserted his penis into her vagina. The appellant thereafter dosed off. The next morning a waitress brought their breakfast to the room. The complainant had breakfast in bed .The complainant thereafter informed him of her doctor's appointment. He accompanied her. The complainant offered to pay the taxi which they traveled in. The appellant testified that he had consensual sexual intercourse with the complainant on the first day (1 February 2019) and denies any sexual intercourse with the complainant on the next day (2 February 2019). He explained that the purpose of the knife was for the complainant to untie herself from the cable ties.

[12] The complainant's older sister, Lisa Lombard, testified that the accused was her boyfriend for 10 years. On the day of the incident, the accused texted her that he arranged a romantic getaway. She replied and asked whether he was horny and wanted to rape her over and over again. When she was questioned as to why she replied in that manner, she informed the court that during their relationship with the appellant, he would never understand when she said no to sex. The witness further observed the bruises on the complainant's hands and feet that seemed like marks from a rope used to tie her hands and feet.

[13] The Defense called the housekeeper at the guesthouse in question, Ms. Shangelao Mwaetako. She testified that the accused came to her alone in the morning and booked the room for two nights. He later left in the afternoon and returned with someone. She confirmed cleaning the room before the accused and complainant entered and after they left. When questioned whether she left any cable ties or sellotape in the room, she replied no. She testified that she was the only one communicating with the accused. The owner of the guesthouse did not directly communicate with the

accused. The accused only collected alcohol and fish from her but did not ask for a knife.

Discussion of grounds of appeal

First ground: Count 1

[14] It is argued that the learned magistrate erred when she convicted the appellant on the 1st and 2nd count of Rape in the absence of credible evidence in support thereof. On the 1st count of rape, counsel for the appellant argued that complainant consented to the sexual act when she kissed him back. He argued further that complainant in her own testimony, stated that she allowed the kiss because she wanted to win his heart over. Counsel submitted that the doctor's medical examination is not conclusive as it does not confirm forced penetration into the complainant's vagina. Another issue raised by counsel was that the complainant gave inconsistent statements when she testified in examination in chief that appellant removed her jeans and underwear, kissed her on the butt and inserted his penis into her vagina whilst her hands and feet where tied up with cable ties whereas, in cross examination she only testified that appellant pulled down her jeans. Finally, counsel criticised the complainant's failure to scream when the housekeeper attended to their room or failed to escape when appellant fell asleep in the room where they both slept.

[15] Counsel for the Respondent on the other hand, argued that complainant testified in detail regarding the sexual acts and her *viva voce* evidence is credible evidence of rape. Complainant was a credible witness because her evidence was corroborated by appellant himself. Counsel argued that the absence of scientific evidence does not automatically invalidate or nullify other equally convincing evidence present.

[16] The complainant's testimony was corroborated by appellant in material respects when he testified of having sexual intercourse with her on 1 February 2019, tied her hands and legs with cable ties, sellotaped her mouth and asked her to lie on her

stomach. The complainant's evidence is further corroborated by the photo plan which confirms that the cable ties were found in the room and the knife under the bed. The complainant testified that she kissed the appellant out of fear that he will stab her. Her conduct can thus not be regarded as consent to have sexual intercourse. Although the medical evidence does not prove a forceful sexual act, the Rape Act[1] defines 'sexual act' to include the insertion (to even the slightest degree) of the penis of a person into the vagina of another person.

[17] Considering the evidence on record, this court endorses the court *a quo's* findings that appellant's version of having consensual sexual intercourse with the complainant is highly improbable. Further, one would not expect a person who is threatened with a knife while their mouth is sellotaped to act in a normal manner by enjoying a conversation or consenting to sexual intercourse.

Count 2

[18] On the second count of rape, counsel for the appellant argued that the complainant's conduct before and after the incident took place, was not consistent with that of a rape victim. The conduct referred to, was complainant's failure to escape when she went to the bathroom while not tied up, her ability to eat the breakfast bought by appellant, her failure to plan an escape, her failure to scream or run away when she had the opportunity. She further failed to inform the lady at the guesthouse, the taxi driver or the security guard at the dentist about the rape incident. Counsel for the appellant further took issue with the fact that in her witness statement, the complainant indicated that she took a shower on the morning of 2 February 2019 whereas in her oral evidence, she contradicted herself by stating that she did not take a shower.

[19] Counsel for the respondent argued that the complainant was only untied after the sexual act already took place. There was no obligation or her to inform every person

[1] Act 8 of 2000

she met about the rape incident. Counsel pointed out that complainant informed her dentist, the person whom she was most comfortable with.

[20] It was submitted that, the argument by counsel for the appellant regarding the complainant's failure or omission to escape and to inform the various individuals they met along the way, holds no water because as counsel for the respondent correctly put it, there was no obligation on the complainant to inform every individual she met about the rape incident. There is further no fixed behavior that is to be expected from all rape victims.

[21] The issues regarding complainant giving contradictory statements in her evidence and her credibility, will be dealt with at a later stage in the judgement under grounds 5 and 6

Third ground

[22] It was argued on behalf of the appellant that the learned magistrate erred by convicting the appellant on rape and kidnapping as it amounted to a duplication of convictions. Counsel for the respondent on the other hand argued that the evidence required to prove the offence of rape is not the same as that of kidnapping. Therefore the similar test evidence does not apply.

Applicable law

[23] The tests used to establish whether a duplication of convictions exist or not, were stated clearly in *S v Eixab* 1997 NR 254 (HC) 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.'

[24] Rape is defined as the intentional commission of a sexual act with another person under coercive circumstances[2] whereas Kidnapping is unlawfully and intentionally depriving a person of their freedom of movement. When applying the single evidence test and the same evidence test, we find that the evidence required to prove the offence of rape is not the same as that required to prove kidnapping. The accused committed two acts, each standing alone is a crime. He did not act with a single intent to commit both of offences. This court finds no misdirection in this regard.

Fourth ground

[25] On the 4th ground of appeal, it was argued on behalf of the appellant that he did not have a fair trial because the court a quo erred by failing to subpoena a witness who was supposed to testify on his behalf. Counsel argued that the owner of the guesthouse was a crucial witness in this case. Counsel for the respondent argued that the court a quo subpoenaed the defense witness using the name and address of the witness as provided by the appellant. The fact that such details were incorrect and resulted in the wrong witness being subpoenaed is not the court's fault.

[26] The record reflects that the appellant requested the court a quo to subpoena a witness to testify on his behalf. The court indicated that it had no issues to assist the defense in that regard and requested the name and address of the witness to be subpoenaed. The appellant gave the full details of his witness to the court. The witness, Ms. Mwaetako was subpoenaed by court. She testified that she is a housekeeper at the guesthouse where the rape incident took place. She testified that she booked the

[2] Combating of Rape Act 8 of 2000

appellant in the guesthouse and that the appellant at some point came downstairs from his room to collect alcohol and fish from her. She further testified that she was the only one attending to the appellant whilst he was at the guesthouse. In examination in chief, the legal representative of appellant informed the witness that his instructions were that the fish was brought to the accused person's room. The witness replied that this was not true as the accused came downstairs to collect the fish himself.

[27] After Ms. Mwaetako completed her testimony, counsel for the appellant informed the court that after consulting the accused, he realized that Ms. Mwaetako was not the correct witness that accused intended to call, he further added that accused intended on calling the lady who owns the guesthouse where the rape incident occurred. Counsel informed the court that the owner of the guesthouse was to testify regarding the fish being brought to the accused bedroom whilst at the guesthouse. Such evidence was going to corroborate the accused's version. Counsel for the accused then requested that the court should subpoena the owner of the guesthouse. In response, the court made a ruling that it will not afford the accused an opportunity to call such witness since the accused would still have contradicting versions because Ms. Mwaetako already testified that the accused collected the fish from her and that the fish was not brought to the accused's room.

Applicable law

[28] Section 179 of the Act[3] provides the accused with the following procedure to secure the attendance of his/her witnesses. It reads as follows:

'(3) (a) Where an accused desires to have any witness subpoenaed and he satisfies the prescribed officer of the court-

(i) that he is unable to pay the necessary costs and fees; and

(ii) that such witness is necessary and material for his defence, such officer shall subpoena such witness.

[3] Criminal Procedure Act 51 of 1977

(b) in any case where the prescribed officer of the court is not so satisfied, he shall, upon the request of the accused, refer the relevant application to the judge or judicial officer presiding over the court, who may grant or refuse the application or defer his decision until he has heard other evidence in the case.'

The record reflects that, the learned magistrate informed the accused person that her refusal to subpoena the owner of the guesthouse is premised on the fact that Ms. Mwaetako already testified on the issue regarding the fish. Calling the owner of the guesthouse would have resulted in there being contradicting statements. The court was therefore not satisfied that such witness was necessary and material for the accused's defence as required by section 179(3)(ii) of the Criminal Procedure Act[4] .

Fifth and Sixth ground

[29] On the 5th and 6th grounds of appeal taken together, counsel for the appellant criticized the manner in which the trial court assessed the complainant's evidence. It was submitted that the trial court failed to exercise caution in dealing with the evidence of the complainant who was a single witness, that too much weight was placed on her conduct and demeanor during her testimony as she continuously and unnecessarily cried without justification. Counsel criticized the contradictions and shortcomings in the complainant's evidence and argued that such discrepancies negatively affected her credibility. Counsel for the respondent on the other hand submitted that the trial court correctly applied the cautionary rule in dealing with the complainant's evidence in that the appellant himself and other witnesses corroborated the complainant's version.

[30] In its evaluation of the single witness evidence of the complainant, the court below was alive to relevant case law where the test had 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. When considering the two mutually destructive or irreconcilable versions, the court was guided

[4] Act 51 of 1977

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]

[31] In its final analysis, the court found the complainant, despite being a single witness, credible. She was found to have testified in a clear and coherent manner, full of detail as to what transpired in both rape incidents. Regard was also had to the fact that complainant's version was corroborated by the appellant in material respects. The court considered the testimony of the defence witness, Ms. Mwaetako who testified that she cleaned the room before the appellant entered and she did not place any cable ties or sellotape in the room. She further confirmed that she, and not the owner of the guesthouse or the construction people entered the room after the appellant and complainant went into the room where the rape incident occurred. Ms. Mwaetako's evidence contradicts the appellant's evidence in material respects and the court has no reason to reject her evidence as she is an independent witness. The court observed that the complainant appeared very emotional during her testimony and she found it difficult to convey to the court her version of events especially when it came to the rape incident. The court found that the complainant could not have faked such emotions. 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.

Applicable law

[32] Section 208 of the Criminal Procedure Act 51 of 1977 allows a court to convict an accused on the evidence of a single witness. However, in terms of our law this evidence should be clear and satisfactory. Our courts have been following the approach set out in: *S v Sauls* and Others 1981 (3) SA 172 (A) 180 (E-G) where the court stated the following:

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[5] *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others* 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).

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings, or defects or contradictions in the testimony, he is satisfied that the truth has been told.'

[33] As regards the credibility of a witness, 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.

[34] The court a quo only had the version of the accused person and that of the complainant who is a single witness. There was no independent eye witness to the events that transpired. Therefore, it was presented with mutually destructive versions. The proper approach to mutually destructive versions is set out in *S v Engelbrecht* 2001 NR 224 at 226 (HC) where the court cited *S v Singh* 1975 (1) SA 227 N at 228 F- H as follows:

'The proper approach… is for the court to apply its mind not only to the merits and demerits of the state and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner … is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.'

[7] *S v Hepute* 2001 NR 242 (HC) at 243G-H.

[35] From the trial court's judgement it is evident that proper consideration was given to the fact that the complainant was a single witness. Her evidence was considered on the evidence as a whole. The court was satisfied that the complainant was credible and her evidence being reliable. The trial court, in our view correctly, followed a holistic approach in its assessment of the evidence and in the end was satisfied that the appellant had raped the complainant on two occasions. We are not persuaded that the trial court committed any misdirection on its evaluation of the evidence.

Appeal on sentence

[36] With regards to sentence, counsel for the appellant continued to argue that the learned magistrate overemphasized the seriousness of the offence and interest of society by imposing an effective prison term of 28 years. The sentences on count 1 and 2 were argued to be shocking and severe as it disregards the principle of reformation of the offender. Counsel further argued that the court a quo failed to take into account, the substantial and compelling circumstances of the appellant to divert from imposing the minimum mandatory sentence. According to counsel, the substantial and compelling circumstances were that appellant was 35 years old and still youthful, he was only 33 years of age at the time of committing the offence, he was in custody for 2 years and 3 months pending the finalization of the matter. Appellant has a ten year old child. The victim of the rape did not suffer serious injuries and minimum force was used during the rape incident.

[37] The appellant's personal circumstances were also not considered according to counsel for the appellant. Counsel further took issue with the court a quo's findings that although there is no evidence before court, the complainant's evidence led to the court's conclusion that complainant suffered psychological scars as a result of the rape incident. She lives in fear of men and it will take her a long period to heal emotionally, psychologically and mentally. Counsel added that the element of mercy was not sufficiently exercised. Counsel for the Appellant made reference to section 8(2) of the Combating of rape Act 8 of 2000 which states that in estimating the weight to be

attached to evidence admitted in terms of psychological effects of rape, the Court shall have due regard to the qualifications and experience of the person who has given such evidence and all the other evidence given at the trial.

[38] Counsel for the respondent argued that the learned magistrate exercised her discretion judiciously. He argued that rape is generally a serious offence. Although there was no expert evidence to testify on the complainant's psychological state after the rape incident took place, the complainant herself testified firstly in her evidence during the trial as to how she felt about the rape incident. During the sentencing proceedings, she testified to the fact that she cannot sleep .It was further argued on behalf of the respondent that the requirement of mercy is not aimed at making the court look weak and that heavy sentences should be imposed if justified.

Applicable law

[39] In *S v Tjiho* 1991 NR 361 (HC) at 364G-H Levy J pointed out that a trial court had a judicial discretion in sentencing the accused. The learned Judge went on to state as follows:

'This discretion is a judicial discretion and must be exercised in accordance with judicial principles. Should the trial court fail to do so, the appeal Court is entitled to, not obliged to, interfere with the sentence. Where justice requires it, appeal Court will interfere, but short of this, Courts of appeal are careful not to erode the discretion accorded to the trial court as such erosion could undermine the administration of justice.'

[40] Conscious of the duty to respect the trial court's discretion, Levy, J in *S v Tjiho*[8] at 366A-B listed the following guidelines which will justify such interference. The appeal court is entitled to interfere with the sentence if:

' (i)the trial court misdirected itself on the facts or on the law; (ii) an irregularity which was material occurring during the sentence proceedings; (iii) the trial court failed to take into account

[8] *S v Tjiho* 1991 NR 361 (HC) at 364G-H

material facts or overemphasized the importance of other facts; (iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that would have been imposed by the court of appeal.'

[41] In this matter, there are no substantial and compelling circumstances placed before court. We do not find any misdirection on the approach of the court a quo on the contended grounds. Rape is a serious offence irrespective of whether the complainant had suffered injuries or not. The complainant's human dignity has been seriously violated and her privacy has been invaded. Although there was no expert evidence regarding the complainant's psychological trauma caused by the rape incident, the record reflects that complainant testified under oath regarding her mental state after the rape incident. The court a quo cannot be faulted for placing due weight on such evidence.

[42] The fact that the appeal court could have imposed a different sentence does not mean that the learned magistrate did not exercise her discretion judiciously. The magistrate imposed a partially suspended sentence on count 2 which implies that she was alive to the consideration of mercy when sentencing. It could not be said that the sentence imposed is so startlingly inappropriate and induces a sense of shock or is unreasonable. We would therefore dismiss the appeal.

[43] In the result, the following order is made:

The appeal on each conviction and sentence is dismissed.

NN Shivute

Judge

HC January

Judge

APPEARANCES:

THE STATE:	Mr. Khumalo Office of the Prosecutor-General Windhoek
APPELLANT:	Mr. Muchali Jermain Muchali Legal Practitioners Windhoek