

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON APPLICATION FOR LEAVE TO APPEAL

Case Title: Alexander Krylov Anna Engelbrecht and State	First Applicant Second Applicant Respondent	Case No: CC 32/2018
Division of Court: Main Division	Heard on: 8 June 2023	
Heard before: Honourable Justice Claasen J	Delivered on: 22 June 2023	
Neutral citation: <i>Krylov v S</i> (CC 32/2018) [2023] NAHCMD 349 (22 June 2023)		
The order: <ol style="list-style-type: none">1. The application for leave to appeal is dismissed.2. The matter is regarded as finalised.		
Reasons for decision:		
CLAASEN J: [1] Having faced a multiplicity of charges, the first applicant, Mr Alexander Krylov, was convicted of 10 counts of human trafficking in contravention of s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 (hereinafter referred to as the POCA), 10 counts of rape in contravention of s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the		

Combating of Rape Act 8 of 2000, (hereinafter referred to as the CORA) and 1 count of supplying of cigarettes to persons under 18 years in contravention of s18 (1)(a) read with s 18(4) of the Tobacco Products Control Act 1 of 2010 and read with s 94 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the CPA). He was sentenced to five years' imprisonment on each of the trafficking counts and fifteen years' imprisonment on each of the rape counts. Parts of the sentences were ordered to run concurrently, resulting in an effective period of thirty five years' imprisonment to be served. In respect of the supplying of cigarettes' charge he was sentenced to pay a fine of N\$12 000 or 12 months' imprisonment.

[2] The second applicant, Ms Anna Engelbrecht, was convicted of 3 counts of rape in contravention of s 2(1)(b) read with s 1, 2(2), 3, 5, 6 and 7 of the CORA and 5 counts of child trafficking also in contravention of s 15 of POCA. She was also sentenced to five years' imprisonment on each of the trafficking counts and fifteen years' imprisonment on each of the rape counts. Parts of the sentences were ordered to run concurrently, which made her sentence an imprisonment term of twenty years.

[3] Both of the applicants are disgruntled by the outcome of the case and they enjoy the right to appeal. In terms of s 316 of the CPA the applicants can pursue that right, upon being granted leave, to appeal to the Supreme Court.

[4] The notice of the application for leave to appeal comprises eighteen pages with nine grounds, a general ground, and a ground ad sentence. The majority of the grounds had several sub-paragraphs, some of which deal with different points, which is not the norm under a single ground of appeal. In its opposition to the application the respondent put forth the view that the applicants' grounds of appeal are not couched in clear or specific terms as required by law, but that the respondent will nevertheless attempt do construe them 'as can be gleaned from the notice of appeal'.

[5] The applicants' heads of argument comprises of 43 pages and was delivered nine days late, only after the chamber's staff had to enquire about it. When asked for the reason for that, counsel for the applicants submitted that it was timeously 'filed electronically' with the judge's erstwhile secretary at a different court building. This is an

odd explanation, given that this is a paper file, nor is it clear why it was sent to another premise, as counsel appeared at the main court building for the allocation of a hearing date. Be that as it may, counsel has extended an apology for that and the court has accepted it.

[6] In an application of this nature, the overall test is whether there are reasonable prospects of success on appeal. In *S v Nowaseb*¹ it has been stated that the mere possibility that another court might come to a different conclusion is not in itself sufficient to justify the grant of the application, and that the applicant has to satisfy the court that he has reasonable prospects of success on appeal. In meeting that threshold, such an application should set out: whether the whole or only part of the judgment is being appealed against; the finding of fact and/or law which is being appealed; and the grounds of the appeal.

[7] I turn to the law that governs a notice of appeal (and also a notice of application for leave to appeal). The law on that is trite, namely that the grounds of appeal must be set out clearly and specifically, in unambiguous terms.² The requirement that the grounds are stated in the application in clear and unambiguous terms is peremptory. The court in *S v Kanoge*,³ referred to the *Gey Van Pittius*⁴ matter and stated as follows:

'I have given great thought to what he says are the grounds; and having done so, I am firmly of the opinion that, upon the authority of *S v Gey van Pittius and Another* 1990 NR 35, there are no proper grounds before the court. They are all conclusions drawn by the appellant. In *S v Gey van Pittius*, Strydom AJP (as he then was) at 36H stated:

"The purpose of grounds of appeal as required by the Rules is to apprise all interested parties as fully as possible of what is in issue and to bind the parties to those issues. (See further in this respect the judgment of my Brother Frank AJ in the matter of *S v Wellington* (1990 NR 20) and the cases referred to therein.)"

¹ *S v Nowaseb* 2007 (2) NR 640 (HC) para 2.

² *S v David* (CC/132018) [2019] NAHCMD 518 (25 November 2019).

³ *S v Kanoge* (CA 39/2012) [2012] NAHCMD 45 (12 October 2012) para 3.

⁴ *S v Gey van Pittius and Another* 1990 NR 35.

[8] In enquiring from counsel for the applicants whether the grounds of appeal in the notice meet muster, his view was that it does with a resounding certainty. With respect, the document shows a different state of affairs, as the formulation thereof has glaring shortcomings. Had it not been such a lengthy document I would have set it out verbatim herein. The document was couched in a diffuse manner, with general and ambiguous sweeping terms. The notion by the drafter to insert several paragraphs and conclusions under a single ground leaves much to be desired. The document also contains legal arguments which best belong in heads of argument. In *Beyer v State*⁵ the headnote states that a ground of appeal which set out conclusions of the draftsman is insufficient and that an improper ground amounts to no ground of appeal at all. It appears that the drafter endorsed an open ended approach without wanting to bind itself to a specific or focused error in a given ground, which is contrary to the law on grounds of appeal. Apart from one of the sub-paragraphs within a ground labelled as ground 2, none of the grounds identifies which applicant the ground pertains to.

[9] This court is constrained to agree with the respondent that the document fails to set out specific grounds of appeal for most of the grounds. The problematic grounds do not clearly specify a particular finding of fact and or conclusions of law objected to, nor does it say in respect of which particular witness, or witness statement or which specific text in the record is referred to. Some of the grounds overlap and some of them are phrased in general terms. That results in it being ambiguous, and incapable of properly informing the respondent what case it has to meet in opposing the appeal. The effect of grounds of appeal that are not clearly and specifically or that are conclusions by the draftsmen is fatal and that is a nullity. The principle is firmly established in our law.⁶ Similar to the respondent, the court will attempt to fathom out the crux of the grounds, to the extent that it is able to, and where more than one paragraphs can be taken together, they will be dealt with as one ground.

⁵ *Beyer v State* (CA 134/2013) [2014] NAHCMD 172 (03 June 2014).

⁶ *Gofried Kuhanga and Another v S* Case No CA 57/2002 delivered 18 November 2004 (HC) (unreported), *Tjiriange v State* (CA 86/2016)[2016] NAHCMD 390 (17 January 2017).

Ground 1

[10] This ground contained three points, which in summary boils down to a complaint that the judge descended into the arena, took over/intervened in cross-examination and was biased. The respondent's stance was firstly that these are not proper appeal grounds, and secondly, that it deals with issues which may be better suited for a review. As for the respondent's review proposition, I do not regard these issues to be considered separately and will deal with them in the forum in which the applicants raised them.

[11] The first and third points of this ground of appeal fails to identify or refer to a specific extract of the evidence that underpins the contention by the applicants. Without that particulars, it amounts to bare conclusions by the drafter, which do not amount to proper grounds of appeal for the court to determine.

[12] I turn to the contention of interference in cross-examination and or taking over the role of interpreter, as that is prefaced by an extract from the record. Counsel for the applicants appears to be oblivious that the extract should be seen in the context of testimony given by a child witness. In the textbook, 'The Judicial Officer and the Child Witness'⁷ the author pinpoints to communication dilemmas by referring to Myers, Saywitz and Goodman (1996:59) as follows:

'The linguistic complexity of court room banter surpasses anything children hear at home or school. Legal terms that are second nature to attorneys are completely beyond children. Considering children's relatively unpolished language skills, opportunities for miscommunication abound, and the court is in a very good position to ensure that attorneys ask comprehensible questions'.

[13] It underscores that children, depending on their growth and development, may find court formalities and legal terminology difficult to follow. That may inhibit their responses and obscure the truth, which can be exacerbated if the evidence relates to intimate or emotionally laden subject matter. This sentiment has been expressed in *Klink v Regional Court Magistrate NO and Others* by Melunsky J that:⁸

⁷ K Muller *The Judicial Officer and the Child Witness*, 1ed (2016) at 336.

⁸ *Klink v Regional Court Magistrate and Others* 1996 (3) BCLR 402(SE).

'It is sufficient to say that I am quite convinced that a child witness may often find it traumatic and stressful to give evidence in the adversarial atmosphere of the court room and that the forceful cross-examination of a young person by skilled counsel may be more likely to obfuscate than to reveal the truth.'

[14] In general, a judicial officer has to do what he reasonably can to remove obscurities of language or meaning whenever possible, for example, by asking questions himself.⁹ In the case of a child witness, the need for that is greater. As such, a court has a duty to ensure that child witnesses receive the necessary assistance¹⁰ which means it may simplify technical terms or specialised court language and guard against children being misled in court.¹¹

[15] Returning to the extract and the contention by counsel for the applicants, it is factually incorrect to state that for 16 minutes 'the court took over the cross-examination' as it was an exchange wherein several parties spoke, namely the erstwhile counsel, the interpreter, the witness and the court. The text further illustrates why it was necessary at certain points for the court to clarify and simplify legal concepts for the witness. There is no irregularity in that:

'Court: Does she understand undue influence, you simplify it. --- I do understand that my lady. I gave the statement freely and voluntarily without any anybody's force.

Mr Scholz: Okay

Court: force and undue influence are different things, that is why I ask does she understand the words, she must not just say yes yes yes, if she does not really comprehend please.¹²

[16] I move on to a portion thereafter wherein the erstwhile legal counsel for the applicants proceed to prompt the witness about her second witness statement. She was asked in what language it was done and whether she understood it. She replied it was done in English and that she understood it. In order to illustrate the point, I will, with

⁹ *R v Kumalo* 1947 (4) SA 156 (N).

¹⁰ *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) (3 October 2013).

¹¹ *S v Krylov* (CC 32/2018) [2023] NAHCMD 48 (13 February 2023) para 8 and para 9.

¹² Record at page 98 lines 14-22.

brevity in mind, set out another part of the extract referred to as it will illustrate the relevant law of evidence which I will come to below:

'And after the statement was taken down, did you read through it? – No I did not.

Do you know whether this was the truth and nothing else but the truth, the content of your statement?

Court: Maybe the question is were you satisfied, it is simpler, were you satisfied that the content of the statement is correct according to you, was she satisfied? – yes I was satisfied my lady because that police officer would not lie.

Although she did not read it and was it read to her? --- It was not read to me neither did I read it my lady.

Then how can you be satisfied, is it trust, you are trusting that it is correct?--- My lady I knew that I told the truth.¹³ (My own emphasis)

[17] Given that a witness statement is a private document, a cross-examining party must produce the original document, prove the authenticity and prove the content of the document. As long as these requirements has not been proving, by properly laying a basis for that, the statement cannot be admitted for cross-examination. Part of the constituent questions relates to whether the statement was read by the witness or read by the official who recorded it to the witness and whether the witness was satisfied that it had been correctly reduced to writing. In this cited text the response that she did not read it, constitutes a critical point, as it closes the path for what the cross-examiner wants to do. Despite that, we see in the text that the cross-examiner moved on to a different question. It is at that juncture that the court drew the attention back to that component. It was to establish through a different question whether she nevertheless had an opportunity to be satisfied that the content of the statement is indeed what she said. That is for the sake of the court who has to ensure that the evidential and procedural requirements are met before the statement may be admitted for purposes of cross-examination. Thus there is no merit in this ground.

[18] In the cited text the child did not read the statement, nor was it read to her. Her

¹³ Record at page 99 lines 8-22.

understanding was that she was satisfied with the correctness of the content, because a police officer wrote it. That was why the court enquired into that contention. At the end of the day the responses by her in that particular witness statement did not instil in the court a sense that she of own cognition verified the accuracy of the statement.

Ground 2

[19] This ground was formulated as ten paragraphs, which makes the ground unclear as to what specifically the central objection is therein. I have earlier eluded to the difficulty when a ground is phrased in that fashion. The respondent stated that it had to assume what the applicants meant, which was that the applicants contend that the court erred by failing to apply *Veira v State*¹⁴, and incorrectly interpreted or applied it to CORA. In oral arguments, counsel for the applicants submitted that the issue was that the evidence did not prove the form of coercive circumstances as alleged in the charge and on which the court convicted. In answer to this ground, the court has a discretion to include coercive circumstances, other than those listed in CORA, which is what the court did in the case at hand. The court has dealt with it in the trial judgment,¹⁵ and in the court's view there is no merit in this ground. Insofar as the qualm pertains to the second applicant's convictions on rape, CORA provides for that. Incidentally, it was not the first time in Namibia that a court convicted a person for having caused a person to commit a sexual act. Nor is it the first that that this form of coercive circumstances formed that basis for the rape convictions, as can be seen from *S v Lukas*.¹⁶ Counsel of the applicants argued that there was an issue in one of the rape convictions in the *Lukas* matter. My understanding of that issue is that it does not support the argument of the applicants herein at all.

Ground 3, Ground 4, Ground 5 and 'Ad General'

[20] Ground 3 does not contain specific portions of evidence on which the drafter relies and amounts to nothing more than a mere conclusion by the drafter. Ground 4 seemingly deal with discrepancies or deviations in the respondent's case, in general. It is equally vague and does not refer to specific instances, it does not state in respect of which of the

¹⁴ *Viera v Prosecutor General and Others* (HC-MD-CIV-MOT-REV-2021-00315) [2022] NAHCMD 659 (6 December 2022).

¹⁵ *S v Krylov* (CC 32/2018) [2023] NAHCMD 48 (13 February 2023) Para 19, 20, and 98 to 207.

¹⁶ *S v Lukas* (CC 15/2013) [2015] NAHCMD 124 (2 June 2015).

state witness it is alleged, or which statement forms the subject matter. Ground 5 alleges in general tenor that the court erred in not finding the versions and defences of the accused reasonably possibly true. It has paragraphs thereunder that are conclusions by the drafter as to how he thinks the court ought to have dealt with the defences. Needless to say, the judgment deals with the defences raised and thus this ground amounts to conclusions made by the drafter. The ground titled 'AD GENERAL' is an all-time first for this court and it is very telling as to the approach to grounds of appeal that counsel for the applicants embraces. Suffice it to say, from its very title, it is inappropriate and after having raised it with counsel for the applicants, he conceded to that.

Ground 6

[21] What can be gathered from this ground is a contention that the court erred in limiting cross-examination of state witnesses on the content of their earlier statements, which is similar to one of the complaints in ground 1 and which has been dealt with earlier in the judgment. As far as ground 6 is concerned, the respondent opposed it and for the purpose of construing, it contended that whenever the court intervened in cross-examination, it was on the basis of the applicable rules of evidence and relevancy. In looking at ground 6, as it is in the notice of leave to appeal, it is a generalised notion in a sea full of witnesses and even more witness statements. In the absence of providing any context or specific details the court is unable to gauge and respond thereto. That being the case, it does not constitute a valid ground of appeal.

Ground 7

[22] This is another composite ground, which is non-specific, as it fails to inform in respect of which incidents or charges it relates to and leaves the court to do some guesswork. I will take the four paragraphs together. From that it appears that the applicants contends that the court erred in convicting the applicants of trafficking, as the state proved no means. The reasons of the court for the trafficking convictions were already set out in the trial judgment¹⁷. Moreover, counsel for the applicants' contention

¹⁷ *S v Krylov* (CC 32/2018) [2023] NAHCMD 48 (13 February 2023) para 15, 16, 197 and 197.

that the respondent needed to have proven 'means' is wrong as the victims herein are children.¹⁸ Thus there is no substance in this ground.

Ground 8

[23] This ground appears to be a complaint that the court erred in convicting the accused multiple times for the rape and the trafficking offences. Again, the respondent and the court had to try and improvise what is meant by this ground. Insofar as the ground can be construed to refer to duplication of charges, which is what the respondent inferred it meant, I concur with the respondent, that it had been done, as is evident in a number of acquittals on that basis. Furthermore, if the issue was the single count for the supply of cigarettes on many occasions¹⁹ as opposed to the other charges for which it was a charge for each alleged incident, that is the prerogative of the Prosecutor-General. In any event, the ground is vague, it has no references as to what particular charges are referred to nor does it say if it pertains to charges of the first or second applicant, which details would have provided specificity and clarity. For that reason I do not consider it to be a valid ground.

Ground 9

[24] This ground contends that the court erred in relying on the photo plan to establish that the 'complainants are small girls and that the accused should have known that they were under 16 years old.' (sic). The respondent opposed the point arguing that it was the primary evidence available as to the physical structures of the complainants at the relevant time. There is no error or irregularity in the court referring to the physique of the girls on the photo plan as one of the indicators to refute the contention by the first applicant that he did not know the girls were minors. In any event, the oral evidence provided a collage of factors to rebut that stance, such as: the first applicant told two of the girls words to the effect that he likes sexual intercourse with young girls; one of the girls testified that she at the time wore panties of the age group 11-12 years; one of the girls testified she practically grew up in front of the second applicant who knew that the

¹⁸ Article 3 of Annexure 11 (c) of the Palermo Protocol.

¹⁹ Read with s 94 of the CPA.

girl was not an adult yet; the second applicant had a reservation as to whether one of the girls was too young to smoke and also described that particular girl as having had a tiny body structure. In short, there is no error in this regard thus there is no merit to this ground.

Ground on sentences

[25] This was a composite ground which can be construed to mean that the sentences imposed for rape and the supply of tobacco products are shockingly inappropriate. It is as clear as daylight that s 3(1)(a)(iii)(bb)(B) of CORA provides for a mandatory minimum term of imprisonment of not less than 15 years for a person who is convicted of rape wherein the complainant 'is by reason of age exceptionally vulnerable.' That in my view is the applicable category and the court found no substantial and compelling circumstances for both of the applicants. An extensive expose was given in the sentencing judgment²⁰, and it needs no repetition.

[26] As far as the supplying of tobacco products to minors is concerned, this court does not regard a fine of N\$12 000 or 12 months' imprisonment as shockingly inappropriate in the circumstances of this matter. The court could exercise its discretion within the range of a fine not exceeding N\$100 000 or five years' imprisonment or both as provided for in s 18(4) of the Tobacco Products Control Act 1 of 2010. In this case the *modus operandi* was interwoven with the other offences on which first appellant was convicted of. If the grievance is that the court did not endorse the lesser penalty proposed by both parties, a court is not bound to those proposals and there is no merit in this ground.

[27] For the aforesaid reasons and conclusions, it is my firm view that the applicants failed to show on a balance of probabilities that there are reasonable prospects of success on appeal.

[28] In the result, it is ordered that:

1. The application for leave to appeal is dismissed.
2. The matter is regarded as finalised.

²⁰ *S v Krylov* (CC 32/2018) [2023] NAHCMD 131 (17 March 2023) para 26 and 27.

Judge's signature	
Counsel:	
Applicants	Respondent
I Velikoshi Of Ileni Velikoshi Inc. Windhoek	P Khumalo of the Office of the Prosecutor General Windhoek