

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: CA 50/2011

In the matter between:

**JASON MUNONDUMBO ANGUO**

**1<sup>ST</sup> APPELLANT**

**SIMEON EPOSHE ANGUO**

**2<sup>ND</sup> APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Anguo vs The State (CA 50/2011) NAHCNLD 59 (5 December 2013)*

**Coram:** CHEDA J and MILLER AJ **Heard:** 05 December 2013 **Delivered:** 05 December

**2013**

**Flynote:** Conviction for rape - complainant's testimony full of contradictions and improbabilities. Appellants' explanation of the circumstances surrounding the offense unjustifiably rejected. Evidence led insufficient to secure a conviction. Appeal against both conviction and sentence upheld.

Summary - complainant and 1<sup>st</sup> appellant were in love. Complainant alleged that the two appellants who are brothers raped her. Her explanation of the circumstances unconvincingly. Evidence led insufficient and therefore conviction is unsafe.

## **ORDER**

1. Appeal against both conviction and sentence upheld.

## **JUDGMENT**

CHEDA J (Miller AJ concurring):

[1] Appellants noted an appeal to this court against both conviction and sentence of the Regional Court sitting at Outapi on the 25 July 2008. They were sentenced to 18 years imprisonment on each of the two counts of rape, with the sentence on the second count ordered to run concurrently with the sentence in count 1.

[2] The brief background of this matter as presented by respondent is that the appellant and complainant were boyfriend and girlfriend.

[3] Complainant was 17 years of age and was in Grade 10 when this incident occurred. On the day in question she met 1<sup>st</sup> appellant when she was coming from school. She had already fallen in love with him. 1<sup>st</sup> Appellant suggested that they should have sexual intercourse which suggestion she turned down. 1<sup>st</sup> Appellant however, took her by hand led her into the bush where he commenced

assaulting her with a stick. He was later joined by his brother, 2<sup>nd</sup> appellant. They continued to manhandle her. She was pulled to the ground by 2<sup>nd</sup> appellant and they removed her trouser and thereafter had sexual intercourse with her again without her consent. 1<sup>st</sup> Appellant had sexual intercourse with her four times while 2<sup>nd</sup> appellant had sexual intercourse with her three times. All this was against her will and she was screaming.

[4] She then left for her home but did not report the alleged rape to anyone. Despite the fact that her aunt had specifically asked her whether there was anything wrong with her since she expressed a desire to go to her mother she declined to reveal anything. She however told the court that at that time she was contemplating to commit suicide and she left a suicide note behind when she went to her home. She stayed for a number of days at the her home. When she came back, she was still contemplating suicide because she had been raped. She however, went to make a report to the Police which led to an abortion and the arrest of the 2 appellants.

[5] Prior to laying rape charges against he appellants, she together with her relatives went to appellants' home to announce the pregnancy and not rape. 1<sup>st</sup> appellant who was present admitted the responsibility of the pregnancy, but denied raping her. 2<sup>nd</sup> appellant who is younger than 1<sup>st</sup> appellant was not at home.

[6] 1<sup>st</sup> Appellant denied raping the complainant and he insisted that they were in a love. He further stated that in fact it was the complainant who had invited him to have sexual intercourse with her which he did as they had done it before. 2<sup>nd</sup> Appellant vehemently denies raping complainant although the admits seeing her with 1<sup>st</sup> appellant on the day in question.

[7] The question before the court is whether or not the court *a quo* was justified in returning a conviction of rape in the circumstances. In addition to all this drama complainant, went to accused a defence witness whom she joined holding her baby and remarked that "had my mother did what she did to me, I could also have been holding my child" or words to that effect. This is not a statement by a supposedly distressed woman who lost a baby due to rape. To me it was a mixture of regret. This in my mind is an indication that she indeed was an untruthful witness and therefore unreliable.

[8] In as much as the court of appeal was not privileged to see the witnesses and assess their demeanour there are certain guidelines which the appeal court can employ in assessing matters of this nature. The court of appeal is therefore not only required to consider the outcome of the proceedings held in the lower court, but also the said reasons furnished for the condition or acquittal and therefore the reasons should be properly formulated and dealt with by the court *a quo* in its judgment by explaining the credibility finding of the court. This was the approach adopted to this court in *Shilyapeni Protasius v The State* (unreported case no. CA 96/2010 (delivered on 04/11/2011 at para. 13). The court of appeal is then required to decide whether due consideration was given to the evidence and whether the court has come to the conclusion in its assessment of all the evidence.

[9] This court cannot avoid securitizing the evidence led in court in more detail bearing in mind that appellants were unrepresented during the trial. Courts in my view should in general adopt a robust approach in general and in particular where the consequences of conviction are imprisonment. It is very easy to alleged rape, but very difficult for disprove it. Complainant had just finished her examinations which if she passed, her future career would have been guaranteed. According to her, her boyfriend whom she loved had sexual intercourse with her against her will, and not only alone, but had done so with his young brother.

[10] This to me is not a matter she would have kept quite about. According to her evidence the sexual intercourse took place in November 2005. She however only made a report in December after she discovered that she was pregnant. Even before the Police were informed she together with her mother went to 1<sup>st</sup> appellant homestead to report pregnancy to which he accepted responsibility. When she left her aunt she wrote a suicide note and again when she went to her home she was threatening suicide if the pregnancy was not terminated.

[11] It was however, terminated at the hospital as she alleged rape. This type of conduct seems to have escaped the trial court's scrutiny with regards to her credibility. One other aspect which needs attention is the probability of how the alleged rape took place. She admits that she fell in love with 1<sup>st</sup> appellant, but had not slept with him and she stated that he should have asked her politely which of course is her right to either consent or decline. The court finds it improbable that 1<sup>st</sup>

appellant who was in love with his girlfriend could have asked his young brother to engage in a sexual orgy of that nature. It is this piece of evidence which the learned regional magistrate failed to apply his mind to. In light of the above I find that the evidence adduced by the state in this matter was not in the circumstance proof beyond reasonable doubt that sexual intercourse took place in the said circumstance as presented by the complainant. It is trite law that in criminal matters where there is a shred of doubt as to the commission of a crime that doubt should be accorded to the accused person, especially when the appellant (accused are unrepresented).

[12] This reasonable of this approach is on the basis of the strict and the higher burden of proof which rest on the shoulders of the respondent (state). It is for that reason that I find that the evidence before the court was not safe to secure a conviction.

[] In the result the following order is made:

1. The conviction and sentence are set aside and the appellants are entitled to immediate release.

M

Cheda

JUDGE

P J Miller ACTING

JUDGE

**APPEARANCES**

**APPELLANTS:**

**Ms. Kishi**

DR. WEDER, KAUTA & HOVEKA

**RESPONDENT:**

**Mr. D. Lisulo**

Office of the Prosecutor-General