

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
APPEAL JUDGMENT

Case no: CA 27/2015

In the matter between:

LEEVI KASHEMETELE NGHIFEWA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Nghifewa v S* (CA 27/2015) [2017] NAHCNLD 22 (28 March 2017)

Coram: TOMMASI J and JANUARY J

Heard: 4 July 2016, 3 March 2017, 7 March 2017

Delivered: 28 March 2017

Flynote: Evidence – Court to caution itself as to the inherent dangers of relying on the uncorroborated evidence of a single witness – Court a quo erred in the evaluation of evidence – Discrepancies, inconsistencies and unsatisfactory aspects considered on appeal to be material.

Summary: The appellant was convicted of rape and kidnapping. The complainant was a 14 year old girl who testified that she was unlawfully detained for 3 days at the appellant's room and that he had sexual intercourse with her against her will. Her uncle found her locked inside the room of the appellant. The appellant ran away but was caught by the uncle. The appellant opened the door and the complaint was sent home by her uncle. She did not go home but returned to the appellant's room to collect her jersey. Her uncle learnt that the complainant did not arrive at home and he found her at the appellant's place after he closed the bar where he was working. The court found that there were material discrepancies contradictions and inconsistencies which the court *a quo* found to be immaterial. The court of appeal held that the court *a quo* erred in this regard.

ORDER

1. Condonation for the late filing of the notice of appeal is granted;
 2. The appeal partially succeeds and the conviction and sentences imposed by the regional court are hereby set aside;
 3. The Accused is convicted of having contravened section 14(a) of the Combating of Immoral Practices Act, 1980 (Act 21 of 1980) as amended;
 4. The accused is sentenced to 5 years imprisonment of which 2 years are suspended for a period of 5 years on condition that the accused is not convicted of the offence of contravening s 14(a) of the Combating of Immoral Practices Act, 1980 (Act 21 of 1980), as amended.
 5. The sentence is ante-dated to 30 June 2014.
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JUDGMENT

TOMMASI J (JANUARY J concurring):

[1] The appellant applied for condonation for non-compliance with the Magistrate's court rules and requested leave to argue his appeal against conviction and sentence.

[2] Mrs Horn was appointed *amicus curiae* and Mr Wamambo appeared on behalf of the Respondent.

[3] The reasons advanced by the appellant for his delay in noting the appeal were that: he was unrepresented during the trial in the district court and, although his right to appeal was explained to him, he was not able to fully understand how to write his appeal as he is a lay person. His fellow inmates drafted the notice of appeal on his behalf. I pause to mention that the regional court magistrate fully explained his right to appeal and the procedure to be followed in accordance with the guidelines given by this court. The appellant in fact filed his first notice of appeal timeously.

[4] The appellant explained in his affidavit that Mrs Horn advised him that he should file a fresh notice of appeal. He filed his new notice of appeal on 23 May 2015 i.e almost a year after he was sentenced.¹ I am persuaded that the appellant expressed his desire to appeal from the outset and I am of the view that the main consideration ought to be whether the appellant has reasonable prospects to succeed. Having had regard to the grounds raised and having perused the record herein, the court is of the view that there are reasonable prospects that the appellant may succeed. Condonation may be granted for the late noting of the appeal and the appeal is thus considered on the merits.

¹ Appellant was sentence on 30 June 2014

[5] The appellant was charged with two counts. The first count was that he contravened section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000); alternatively that he committed or attempted to commit a sexual act with a child under the age of 16 years in contravention of section 14(a) of The Combating of Immoral Practices Act, 1980 (Act 21 of 1980), as amended by Act 7 of 2000. The second count was kidnapping. He pleaded not guilty but was nevertheless convicted of rape and kidnapping. He was sentenced to 10 years' imprisonment in respect of count 1 and 3 years' imprisonment in respect of count 2.

[6] The following is a short summary of the State's case. The complainant, a 14 year old girl passed by the workplace of the appellant on 11 November on her way to Omuthiya. The appellant called her, held her by her arm and took her inside his room. Once inside he asked her how old she was and she informed him that she was 14. The appellant found this hard to believe. Later on he put the mosquito net on the bed and locked the room. She informed him that she has to leave as she was sent to Omuthiya but the appellant refused to allow her to leave. They stayed until night time and he later had sexual intercourse for the first time without a condom.

[7] The next day 12 November the appellant wanted her to take a bath in his room but she refused insisting that she wants to leave. He locked her inside and went to work outside the building where he was making bricks. When he came back he asked her to have sexual intercourse with him. She refused but he pulled off her panty and proceeded to have sexual intercourse with her anyway. This time he used a condom. She wanted to leave but he insisted that she should first have a bath.

[8] The next day, 13 November her uncle came to the place where she was held captive and he enquired about her whereabouts. The appellant informed him that he did not see her. Her uncle did not leave and she started calling him from inside the house of the appellant. What transpired hereafter is not entirely clear but it appears that the appellant ran away, wanted to fight with her uncle and he unlocked the door for her. On her way home she

realised that she had left her jersey so she returned to the place of the appellant. He refused to give it to her. He gave it to her later when her uncle returned with other people. The matter was then reported to the police and she was examined. The medical report was handed into evidence and the following was recorded: 'slight laceration noticed around the majora labia' and that this injury is compatible with "dry penetration into the vagina'. She explained that it was senseless for her to scream as the door was locked and the window closed.

[9] During cross-examination however she testified that the appellant had sexual intercourse with her on three occasions. He raped her the first time with a condom and the 2nd and 3rd time without a condom. When the court asked her if it was not the other way around as testified during her evidence-in-chief, she replied as follows: "1st time he did not rape me with a condom, and then for the 2nd round he used a condom and the 3rd occasion also he did not use a condom."

[10] The appellant furthermore put it to her that it was not probable that she could have been kept at the place for 3 days against her will because of the presence of workers at the brickmaking who had to collect cement from the building where she was kept. She denied that any person came to collect cement whilst she was there.

[11] The complainant's uncle testified that her grandmother sent her to Omuthya on a Sunday. She did not come home that evening. He searched for her on Monday and Tuesday and on Wednesday he was directed to the brickmaking business where the appellant was working. He found the appellant and other people at the place. The appellant told him that the complainant was there the previous day and she merely passed by. He asked for permission to look inside the room and nobody answered him. The appellant walked away. He peeped through the keyhole and saw the complainant in the room of the appellant. He called her and asked her what she was doing there. She informed him that the appellant brought her into his room and that the room was locked. He called the appellant to open the room

but he started running away. He chased the appellant and the appellant wanted to fight with him.

[12] He managed to get the appellant to open the room and he instructed the complainant to go home. He invited the appellant to talk to him. He did not go to the police but went to work at a bar. After some time he called to find out whether the complainant had arrived at home, He determined that the complainant did not arrive at home. He waited 'until the time I have to lock the bar' and he returned to the appellant's room with his brother, the bar lady and another employee. He found the complainant in close proximity to the appellant's room. She informed him that she returned to fetch her jersey. It was not clear how long the complainant stayed here. It may be inferred that it was quite a while given the fact that the uncle had to wait until it was time to close the bar.

[13] The owner of the brick making business described the premises where the appellant was living in as a brick house with a corrugated iron on top. It is located behind the brick making business. The appellant was sharing a room with another person. He testified that he found the complainant with her uncle at his place. The uncle informed him that he was looking for the girl for four days and he pointed at the appellant as the one who was with her for four days. According to him the uncle chased the girl away and he also informed the complainant to stay away from the workplace. At the time he was speaking to the uncle, the appellant ran away.

[14] The State called a police officer who took the warning statement of the appellant. The appellant stated therein that the complainant overnighted at his place and he walked her home the next morning. She however returned, took a bath and went to school. He had sexual intercourse with her the day that she returned and he used a condom. The appellant opted to remain silent.

[15] The first ground of appeal deals with the difference between the written and typed charges. The learned magistrate explained that the written charge sheets contain the charges which were put to the appellant. Ms Horn, in light

of this explanation, did not pursue the first ground of appeal. The court requested counsel to address the court on whether the State proved the coercive circumstances contained in the written charge sheet and the effect of the State's omission to include the unlawful detention as a coercive circumstance.

[16] Both counsel were *ad idem* that all the State is required to do, is prove that sexual conduct took place against the will of the complainant and that the failure by the state to mention the coercive circumstances mentioned in s 2(2) (e) was not fatal. Mrs Horn referred this court to *S v PV* 2016 (1) NR 77 (HC) where Uietele J stated at page 88, paragraph 25 as follow:

'Section 2(2) of the Combating of Rape Act, 2000 by stating that 'coercive circumstances' includes, but is not limited to the circumstances stated in that subsection recognises the need to give that phrase a broad definition. The English dictionary defines coercive to mean 'using force or threats to make somebody do something against his or her will'. In my view the phrase 'coercive circumstances' connotes the absence of free will or consent. [my emphasis]

[17] Ms Horn however pointed out that there has been a failure to explain coercive circumstances to the unrepresented accused and referred the court to *S v SS* 2014 (2) NR 399 (HC) where it was held that charges had been formulated in such a way that they were confusing and misleading. In this case the charge in count 1 was formulated clearly and the kidnapping charge gave the appellant sufficient notice that the State intended to prove that he unlawfully detained the complainant. The appellant was properly apprised in count 1 of the case he has to meet. There is therefore no prejudice although the state omitted to include the coercive circumstance provided for in s 2(2)(e) of the Combating of Rape Act. I pause to mention that the alternative charge was not correctly formulated. This point however was not raised as a ground of appeal and there is no need for this court to deal with this issue.

[18] The second ground raised was that the learned magistrate erred when accepting the birth certificate into evidence as same constitutes hearsay evidence. The birth certificate is a public document and is admissible in terms

of the provisions of section 233(1) of the Criminal Procedure Act dealing with the proof of public documents. It reads as follows:

(1) Whenever any book or other document is of such a public nature as to be admissible in evidence upon its mere production from proper custody, any copy thereof or extract therefrom shall be admissible in evidence at criminal proceedings if it is proved to be an examined copy or extract, or if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted.

The birth certificate handed into evidence complies with the provisions of s 233.

[19] The age of the complainant could be proved by the evidence of her mother, or someone else present at her birth or by the production of her birth certificate.² In *S v Le Roux* 2000 NR 209 (HC) the State was required to prove knowledge of the unlawfulness of the act which in that case included knowledge of the age of the girl. In that matter the court held that the production of the birth certificate could not be relied on as proof that there was an awareness of unlawfulness. In this matter the birth certificate was properly explained to the appellant and admitted into evidence by the *court a quo*.

[20] The remaining grounds relate to the evaluation of evidence i.e the failure by the magistrate to: take into consideration the fact that the complainant returned to the house of the appellant to retrieve her jersey, and to apply caution to the contradictory evidence of a single witness.

[21] The main complaint is that the magistrate failed to take into consideration certain contradictions and or inconsistencies in the complainant's own testimony, contradictions and inconsistencies between her evidence and that of her uncle and the improbabilities in the evidence of the complainant who was a single witness. The learned magistrate's response hereto was that he indeed applied caution; that he considered the discrepancies, inconsistencies; and contradictions and found them not to be material. He however did not indicate what these discrepancies were.

² Zeffertt & Paizes 3 at 438.

[22] In *S v Noble* 2002 NR 67 (HC) Maritz J, as he then was, at page 70 - 71, sets out the approach to be adopted when evaluating the evidence of a single witness as follow:

'Judicial experience of the inherent danger to convict on the evidence of a single uncorroborated witness 'evoked a judicial practice that such evidence be treated with utmost care' (Du Toit et al Commentary on the Criminal Procedure Act at 24-1). The most basic requirement demanded by our courts for the acceptability of such evidence is that it must be credible. That requirement was also expressly demanded by s 231 of the Criminal Procedure Ordinance, 1963 and its predecessor, s 243 of the Criminal Procedure and Evidence Proclamation, 1935. The statutory omission of that requirement in s 208 of the Criminal Procedure Act 1977, is, as Diemont JA pointed out in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180D-E,

"of no significance; the single witness must still be credible, but there are, as Wigmore points out, "infinite degrees in this character we call credibility". (Wigmore on Evidence vol III para 2034 at 262.) There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpf JA in *S v Webber* 1971 (3) SA 754 (A) at 758). 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. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded" (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

The remarks relating to 'the cautionary rule referred to by De Villiers JP in 1932' refer, of course, to the guidelines for the evaluation of a single witnesses' evidence mentioned in *R v Mokoena* 1932 OPD 79 at 80 in the following terms:

'In my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every

material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the appellant, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc.”

[23] In *S v HN* 2010 (2) NR 429 (HC) at 443 E – F the court in this regard stated the following:

'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.'

[24] The complainant is a single witness in respect of the sexual intercourse. In respect of the kidnapping there appear to have been other witnesses who either resided with the appellant or worked with him at the place where the complainant was kept. The owner testified that the appellant shared the room with one Petro Nathepite. The State requested a postponement for this witness to be called. On the date the matter was postponed to, the prosecutor called the police officer who took down the warning statement of the appellant. The matter was thereafter postponed for one day. On this date the State prosecutor informed the court *a quo* that she needed to call another witness but that this particular witness could not be located. The prosecutor did not inform the court *a quo* who the witness was, the importance of his testimony and what attempts were made to trace him.

[25] The uncle of the complainant corroborates the complainant's testimony that she was locked inside. The appellant did not dispute that he ran away when the uncle arrived. These facts must be viewed together with the body of the evidence inclusive of some unsatisfactory aspects of the complainant's evidence which was not fully detailed in the learned magistrate's judgment. The learned magistrate in his response to the grounds of appeal, simply indicated that he applied caution and that the discrepancies were not material.

[26] The appellant, in his grounds of appeal, refers to the fact that the complainant contradicted herself by testifying that she was raped twice during her evidence-in-chief and changing it to having been raped three times during cross-examination. The grounds of appeal further highlights that she testified during her examination-in-chief that the appellant did not use a condom the first time and during cross-examination but testified that he used a condom the first time but not the 2nd and 3rd time. These discrepancies are material. It forms the substance of the charge of rape. The complainant gave no explanation why she contradicted herself in this manner.

[27] A further discrepancy was between her and her uncle's testimony. She testified that she called out to him whereas he testified that he peeped through the keyhole and saw that she was inside. On his version the complainant did not alert him as to her presence. This is so despite the fact that she overheard him asking the appellant if he had seen her. On her own version she heard him asking about her whereabouts which is why she called out to him. She did not testify that she was threatened in any manner. She did not scream because the door and window was locked but it was evident that there were people on the day her uncle arrived. It is difficult to understand why the complainant would not even attempt to alert the workers.

[28] A further unsatisfactory aspect of her testimony is the fact that she returned to the premises of the appellant to collect her jersey. Her uncle told her to go home. He thereafter went to work. He did not report the matter to the police. This was only done later. According to the owner of the place, the complainant's uncle "chased" her away from the appellant's house. The complainant, after being deprived of her liberty for three days, returns unaccompanied by someone to protect her, to the very same place to retrieve a jersey. Furthermore it may be inferred that the complainant must have been there for some time if one has regard to the testimony of her uncle i.e that he waited until it was time for him to close the bar before he went in search of the complainant once more.

[29] The appellant's warning statement was properly admitted into evidence and this serves as corroboration of the complainant's testimony that sexual intercourse took place. The medical report furthermore is consistent with the complainant's version that sexual intercourse took place. He did furthermore not dispute that he ran away at the time when the complainant was found locked up in his room.

[30] The contradictions and unsatisfactory aspects of the complainant's testimony were material and this ought to have alerted the magistrate to the inherent danger of relying on the single evidence of the complainant. It was important for the State to call the witness who shared the room with the appellant to corroborate her testimony that she was unlawfully detained. The evidence of this witness, in view of the unsatisfactory aspects of the complainant's evidence in respect of her unlawful detention, was essential to the just adjudication of the case, particularly in view of the fact that the appellant was unrepresented. The learned magistrate ought to have subpoenaed this witness. It is also my considered view that the learned magistrate erred when he concluded that the contradictions and discrepancies in the evidence of the complainant was not material.

[31] In view of the misdirection by the magistrate this court considered all the evidence adduced and it concluded that it would not be safe to rely on the uncorroborated evidence of the complainant. It may be accepted that sexual intercourse took place as same was corroborated by the accused in his warning statement. There has been no evidence adduced that any threats were made., Mr Wamambo submitted that the mere removal of the complainant's panty and sexual intercourse against her will constitutes physical force. The real difficulty is however that this court cannot rely on the testimony of the complainant that such intercourse took place without her consent nor can the court rely on her testimony that she was held in the appellant's room against her will.

[32] It is thus the considered view of this court that the State did not prove the elements of rape in contravention with section 2(1)(a) as it failed to

establish that the sexual act was committed under coercive circumstances. Furthermore the court is also not persuaded that the State proved the offence of kidnapping beyond reasonable doubt. This court is however satisfied that the State proved beyond reasonable doubt that the appellant, contravened s 14(a) of the Combating of Immoral Practices Act, 1980 (Act 21 of 1980), as amended.

[33] The appeal furthermore ought to partially succeed in that both convictions and the resultant sentences stand to be set aside. The appellant however cannot escape a conviction on the alternative.

[34] The court invited counsel to address the court on what a suitable sentence would be under the circumstances. The appellant was 24 at the time he was sentenced and no previous convictions were proven against him. He is the father of one child who resides with his mother. He lost his employment and was helping out his mother who is suffering from hypertension and arthritis and his father who suffers from cancer. The appellant was held in custody from 13 February 2014 until he was sentenced on 30 June 2014.

[35] The complainant had just turned 14 that year i.e almost 2 years younger than 16 and the appellant was 23 years old at the time. The disparity in the ages is aggravating. There is a great need for this court to deter older men to have sexual intercourse with minors who still attend school. The statutory provisions are there to protect these young children as they are vulnerable. The penalty clause is indicative of the seriousness with which the legislature viewed this offence.

[36] A further consideration is the fact that the appellant is currently serving a custodial sentence. Both counsel suggested that the court impose a custodial sentence and the period differs marginally.

[37] This court, having considered the mitigating circumstances, the aggravating factors, and the offence committed and the interest of society

concludes that custodial sentence of which a portion is suspended would be an appropriate sentence.

[38] In the result the following order is made:

1. Condonation for the late filing of the notice of appeal is granted;
2. The appeal partially succeeds and the conviction and sentences imposed by the regional court are hereby set aside;
3. The Accused is convicted of having contravened section 14(a) of the Combating of Immoral Practices Act, 1980 (Act 21 of 1980) as amended.
4. The accused is sentenced to 5 years imprisonment of which 2 years are suspended for a period of 5 years on condition that the accused is not convicted of the offence of contravening section 14(a) of the Combating of Immoral Practices Act, 1980 (Act 21 of 1980), as amended.
5. The sentence is ante-dated to 30 June 2014.

M A TOMMASI
JUDGE

JUDGE
HC JANUARY

APPEARANCES

FOR THE APPELLANT:

Ms Horn (amicus curiae)
Of W Horn Attorney

FOR THE RESPONDENT:

Mr Wamambo
Of Prosecutor General Office