REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA

NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2020/00032

In the matter between:

ANTONIO JEREMIA	**FIRST APPELLANT**
FILLIPUS JOSEF MUTIMENI	**SECOND APPELANT**
TOMAS MATEUS TJIWANA	**THIRD APPELLANT**

v

THE STATE	**RESPONDENT**

Neutral citation: *Jeremia v S* (HC-NLD-CRI-APP-CAL-2020/00032) [2022] NAHCNLD 50 (6 May 2022).

Coram: Munsu AJ *et* Kesslau AJ
Heard: **24 March 2022**
Delivered: **6 May 2022**

Flynote: Criminal Procedure- Rape- Appeal against conviction and sentence- Condonation- Prospect of success- inadequate record of proceedings- Duty to keep proper record- Fair trial- Right to appeal.

Summary: The appellants were each convicted in the Regional Court held at Outapi on one count of contravening Section 2(1) (a) of the Combating of Rape Act 8 of 2000: Rape and two counts of the contravention of Section 2(1) (b) of the Combating of Rape Act 8 of 2000: Rape (in that they assisted their co-accused to commit the offence). They were each sentenced to an effective term of imprisonment of twenty years on the three charges. The appeal is against both conviction and sentence. Appeals were filed out time with applications for condonation. Counsel addressed court on merits without addressing issues pertaining to the adequacy of the record of proceedings from the court a quo.

Held: that the record should be comprehensible and adequate for proper consideration of appeal;

Held further: that the clerk of court is the custodian of court records while the shorthand notes by the Magistrate are deemed to be the correct record of proceedings if certified as such;

Held further: that the responsibility to ensure that all copies of the record on appeal are properly before court rests with the appellant if they are legally represented;

Held further: that the failure to keep a proper record by the court *a quo* or the absence thereof renders the appellants' right to appeal meaningless.

ORDER

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1. The respondent's point *in limine* is dismissed.
2. The appeals by the first, second and third appellants are upheld.
3. The convictions and the sentences are set aside in respect of all three appellants.

JUDGMENT

KESSLAU AJ (MUNSU AJ concurring):

Introduction

[1] The appellants were each convicted in the Regional Court held at Outapi on one count of contravening Section 2(1) (a) of the Combating of Rape Act 8 of 2000: Rape and two counts of the contravention of Section 2(1) (b) of the Combating of Rape Act 8 of 2000: Rape (in that they assisted their co-accused to commit the offence). They were each sentenced on 8 September 2017 to an effective term of imprisonment of twenty years on the three charges. All three appellants are appealing to this court against both the convictions and sentences.

[2] The three appellants' initial notices of appeal were dated 14 September 2017, confirmed by a cover page of the Correctional facility; however it appears to have been registered at Outapi Magistrate's Court only on 7 March 2019. The initial appeal was struck from the roll due to defectiveness. Consequently, when the appeal was re-enrolled, the appellants had to file applications for condonation.

Points in limine

[3] While addressing the applications for condonation, the respondent did not take issue with the reason provided for the delay and for a good reason because the delay was caused mainly by a problematic record of the court *a quo*. Regarding the second requirement for the granting of condonation, *to wit* the prospect of success, the respondent raised the point that the first, second and third appellants had no prospects of success on appeal against the conviction and sentence. On that basis counsel for the Respondent requested that the condonation be refused and the appeals be struck or dismissed. Lastly, the respondent raised the point that the third appellant failed to file a condonation application with supporting affidavits simultaneously with his latest amended notice of appeal and therefor he is not properly before this court. In this regard the respondent referred to the reasoning by Maritz J (as he then was) in *S v Kakololo*[1]. However the cited case is not on par with

[1] *S v Kakololo* 2004 NR 7

the current matter as in the *Kakololo* matter the initial notice of appeal was defective and could not be cured by filing amended notices of appeal. In *casu* the notice of appeal by the third appellant filed by previous counsel was properly done.

Reason for the late filing of notice of appeal

[4] The three appellants followed a long and winding road to reach the court of appeal. They filed their initial notices of appeal within time however when counsel was appointed all three filed amended notices of appeal. At that stage only counsel for the first and second appellants filed condonation applications simultaneously with the amended notices whilst the third appellant did not file any. Upon realising that the third appellant did not file the required condonation the appeal was stuck from the roll. When re-enrolling the matter all three appellants with the assistance of counsel filed amended notices of appeal together with condonation applications. Thereafter counsel for the third appellant withdrew and the Directorate of Legal Aid appointed different counsel. The newly instructed counsel for the third appellant then filed a further amended notice of appeal on 13 December 2021 but delayed until 10 February 2022 to file a condonation application. The application for condonation took the form of a founding statement, not from the appellant, but from his counsel. The appellant submitted a confirmatory statement to the condonation (which was only filed on 11 March 2022) without explaining the reason for the delay or addressing the issue of prospects of success.

[5] The respondent referred this court to the matter of *S v Kashire*[2] wherein Lichtenberg AJ (as he then was) described the proper procedure for obtaining condonation to be that the application for condonation should be accompanied by an affidavit under oath from the applicant with a supporting affidavit from counsel. The applicant in his sworn affidavit needs to give a reasonable and acceptable explanation for the cause of the delay and satisfy the court that he has reasonable prospects of success on appeal[3]. The last amended notice of appeal and condonation by the third appellant does not comply with the established practices of this court. Counsel for third appellant was given extensive time at the cost of the other appellants to get his house in order but failed to do so. The flagrant disregard for the rules cannot be

[2] *S v Kashire* 1978 (4) (SWA) at page 167 par H.
[3] *Uirab v S (*HC-MD-HCMD-CRI-APP-CAL-2021/00033) [2021] NAHCMD 95 (7 March 2022).

condoned[4]. The last notice of appeal is accordingly not properly before court. The previous amended notice was however not withdrawn by the filing of the amendment and the appeal proceeds on that basis in respect of the third appellant.

Prospects of success

[6] The first and second appellant's grounds of appeal against conviction are the same and read as follows:

'(a) The learned magistrate erred in law and or fact by allowing the evidence of the complainant into evidence despite there being suspicion that the complainant was mentally challenged and therefor an incompetent witness;

(b) The learned magistrate erred in law and or fact by relying on the evidence of the complainant to sustain a conviction despite there being suspicion that the complainant was mentally challenged and therefor an incompetent witness;

(c) The learned magistrate erred in law and or fact by holding that the version of the appellant was an afterthought despite their version having been communicated to the investigating officer at the earliest possible time.

(d) The learned magistrate erred in law and or fact by holding that the evidence of the State was consistent in all material respects despite there being glaring contradictions on the evidence of the State witnesses.

(e) The learned magistrate erred in law and or fact by holding the failure of the accused persons to properly cross examine the State witnesses against them despite the accused persons being laymen.

(f) The learned magistrate erred in law and or fact by failing to assist the accused persons in the conduct of their defence despite the accused being unrepresented laymen.'

[7] The third appellants' grounds of appeal ad conviction as per his first amendment are:

'(a) The learned Magistrate failed/omitted to adequately explain to the appellant his right to legal representation in particular how to access Legal Aid as well as failed to encourage him to apply for Legal Aid and; failed to warn him of the dangers of conducting own defense on a serious charge.

(b) The learned Magistrate failed/omitted to ensure that the appellant is provided with disclosure of the docket in order to prepare for trial.

[4] *Kakoma v S* (CA 41/2016) [2018] NAHCMD 283 (14 September 2018).

(c) The learned Magistrate and or his Divisional Magistrate failed to properly and timeously ensure that the mechanical record of proceedings is transcribed.

(d) That the incomplete typed record is prejudicial to the appeal of the appellant.

(e) The Magistrate erred by only considering selective parts of the evidence; convicted the third appellant on counts 2 and 3 without evidence of the third appellant inserting the penises of first and second appellant into the vagina of the complainant; ignored the evidence that the victim appeared to be mentally disturbed; considered the evidence of a mental person contrary to Section 194 of the Criminal Procedure Act; admitted medical evidence which was from a different doctor who could not say if the vaginal tear was from recent sexual activity; ignored that the victim was a single witness and DNA results were not canvassed; ignored contradictory evidence of what the complainant said she was wearing in contrast to the images on the photo plan; relied on a photo depicting torn pants without showing the face of the person wearing such pants; erred in relying on the warning statement of the first appellant as evidence that the third appellant raped the victim; failed to consider that first appellant gave a different version to his warning statement; failed to explain and to assist third appellant in cross-examining the first appellant regarding the contents of the warning statement; ignored the improbability of the presence of a lot of sand in the vulva and anus of the victim if she was wearing a tight underneath which was not torn; failing to call the witness Brenda; ignored the fact that the shoe laces used to tie the victim is neither handed in as evidence nor is it depicted on the photo plan'.

[8] The first and second appellants' grounds for appeal against sentence are briefly that the magistrate failed to consider the youthfulness of the appellant and that he overemphasized the seriousness of the offence while not considering that the penalty clause did not apply to the first appellant who was a minor at the time of the commission of the offeces. (It was however the second appellant and not the first appellant who was a minor at the time of the commission of the offences). Third appellants' ground against sentence is that, despite the presence of substantial and compelling circumstances, the magistrate imposed a sentence that induces a sense of shock.

[9] The respondent submitted that the grounds of appeal in respect of all three appellants do not hold water and should be dismissed.

Record of proceedings of the court a quo

[10] The grounds of appeal by the appellants are extensive and attack almost every aspect of the proceedings. However they are not without fault as some of the grounds are vague whilst others simply rely on unclear or unreliable information. The poor state of the court record appears to be the cause for this line of attack.

[11] The record before us consist of the cryptic handwritten notes by the magistrate, a typed version of the said notes, the warning statements in respect of first and second appellants (Exhibit B and D), a medical report and a photo plan. It is unclear if the proceedings were mechanically recorded as there is no such indication on the magistrate's notes. The handwritten notes are impossible to read without guessing and assuming words and phrases. The typed version is no better. A sworn statement from a clerk at Outapi indicates that the record could not be certified as the magistrate left service and he did not provide the mechanical record. It is unclear why the clerk is labouring under the impression that the magistrate should provide the mechanical record as it is the clerk of court who is the custodian of the record. In terms of Rule 66 (5) of the Magistrates Court Rules, the 'shorthand notes' by the Magistrate shall be deemed the correct record of proceedings if certified as such. These notes could however not be certified as correct.

[12] The handwritten notes are incomprehensible. The person who attempted to reduce the handwritten notes into a typed version struggled and repeatedly omitted words. The typed version is incoherent and difficult to understand. There is no indication as to who was responsible with the typing of the record as no certificate is attached. The following are some examples of the typed record. A question from the third appellant to the victim is recorded as:

'Q: What did you show Megano that you were raped?

A: You said I have big buttocks and cannot go home[5].

A question from first appellant to the witness 'Beatha' (Brenda) is recorded as:

'Q: We went toghether and looked for the phone?

A: She grabbed the girl out of my hand[6]'

A question by the third appellant to witness Mangano reads:

'Q; I don't know you?

[5] See Page 152 of the record of Appeal.
[6] See Page 154 of the record of Appeal.

A: Maybe I was dirty[7].'

According to the record the witness Julia Hamalwa testified: 'I asked him in which language he will humiliate[8]'.

Another witness, Wambwi Chikuma is recorded to have said: 'I am a medical dr. Bachelor of medicine and burger at Namibia University'.

The Prosecutor in cross-examination to first appellant is recorded as follows:

'Q: Linda stated you, accused 2 and 3 were together at the incident of the rape?

A: I don't know if you was raped.

Q: Why did Linda he against you?

A: She locked us as she knew us.

Q: You asked accused 2 and 3 to rape Linda?

A: I did not touch[9].'

The record reflects the following when second appellant was cross-examined by the prosecutor:

'Q: You are trying to sworn up her events?

A: I am telling the truth……is my……[10]'

Q: It is shameful for a person to talk when was argued?

A: I don't know but she accepted[11]'

'The complainant was tied with a shoe on the arm[12]'

[13] Apart from the incomprehensible record there are also obvious procedural errors. The rights that were explained are indicated with a one sentence entry on the record. The terms in which these rights were explained were not recorded. For instance, regarding the right to legal representation, the learned magistrate simply recorded that the accused informed the court that they will defend themselves. The explanation to the accused, if any was done, is not recorded.[13] Over and above, at the stage when the matter was transferred from the District Court to the Regional Court, the appellants required legal aid. It is not indicated on the record whether, and at which stage, the appellants waived their right to apply for legal aid.

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[7] See Page 157 of the record of Appeal.
[8] See Page 159 of the record of Appeal.
[9] See Pages 166 and 167 of the record of Appeal.
[10] See Page 168 of the record of Appeal.
[11] See Page 169 of the record of Appeal.
[12] See Page 179 of the record of Appeal.
[13] See page 61 and page 142 of the record of Appeal; See *S v Willemse* 1990 NR 344 (HC)

[14] On the record, no entry could be found on the rights in terms of Section 115[14] or the right to present substantial and compelling circumstances before the court regarding sentence. In sentencing the magistrate found 'compelling and substantial circumstances', however the details of such circumstances were not indicated on the record[15].

[15] Despite being mentioned by the witnesses, the parties in the court *a quo* did not address the concerns surrounding the mental condition of the victim. The warning statements which were handed in as evidence and upon which the convictions were premised do not contain a full explanation of the rights to legal representation in that Legal Aid is not mentioned. Furthermore, the record reflects that the magistrate in his judgment, whilst referring to information from the warning statement of the first appellant (Exhibit 'B'), stated the following: 'According to this statement accused 3 lifted the complainant up on his shoulder and was then followed by accused 2 and accused 1'.[16] However the said statement does not contain any such information.

[16] It was suggested by this court that parties should get the opportunity to reconstruct the record to ensure a fair result. However, counsel on both sides submitted that it would be impossible to do so in the light of the fact that the appellants conducted their own defence in the court *a quo* and did not keep notes during the trial; the magistrate's contract has ended and his whereabouts unknown and; the one prosecutor passed away and the other resigned. The parties further submitted that this court should make a decision based on the record before it. The record, if it can be called that, cannot be a true reflection of the proceedings. Unfortunately, the Outapi clerk of court did not act sooner to reconstruct the record.

[17] The concern this court has, is whether the record of proceedings is adequate for the adjudication of the appeal. Apart from giving the reason why the record could not be reconstructed, none of the parties argued the point regarding the inadequacy of the record.

The law on incomplete records of appeal

[14] Criminal Procedure Act 51 of 1977.
[15] See in this regard the mandatory provision in Section 3(2) of the Combating of Rape Act 8 of 2000.
[16] See page 180 of the record of Appeal.

[18] In terms of High Court Rule 118 (5), the responsibility to ensure that all copies of the record on appeal are in all respects properly before the court rests with counsel for the appellants. Due to the poor state of the record, the appellants in this matter faced an uphill battle as they were at the mercy of court officials.

[19] The procedure to be followed for the reconstruction of a record has been extensively explained in various cases in our courts[17]. The process needs an input from all parties involved in the initial trial orchestrated by the clerk of court. As alluded to before, that option is no longer available.

[20] In the matter of *S v S*[18] wherein the court was confronted with a defective record, the following measure was applied: 'Test whether the record was materially correct and complete and that this question had to be answered in the context of the case and not *in vacuo*. The question of whether a defect was material in an appeal depended on the issues disputed on appeal, as determined by the notice of appeal'. The question to be answered is whether there can be a fair adjudication of this appeal based on the available record.

[21] In *Soondaha v The State*[19] it was stated by January J that: 'Court of appeal is confined to decide the appeal within the four corners of the record' and 'It is not only difficult for this court to evaluate and make findings in relation to the grounds of appeal raised but impossible.'

[22] Confronted with an incomplete record, Parker AJ in the matter of *Ditshabue*[20]determined that the record should be comprehensible and adequate for a proper consideration of the appeal. Furthermore those indistinct parts should still make sense of the evidence that was adduced and the appellant should not be prejudiced in any manner by the part being indistinct. Faced with an incomplete record, Claasen J found, in the matter of *Lizazi v S,*[21] that the court record should be adequate for an objective assessment of the question of whether the convictions of the appellants were correct.

[17] See *S v Aribeb* 2014 (3) NR 709 (HC); *S v Mbangu and Others* (CR 24/2022) [2022] NAHCMD 174 (05 April 2022)
[18] *S v S* 1995 (2) SACR 420 (T)
[19] *Soondaha v The State* (CA 28/2013) [2016] NAHCNLD 76 (22 August 2016) page 8 par 19.
[20] *Ditshabue v State* (CA 96/2010) [2013] NAHCMD 132 (12 April 2013)
[21] *Lizazi v State* (CA 23/2015) [2020] NAHCMD 91 (13 March 2020).

Evaluation

[23] The court record before us is not only incomplete but it is also riddled with evidence that does not make sense. The grounds of appeal cannot be addressed based on the information before court without this court relying heavily on assumptions. It would be unfair towards the administration of justice to rule on such a completely inadequate record. The defects are material in nature and cover almost all aspects of the proceedings. An appeal cannot be adjudicated on guessing, speculation, assumptions and inventions. It is therefore impossible to determine the prospects of success or the merits in this case.

[24] It is established law that if, through no fault on the part of the appellants, the appeal cannot be heard, it will be highly prejudicial to their appeal resulting in a failure of justice. Whenever the said failure of justice is impossible to rectify it will follow that the conviction cannot stand.[22] In the matter of *Jankowski* v S it was stated that: 'an unreconstructable record renders the proceedings in the trial out of place and of no force or effect'.[23] The failure to keep a proper record by the court *a quo* or the absence thereof renders the appellants' right to appeal meaningless.

[25] In light of the inadequate record of proceedings coupled with the above highlighted irregularities, the appeals are bound to succeed.

[26] In the result it is ordered:

1. The respondents' point *in limine* is dismissed.
2. The appeals by first, second and third appellants are upheld.
3. The convictions and the sentences are set aside in respect of all three appellants.

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E. E. KESSLAU

[22] *S v Madema* (CR 20/2020) [2020] NAHCMD 118 (27 March 2020); *Katoteli v The State* (CA 201/2004) Unreported Judgment delivered 26 September 2008
[23] *Jankowski v S* (CA 60/2017) [2018] NAHCMD 158 (12 June 2018)

ACTING JUDGE

I agree,

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D. C. MUNSU

ACTING JUDGE

APPEARANCES:

FIRST AND SECOND APPELLANT:	Mr. N. Tjirera Directorate of Legal Aid, Opuwo.
THIRD APPELLANT:	Mr. G. Mukasa Directorate of Legal Aid, Oshakati.
RESPONDENT:	Mr. L. S. Matota Office of the Prosecutor General, Oshakati