

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2021/00038

In the matter between:

RUBEN JOSUA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Josua v S* (HC-NLD-CRI-APP-CAL-2021/00038) [2023]
NAHCNLD 107 (13 October 2023)

Coram: SALIONGA J et KESSLAU J

Heard: 6 October 2023

Delivered: 13 October 2023

Flynote: Criminal Appeal - Procedure – Notice of Appeal filed late - Condonation application – Reasonable and acceptable explanation for delay – Inadequate court record to decide on grounds of appeal – Appeal upheld.

Summary: The appellant was convicted for rape in contravention of s 2 (1)(a) of the Combating of Rape Act 8 of 2000 in the Regional Court sitting at Outapi. He pleaded not guilty and claimed consent was given by the complainant, however was convicted after the evidence was led. He was sentenced to 10 years imprisonment.

Held that the record of proceedings was kept by the Magistrate in short hand and found to be inadequate for the adjudication of the appeal.

ORDER

1. The appellant's application for condonation is hereby granted.
 2. The appeal is upheld.
 3. The conviction and sentence are set aside.
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JUDGEMENT

KESSLAU J (SALIONGA J concurring):

Introduction

[1] The appellant stood charged in the Regional Court Outapi with the offence of Rape in contravention of s 2 (1) (a) of the Combating of Rape Act 8 of 2000. The appellant was unrepresented throughout the proceedings.

[2] The appellant pleaded not guilty to the charge stating that it was consensual sexual intercourse with the complainant being his girlfriend. On 30 May 2018 he was convicted and sentenced to ten years imprisonment. This appeals lies against both conviction and sentence and was filed with an application for condonation for the late filing.

[3] In considering the appellant's application for condonation, I remind myself that an application for condonation should satisfy two requirements before it can succeed. These entail firstly establishing a reasonable and acceptable explanation

for the delay, and secondly, satisfying the court that there are reasonable prospects of success on appeal.¹

Appellant's reasons for late filing

[4] Appellant presented a detailed explanation covering the obstacles he encountered in the process of noting his appeal. He blames the delay on various aspects starting with the Magistrate's cryptic explanation of his right to appeal, the fact that he is illiterate, was in prison after being sentenced, the Covid epidemic and that he initially sent his appeal to the wrong court.

[5] The appellant's explanation appeared to be reasonably acceptable and an indication that he was not in wilful default. Counsel for the respondent conceded as much. Having satisfied the first leg of the application we will now consider the prospects of success.

Prospects of success

[6] Regarding the prospects of success, I am guided by the following as stated by Ndaugendapo J in *S v Gowaseb*² that:

'The appellant is not absolved from the second requirement regardless of whether a reasonable explanation was furnished or not. The prospect of success on appeal is imperative. If the prospect of success at appeal is non-existent, it matters not whether the first requirement was reasonable or not, the appeal must fail.

[7] The summarised amended grounds of appeal ad conviction are that:

(a) The learned Magistrate erred by failing to adequately assist the unrepresented accused in the conduct of his defence in that the magistrate failed to explain the purpose of cross-examination and failed to assist the accused to put his version during cross-examination to the witnesses;

¹ *Balzer v Vries* 2015 (2) NR 547 (SC); *Leonard v Oshana Security Services CC* (HC-NLD-LAB-APP-AAA-2021/00006) [2023] NAHCNLD 1 (17 April 2023).

² *S v Gowaseb* 2019 (1) NR 110 at par 4 page 112; *See also S v Umub* 2019(1) NR 201 and *S v Murangi* [2013] NAHCMD 50 (CA 88/2013; 14 February 2014) paras 7-9.

(b) The learned Magistrate erred by finding the accused guilty without considering the merits and demerits of the case, without warning himself of the dangers when dealing with a single witness, he ignored the fact that the State failed to call an eye-witness of the alleged force being used and, failed to consider that the medical report did not support any evidence of injuries;

(c) The learned Magistrate failed to keep an adequate record of proceedings;

(d) The learned Magistrate erred by not explaining “coercive circumstances” to the accused.

[8] The summarised amended grounds of appeal ad sentence are that:

(a) The learned Magistrate erred by failing to explain to the unrepresented accused as to which provision of the Act relating to the prescribed minimum sentence was applicable to him;

(b) The learned Magistrate erred by failing to explain the effect and meaning of ‘substantial and compelling circumstances’ to the accused; and

(c) The learned Magistrate erred by failing to adequately assist the accused during mitigation proceedings before sentence.

[9] The above grounds of appeal are extensive and cover almost every aspect of the court proceedings. The poor state of the court record appears to be the cause for this line of attack. The record of proceedings was done manually by the Magistrate with no mechanical recordings available.

[10] Apart from the cryptic record there are also obvious procedural errors. The rights that were explained were indicated with a one sentence entry on the record. The terms in which these rights were explained were not recorded.

[11] On the record of the court *a quo* no entries could be found reflecting the accused’s rights in terms of Section 11³ disclosure⁴ or the right to present

³ Criminal Procedure Act 51 of 1977.

⁴ *Aukalius v S* (CA 50-2014) [2017] NAHCNLD 10 (20 February 2017); *S v Nassar* 1994 NR 233 (HC).

substantial and compelling circumstances before sentencing.⁵ The record is lacking details and content to such an extent that it is virtually impossible for a court of appeal to meaningfully decide on the grounds of appeal and to properly adjudicate the appeal.

[12] In *Soondaha v The State*⁶ 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.’

[13] Similarly dealing with an incomplete record, Claasen J found in the matter of *Lizazi v S*,⁷ that the court record should be ‘adequate for an objective assessment of the question of whether the convictions of the appellants were correct.’

[14] It is established law that if, through no fault on the part of the appellant, the appeal cannot be heard, it will be highly prejudicial to his 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.⁸ 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’.⁹ The failure to keep a proper record by the court *a quo* renders the appellants’ right to appeal meaningless.

[15] In light of the inadequate record of proceedings of the court *a quo*, the highlighted irregularities, and counsel for the Respondent’s concession in this regard the appeal is bound to succeed.

[16] In the result, I made the following order:

1. The appellant’s application for condonation is hereby granted.
2. The appeal is upheld.
3. The conviction and sentence are set aside.

⁵ See in this regard the mandatory provision in Section 3(2) of the Combating of Rape Act 8 of 2000.

⁶ *Soondaha v The State* (CA 28/2013) [2016] NAHCNLD 76 (22 August 2016) at 8 para 19.

⁷ *Lizazi v State* (CA 23/2015) [2020] NAHCMD 91 (13 March 2020).

⁸ *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.

⁹ *Jankowski v S* (CA 60/2017) [2018] NAHCMD 158 (12 June 2018).

E E KESSLAU
JUDGE

I concur.

J T SALIONGA
JUDGE

APPEARANCES:

APPELLANT

S Aingura
Aingura Attorneys, Oshakati

RESPONDENT

R Shileka
Of the Office of the Prosecutor-General, Oshakati