REPORTABLE

CASE NO.: SA 09/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ABRAHAM RUHUMBA **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Mainga JA, StrydomAJA *et*MtambanengweAJA

Heard on: 28/10/2011

Delivered on: 13/08/2012

APPEAL JUDGMENT

STRYDOM, AJA :

[1] The appellant was convicted in the Regional Court of the common law crime of rape and was sentenced to imprisonment of 15 years. He appealed to the High Court of

Namibia but because his notice of appeal was out of time he was advised to simultaneously make an application for condonation of his late filing of the notice of appeal. This was done by the appellant. He appeared before DamasebAJ (as he then was) and Usiku, AJ (as she then was). In a well reasoned judgment by Damaseb, AJ, in which Usiku, AJ, concurred, the Court rejected the application for condonation on the grounds that there was not a reasonable and acceptable explanation for not complying with the provisions of Magistrates' Court Rule 67; and that it was not a proper application for condonation. Although the merits of the appeal were fully argued the Court did not find it necessary to consider the prospects of success of the appeal because of the Court's finding in regard to the failure of the appellant to explain his non-compliance with the Rules.

[2] The appellant was not satisfied with this outcome and he launched, without further ado, various petitions to the Supreme Court in which he asked for leave to appeal. He was informed by the Chief Justice that in this instance, where his appeal floundered on the basis that condonation was refused he had a right of appeal and did not need leave to appeal. (See in this regard *Absalom v The State,* 1989(3) SA 154 (AD).)

[3] At his trial before the Regional Court, and in the High Court, the appellant had legal representation. In the latter instance the Court appointed counsel *amicus curiae* for the appellant. However, in his appeal before this Court he appeared in person whereas the State was represented by Mr. Kuutondokwa.

[4] The appellant filed written heads of argument in which he criticised the regional magistrate for not evaluating the evidence properly and not being cautious when he accepted the evidence of the complainant and the other two eyewitnesses because of the fact that they were under the influence of liquor. He further criticised the magistrate for not applying the probabilities emerging from the evidence in his favour or at all. The appellant also complained that the evidence of the complainant and the other witnesses was inconsistent with statements they had made to the police. The magistrate also failed to state his findings in regard to the medical evidence. In conclusion the appellant alleged that the State did not prove its case beyond reasonable doubt.

[5] Mr. Kuutondokwa pointed out that the High Court properly considered all facets applicable to condonation. The Court analysed the application to see if there was a proper and acceptable explanation for the appellant's non-compliance with the rules of the magistrates' court. The High Court further allowed the appeal to be fully argued to consider the prospects of success on the merits and concluded that there was no merit in the appeal. The Court also considered the allegation by the appellant that he was unrepresented in the trial court. This was a lie as the record showed that he was ably represented throughout the trial. Counsel further submitted that this Court would only interfere with the findings of the Judges *a quo* if it was shown that they misdirected themselves on the law or on the facts, where the reasons of their findings were unsatisfactory or, though satisfactory, it was shown that they had overlooked other facts or probabilities. Counsel argued that the appellant failed to demonstrate any grounds on

which this Court would be entitled to interfere. Counsel dealt with the various grounds of appeal and concluded that they were without substance and that, looking at the evidence overall, it was clear that the complainant's evidence was corroborated by the other two witnesses.

[6] Mr. Kuutondokwa referred the Court to the case of *S v Van der Westhuizen,* 2009(2) SACR 350(SCA) where at p353c-d it was stated that a Court dealing with an application for condonation must consider all relevant facts. The following was said by the learned Judge:

> "Factors such as the degree of non-compliance, the explanation for the delay, the prospects of success, the importance of the case, the nature of the relief, the interests in finality, the convenience of the court, the avoidance of unnecessary delay in the administration of justice and the degree of negligence of the persons responsible for non-compliance are taken into account. These factors are interrelated, for example, good prospects of success on appeal may compensate for a bad explanation for the delay."

[7] A reading of relevant cases shows that a factor such as the prospects of success on appeal is of great importance and can be conclusive in certain circumstances. Where the prospects of success on appeal are non-existent or highly doubtful condonation is refused notwithstanding that an acceptable explanation is given for the non-compliance of the rules by the applicant. A finding that there were no reasonable prospects on appeal comprised many of the other factors referred to above such as the interest in finality, the convenience of the Court and the avoidance of unnecessary delay in the

administration of justice. It would be a futile exercise to grant condonation in circumstances where there were no good prospects of success on a further appeal. Although the Court *a quo* declined to consider the merits of the appeal because it concluded that there was no acceptable explanation for the delay to comply with the rules the casesshow that even a bad or unacceptable explanation for the delay may be compensated for where there are good prospects of success on appeal.

[8] I share the Court *a quo's* criticism of the explanation given by the appellant concerning the reasons for his delay in filing his notice of appeal timeously, but in my opinion the appellant endeavoured to give an explanation and although it may be unsatisfactory, or even bad, I will consider the prospects of success on appeal as we were fully addressed on that issue. As set out in the case of *van der Westhuizen, supra,* the factors to be considered are interrelated and not mutually exclusive and an unsatisfactory or bad explanation may be cured where there are good prospects of success on appeal. See cases such as *S v Ackerman,* 1965(4) SA 740 (OPD) and the majority decision in *Chairperson of the Immigration Selection Board v Frank and Another*2001 NR 107 (SC).)

[9] I will then proceed to consider the appellant's prospect of success on appeal to determine whether it is such that it may convince the Court to nevertheless grant condonation notwithstanding the appellant's unsatisfactory explanation for the delay.

[10] All the State's witnesses were agreed that they drank heavily liquor on this fateful day and that they were all under the influence when the alleged rape occurred. It seemed that they had visited various places where they drank, mostly wine and also obtained wine. At some stage they met with the appellant who then accompanied them to the house of the daughter of the witness Anna de Klerk. When they ran out of liquor Anna and the appellant contributed money to buy some more wine. The appellant invited the complainant to accompany him to the wine house where they intended to buy more wine but Frans Angermund, the boyfriend of the complainant, refused to let her go with appellant.

[11] The complainant testified that Fanie and Frans then started to argue as a result of which Frans decided to go home. The complainant also went outside and as she and Frans were walking away the appellant called her and when she came closer he grabbed her and pulled her into the house. He locked the front door and put the key into his pocket. He then started to undress her. He first took off her blouse and brassiereand then pulled off her slacks and panty. The appellant also threatened her with a knife. She did not know where the knife came from but stated that at some stage the appellant went into the kitchen and she did not know where he obtained the knife but it was a table knife.When the appellant went into the kitchen the complainant fled to the toilet but because the door could not lock the appellant was able to pull her out of the toilet. She then went to the front door, which was the only door in the house but because it was locked she could not get out. There the appellant bent her over a low wall and started to have sexual intercourse with her. He also pressed the knife against her head. Fanie and

Anna were present but they were sitting and watching. The appellant then pulled her to a bed where they kept on struggling. It was at the bed that Fanie came and pulled the appellant off the complainant and tried to protect her by lying down on top of her. He was however pulled off by the appellant who by now only had his shirt on.

[12] Under cross-examination the complainant gave a different version of how the attack on her started. She said that after she was pulled into the house they sat down and had another drink. The appellant then said that he wanted to have sexual intercourse with her and he said that he had paid her N$50 for this. The complainant denied that she was paid N$50 by him and the appellant then started to undress her. She was then taken to the bed. She struggled with the appellant and he then went into the kitchen. She ran to the toilet but because it could not be locked she went to the front door to try to escape but because it was locked she could not get out. It was there that the appellant then bent her forward and had intercourse with her.

[13] The complainant was also confronted with a statement she had made to the police on the same day that the alleged rape occurred. This also showed some confusion in the mind of the complainant as to when and where she was undressed and also what the sequence of events was.

[14] The two State witnesses Mr. Fanie Benz and Ms. Anna de Klerk corroborated the evidence of the complainant in material respects. Fanie testified about his altercation with Frans and stated that it concerned some or other work relationship. That is also the

evidence of Anna. They also did not hesitate to state that they were all heavily under the influence of liquor. Both witnesses also said that when they decided to buy more liquor the appellant invited the complainant to go with him but that Frans did not want her to go. Fanie testified that after the argument with Frans the complainant left with him but the appellant went out and brought her back. Appellant locked the door and he then started with the complainant. He further stated that the appellant removed the complainant's clothes and he had bent the complainant over a low wall. The witness said that the complainant shouted for help but he did not do anything then but during the struggle they went into the bedroom and he then went to help the complainant. He threw his body onto the complainant in an attempt to stop the appellant. By this time he saw that the appellant had a knife. Because of the knife, the witness decided to desist and not to interfere further. After sometime the appellant and the complainant left.

[15] Under cross-examination he was positive that the appellant had sexual intercourse with the complainant. He also corroborated the complainant that she was fully undressed and that the appellant had only removed his trousers and not his shirt. He also testified that he did not see any assault by Frans on the complainant. It seems that this witness also did not hesitate to deny some of the evidence given by the complainant. He denied that after the complainant was pulled into the house they sat around having some more liquor. He stated that the alleged attack on the complainant started the moment she was pulled into the house.He also stated that all her clothes were removed there at the door. He, somewhat hesitantly, also denied that the complainant went to the toilet.He further said that he did not try to open the door

because he knew it was locked but stated that the complainant had asked him, at some stage, to open it.

[16] Frans Angermund confirmed that he and the complainant had been living together for a period of 15 years. He further stated that when they went out for more liquor the appellant asked the complainant to go with him but he refused to let her go.He further testified that he and the complainant were already out of the house when the appellant came and pulled her back and said that he would have sex with her that day. He then tried to enter the house but the door was locked and nobody opened it. He said he went home because he thought that nothing untoward would happen because of the presence of Fanie and Anna. Later on the complainant came home. She woke him up and told him she was raped. He became very angry and they there and then went to the police station to report the rape. He also testified that he saw bruises on the complainant and he denied that he had assaulted her.

[17] Ms. Anna de Klerk stated that they were all under the influence of liquor. That included the appellant. She testified that Fanie and Frans had an argument about work and that Frans then told the complainant that they had to go. They left and the appellant followed them. He and the complainant returned and she saw that the appellant held the complainant by the arm. The door was closed and she heard the appellant saying that he was looking for his money and he started to undress her. He, the appellant, also undressed himself and he bent the complainant over a low wall and started to have sex with her. The complainant was struggling but the appellant pulled her into a room to a bed. It was then that Fanie went to help the complainant. The witness now also saw that

the appellant had a table knife. Fanie was pushed away and from there the complainant and the appellant again moved towards the low wall where he again bent her forward and had sex with her. After the appellant had finished he unlocked the door and they then left.

[18] Under cross-examination Anna told the Court that the appellant had removed all the clothes of the complainant and that she was completely naked. She also stated that the appellant first removed the blouse and brassiere of the complainant and that he only took off his trousers and underwear. Anna also confirmed that the complainant was at the sitting room window but that the window had burglar bars. She also described that from the movements made by the appellant she could see that he was having sex with the complainant. She was certain that this occurred each time when the parties were in the corridor and that she was of the opinion that when they were on the bed the appellant did not succeed in having sex. Anna also denied that they were sitting around having liquor before the appellant started to undress the complainant. Although the witness denied that the complainant was at some stage at the door, when confronted with her statement to the police, she changed her evidence and stated that the complainant was at the door and tried to open it but it was locked.

[19] The complainant was recalled by the State but she could not remember whether the doctor drew blood from her but she remembered that he took vaginal smears. She was asked by the Court whether she had sex with anybody twenty-four hours prior to the incident and she said no.

[20] According to the medical evidence the doctor observed a bruise above her right eye and some bruises on her body. Her genital parts were normal and the doctor saw no injuries.

[21] Initially the defence attacked the chain of evidence concerning the smears and other tests taken by the doctor and handed to the police. Further evidence was led by the State in this regard and in the end the defence accepted the findings as stated in the various reports. The vaginal smears taken showed the presence of spermatozoa which could be indicative of sexual intercourse during a period of twelve hours before the smears were taken.

[22] The appellant gave evidence under oath and confirmed that he was with the four state witnesses on the day of the alleged incident.He testified that he knew the witnesses and that they used to meet at drinking houses. On this day they all went to a house and when they ran out of liquor he wanted the complainant to go with him to buy more liquor but her boyfriend Frans, would not allow that so he and Fanie Benz went to buy more wine. Whilst drinking Frans may have mentioned that complainant and appellant wanted each other and he became jealous. Frans then said that they had to go but the appellant said that she was still drinking and did not want to leave. He then pulled her up and started to assault her. He hit her with the fist above the left eye and when she fell he kicked her three times. Fanie then intervened and Frans desisted from further assaulting the complainant. Fanie then told Frans to leave and he left.

Complainant did not leave with Frans and they continued drinking. At some stage during the drinking bout the complainant said that there was something she wanted to buy and he, the appellant, then gave her N$50. She then also mentioned to the appellant that later on they might get a chance when they could meet and have sex. They continued drinking and he and Fanie went to buy a bottle of wine again. Then the complainant started to leave. He asked her what she was doing and she told him that she was drunk and that they would meet again later. He then asked her to give back his N$50 but she did not do so. He then told her that if she did not hand back his money he would take other steps. She then left.

[23] The appellant further stated that on a previous occasion he and the complainant met and that she then told him to come to her early in the morning when her boyfriend was at work. He went to her house one morning but because Fanie and Anna were there they could not do anything. It was confirmed by Anna that they had met the appellant at the house of the complainant one morning previously to the day of the incident.The appellant denied that, on the day of the incident, he was under the influence of liquor although he had drunk some liquor.

[24] Under cross-examination he said that he gave the complainant N$50 because she said that she wanted to buy something and she told him that they would talk later about the possibility of having sex. He said that he gave her the N$50 because he knew with his heart that at a later stage he would get something back, and on a further question he elaborated and said thathe would get sex. She, the complainant, did not

want to have sex at that stage because she said that she was drunk. According to the appellant a possible reason why the complainant had laid a complaint of rape against him was because he threatened her with other steps if she did not return his money.

[25] In a short judgment the regional magistrate accepted the evidence of the State witnesses and rejected that of the appellant. The court found that although all the parties were intoxicated he was satisfied that the witnesses could observe what had happened and were able to testify about it.

[26] There can be no doubt that the evidence of the complainant was to some extent confusing. The fact that she was allowed in evidence-in-chief to testify about the incident, not always in sequence, did not assist her. A much clearer picture emerged during cross-examination. The evidence of the complainant must be evaluated against the fact that she was under the influence of liquor, that she was the victim of an attack on her and that the scene was a moving one. Reference was made to her evidence that after she was pulled into the house by the appellant they all sat down together and continued to drink. The State witnesses, Fanie and Anna denied this and said that when she was pulled into the house the appellant locked the door and started to undress her. According to Anna it was at this stage that the appellant demanded his N$50.

[27] The question is whether the complainant was telling a deliberate lie or whether she was confused and did so in error when she said that after she was taken back into the house they again sat down and had liquor. This piece of evidence only came out

under cross-examination and was not part of her evidence-in-chief. Given the background, set out herein before, the possibility that she was confused when she said that they first of all sat down and drink cannot be excluded. Something like that did happen but it happened at an earlier stage when they were all still together and Frans was also still there. But even if this was a lie it does not follow that all her evidence was false. (See in this regard*S vOosthuizen,*1982(3) SA 571 (TPD).) I have set out herein before the various aspects in which her evidence was corroborated by the witnesses Fanie and Anna. Some of these instances contained fine detail such as her evidence that the appellant had a table knife. Anna was only asked under cross-examination what type of knife the appellant had and she replied that it was a table knife. They further testified to the fact that the complainant was completely naked whereas the appellant only took off his trousers and underwear. They also testified that the front door was lockedand that the appellant took the key. They were far better able to give a sequence of what had happened than the complainant. If their evidence was a concoction in a conspiracy to get at the appellant, then they had prepared themselves in great detail, something one would expect from people much more sophisticated and with knowledge of court procedures. Although they could adapt their evidence to that of the complainant when certain aspects of the complainant's evidence were put to them, they did not hesitate to say when they did not agree with her. They also did not try to hide their state of intoxication from the court. Any inconsistencies in their evidence were not material and in my opinion there is no reason to reject their evidence. The evidence of the complainant can therefore only be rejected if that of Fanie and Anna is also rejected.

[28] The evidence of the complainant is further supported by the evidence of the medical practitioner who took vaginal smears from her which later on proved to have contained spermatozoa. She denied that she had sexual intercourse with anybody else during a period of 24 hours prior to the incident. It is so that the doctor testified that he could not see any signs of semen or injury on the penis of the appellant but there was obviously some time lapse since the incident and when he saw the appellant. He did not take a smear but only made an observation that he did not see any semen.

[29] There are some serious improbabilities in the evidence of the appellant. He first of all testified that the complainant was assaulted by her boyfriend Frans. According to his evidence this happened inside the house but all the witnesses denied this. According to all the witnesses, including the appellant, Frans and Fanie had some disagreement which did not include the complainant.Bearing in mind the injuries found by the doctor on the body of the complainant it suited the purposes of the appellant to create an assault on the complainant by someone other than him.

[30] The appellant's evidence in regard to the N$50 is in my opinion highly improbable. He testified that after Frans left they continued their drinking bout. The complainant then said that there was something she wanted to buy. He thereupon handed N$50 to her. The complainant then mentioned, seemingly in the presence of Frans and Anna, that they might later get a chance to have sex.The effect of this evidence was that she wanted money to buy something for herself, obviously at some later stage, and that he had her promise of having sex with her, at some time later when

there was a suitable occasion. This is the literal meaning of the evidence of the appellant. In the light of this evidence it is totally inexplicable why the appellant demanded the return of his money when the complainant got up to leave. Surely there was no indication by her that there, at the house of Anna's daughter, there was something that she could buy and shortly before he was apparently satisfied to hand her the money on her promise of sex at a later suitable occasion.

[31] The appellant's so-called threat that unless the complainant gave him back his money he would take other steps was also the only reason he could think of why there was this conspiracy. This threat regarding the return of the N$50 had nothing to do with Fanie and Anna so why they have found themselves obliged to enter into a conspiracy against the appellant is an enigma. In my opinion this was an inept and false attempt to explain away the evidence that he demanded N$50 from the complainant.

[32] But even if there was a handing over of N$50 to the complainant because of some clandestine relationship between the two of them, then it is clear from the evidence of the appellant himself that she was not willing to have sex with him on that occasion.

[33] In my opinion the evidence is overwhelming that the appellant had sex with the complainant on this occasion and that she was not a willing party thereto. In fact she resisted the appellant throughout and even the attempt by Fanie to protect the complainant did not make any impression on the appellant. I am therefore of the opinion

that the conviction of the appellant of rape was correct and that there is no reasonable possibility that the appellant would be successful on appeal.

[34] As far as sentence is concerned, the regional magistrate took into consideration the fact that the appellant threatened the complainant with a knife and that he had his way with her in the presence of two other persons. This is evidence of a total disregard for the person of the complainant and must have been a humiliating experience even for a person who was under the influence of liquor such as the complainant. The appellant has twelve previous convictions of which two are for grievous assault. The previous convictions show that the appellant is a personwith no respect for other people and that he is prepared to take what he wants to have even if it involved the use of violence. In all the circumstances I am also satisfied that there is not a reasonable prospect of success on appeal as far as the sentence is concerned.

[35] I am therefore satisfied that the Court *a quo* correctly refused to condone the non-compliance of the appellant with the rules of the Magistrates' Court.

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

1. The appeal is dismissed.

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STRYDOM AJA

I agree

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MAINGA JA

ON BEHALF OF THE APPELLANT:	In person
COUNSEL ON BEHALF OF RESPONDENT:	Mr. J.T. Kuutondokwa
INSTRUCTED BY:	Prosecutor-General