CASE NO.: CA 23/2008

SUMMARY

SIKONGO EINO SIWOMBE v THE STATE

MULLER, J *et* SWANEPOEL, AJ

22 September 2008

- Criminal Appeal against a conviction of rape in terms of Combating of Rape Act, No 8 of 2000 and sentence of 17 years imprisonment.
- Evidence led at the trial discussed.
- The cautionary rule in respect of the evidence of a single witness discussed as well as the Namibian Supreme Court decision of *S v K* 2000 (4) BCLR 405 (Nms), confirming South African decisions in which the cautionary rule in terms of sexual offenders was set aside. (*S v D and Another* 1992 (1) SA 513 (Nm); *S v J* 1998 (2) SA 984 (SCA) (1998) (1) SACR 470 and *S v Katomba* 1999 NR 348 (SC);
- Evidence envisaged by the State in the opening address of the Prosecution against the evidence on record discussed. In the absence of a cogent explanation a bold assertion by the prosecutor must be deemed to emanate from the complainant who was the only direct State witness on this aspect. *S v V* 1995 (4) SACR 173 T considered and approved.
- Other conflicting evidence between the versions of the complainant and the appellant are discussed.
- **Held :** that the State did not prove its case beyond reasonable doubt.
- Appeal upheld and conviction and sentence set aside.

CASE NO: CA 23/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SIKONGO EINO SIWOMBE **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **MULLER J *et* SWANEPOEL AJ**

Heard on: 2008.09.22

Delivered on: 2008.09.22

APPEAL JUDGMENT:

SWANEPOEL AJ

[1] On 13 November 2007 the appellant was convicted by the learned Regional Court Magistrate for the district of Rundu of contravening section 2(1)(a) as read with section 2(2)(a) and (b) and read with section 3(1)(a)(iii)(ff) of the

Combating Rape Act, Act 8/2000 and read with section 94 of the Criminal Procedure Act, no. 51 of 1977 in that he had raped the complainant under coercive circumstances on 2nd October 2005 at the Sport Fields of the Rundu Secondary School.

[2] This appeal is directed against both the conviction and sentence.

[3] During 11 and 15 September 2008 an amended ground of appeal together with an application for condonation for such late filing were filed. The learned magistrate had nothing to add to his ex tempore judgment.

In view of my decision on the appeal (without considering the amended ground), it is not necessary to deal with the additional ground of appeal and the application for condonation.

[4] The amended charge sheet put to the accused reads as follows:

> "That on or about the 2nd day of October 2005, at Rundu Secondary School Sport Field in the District of Rundu, you, the accused, did wrongfully and unlawfully and intentionally commit or continued to commit a sexual act with Katoti Veronika Donna then aged 17 years, under coercive circumstances by assaulting her with an open hand and threatening to harm her with a knife, which you had and thereafter caused your penis to be inserted into her vagina and on the second occasion, inserted your penis into her mouth."

[5] The appellant refused to plead to the charge and a plea of not guilty was entered by the learned magistrate in terms of section 109 of the Criminal Procedure Act, Act no. 51 of 1977.

[6] The state called four witnesses to wit the complainant herself, Iitula Tertu, a chief constable in the Special Field Force stationed at Rundu, Dr Chrisha Sume Percival, a medical practitioner who examined the complainant on the day after the alleged rape and Silvester Lawrence Kavindja, a detective warrant officer stationed at the Rundu Scene of Crime Unit who took some photographs and prepared a plan which was handed in as exhibit "B".

[7] Briefly stated, the complainant testified that she and her friend Patricia were together on the day of the 2nd of October 2005. On their way home at about 20h00 they came up to a place called Peace Garden where her friend was supposed to buy some drinks for them. The complainant stood outside when a boy that turned out to be the appellant got hold of her arm and pushed her to a nearby pavilion of the Rundu Secondary School's sport grounds. There the appellant started to undress. She testified that "by that time he was armed with a knife". Appellant instructed her to also undress. He asked her whether he must put on a condom to which the complainant replied that it was up to him who should know what to do. He started to have sex with her and "after that" he then told the complainant that she must "come on top" which she did. "After coming

on top for just a few minutes then he told me to leave him and to stand up. I stood up and after I stood up he then took off his condom and then he instructed me to open my mouth. I said: 'Why should I open my mouth?' Then he simply said: 'Just open your mouth'. After I opened my mouth, he inserted his penis into my mouth and then later on he ejaculated in my mouth."

[8] The complainant testified that the appellant again had sex with her for a second time without a condom. She continued her evidence as follows:

> *"Then some other people passed by next to the place where we were. Then when he saw these people, he picked up his clothes and then we started walking now to that person's house direction, Your Worship" … On our arrival there we found that all the people were asleep. Your Worship, even our clothes, we were putting on whilst we were walking on our way from the sports field to the house. We entered in this person's sleeping room or the bedroom. He again started having sex with me and then this time I told him that: 'I am feeling pain now.' On the question by the Public Prosecutor at what time she left that house she replied as follows: "Your Worship, it was 09:00 in the morning. What happened was that I asked him to show me where the private room was, the toilet. Then he just opened, directed me and showed me the toilet side. Then he entered, he went back into the room. In that process I ran away Your Worship. I went straight to my friend's house, I told her everything and requested her to accompany me to the police station to report the matter. "*

[9] The complainant testified that she did not give any consent to the appellant to have had intercourse with her, neither has she known (or seen) the appellant before that date.

[10] The appellant testified in his defence and said that the complainant was his girlfriend and that he had a relationship with her. According to his evidence he was in Peace Garden when complainant's friend came in and told him that he was needed outside by his girlfriend, the complainant. He testified that he and the complainant went to the Rundu Secondary School's playing fields where he had sex with her. Thereafter they walked away and parted ways, each to his or her respective places of residence or stay.

[11] The learned magistrate correctly found that the complainant was a single witness and was furthermore cognisant of the fact that the "double cautionary rule" in evaluating the complainant's evidence pertaining to a sexual offence no longer forms part of our law.

Compare in this regard *S v D and Another* 1992 (1) SA 513 (Nm) which

> *"decision received the imprimatur of the South African Supreme Court of Appeal in S v J 1998 (2) SA 984 (SCA) (1998) (1) SACR 470). In the course of a well reasoned judgment Olivier JA, with the concurrence of Mahomed CJ*

and three other Judges of Appeal, said at 1009 F – G (SA) and 476(e-f) (SACR):

> *'In my view, the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but this is a far cry from the application of a general cautionary rule.'*

In *S v K 2000 (4) BCLR 405 (NmS)* our own Supreme Court followed the decision in *S v J* (*supra).* It held that the cautionary rule had outlived its usefulness. There were no convincing reasons for its continued application. It exemplified a rule of practice that placed an additional burden on victims in sexual cases which could lead to grave injustice to the victims involved (see at 418 H – 419 D.) Compare also *S v Katamba 1999 NR 348 (SC).*

[12] It is trite law that the powers of a court on appeal against factual findings are limited. There must be demonstrable and material misdirections by the trial court before a court of appeal will interfere. Compare *S v Hadebe and Others 1997 (2) SCA 645 F.*

[13] The learned magistrate was also aware of some discrepancies between the complainant's version or testimony in court and that of other witnesses in some respects. There were also discrepancies between her evidence in court and her police statement. The magistrate found however that those discrepancies were immaterial, considering the defence pleaded by the accused person, which by its very nature narrows down issues to consent. The learned magistrate furthermore rejected the appellant's evidence that he had a relationship with the complainant.

[14] Before turning to the evidence of the other state witnesses and the defence, I deem it necessary to refer to the Public Prosecutor's opening address in terms of Section 150 of the Criminal Procedure Act, Act 51 of 1977 before any evidence was led. I do not intend to recite each and every peace of evidence that the Public Prosecutor intended to lead, but only point to the following which was never related to the Court by the complainant when she testified, alternatively was in direct conflict with what the Public Prosecutor had addressed the Court on:

14.1 The appellant allegedly dragged the complainant into the playing fields of the Rundu Secondary School while the complainant testified that he pushed her in front of him.

14.2 When the complainant resisted and wanted to go away from the accused, the accused slapped the complainant and produced a knife – the complainant at no stage testified that

she was slapped by the appellant (as is also alleged in the charge sheet) and she gave different versions of when exactly and where the appellant produced the knife. Incidentally, she never mentioned the presence or placing of a knife on the pavilion by the appellant to the policeman Kavindja who took photographs of the alleged scene of the crime and who also compiled a plan with particulars pointed out by the complainant.

14.3 According to the Public Prosecutor evidence would be led that appellant forced the complainant to swallow his semen after he had ejaculated into her mouth while complainant never testified of any force exerted upon her nor that he had said that she should swallow same.

14.4 When appellant heard the voices of people coming towards the pavilion, he picked up his clothes, held the complainant in one hand and ran away towards the dark side of the stadium, while complainant testified that when appellant saw these people he picked up his clothes and they started "walking now to that person's (appellant's) house". I pause here to note that the complainant did not testify about what happened to the knife which was placed on the 'stoep' (pavilion) when they left and that it is significant that she testified that they were walking to appellant's house while testifying earlier that she did not know the appellant before that date. How would she then know where his house was?

14.5 The complainant allegedly shouted for help when the incident took place during the time when she heard voices

nearby, while the complainant never testified of any shouting by her. In fact during re-examination by the Public Prosecutor she testified that she did not shout because she was afraid of the warning appellant had given to her friend earlier that evening at the drinking place called Peace Garden.

14.6 The complainant made a plan during the course of the evening (while she and appellant were at the latter's house) to escape in which she succeeded and ran straight to her parents where she reported the rape, while the complainant testified that she only left the house at ± 09h00 on the following morning and first went and reported the incident to her friend with whom she had been prior to the alleged rape. During cross-examination she testified that her mother had passed away and her father was in South Africa and she actually said that she was staying with her brothers and sisters.

[15] The aforesaid contradictions are apparent, if not glaring, and I am in respectful agreement with the following dictum by Moseneke AJ (as he then was) in *S v V 1995 (1) SACR 173 (T) at 179 D – G*:

"*I am of the view that in casu the learned magistrate should have had regard to the discrepancies between the opening address of the state prosecutor and the evidence of the complainant. In casu the creditworthiness of the complainant was under severe scrutiny. Such a discrepancy is one that should have been given due weight and*

considered cumulatively to the rest of the other evidential pitfalls which were so abundant in this case. In the absence of any cogent explanation, the bold assertion by the prosecutor that the complainant 'herhaaldelik gesodomiseer is … en dat dit die beskuldigde is wat hierdie handeling uitgevoer het (freely translated continuously sodomized … and that it was the accused who perpetrated the act'), must be deemed to emanate from the complainant, who was the only direct witness on this aspect of the State's case."

[16] There are similar examples in the evidence of the second state witness, one Iitula Tertu, a chief constable in the Special Field Force who testified about what the complainant had said at the police station of what had happened that night which was never testified by the complainant during her evidence or which tends to corroborate the appellant's evidence in material aspects. So for instance Tertu testified that

16.1 Upon her asking the complainant whether she knew the person who had raped her the complainant said: "Yes I know that boy."

16.2 Complainant said that after appellant had raped her "then he started to rape her again, whilst he on (sic) the other hand, was holding a knife. At no stage did the complainant testify that the appellant was holding a knife in his hand while he had sex with her.

16.3 She also testified that when she called the appellant at the police station he never refused to come, while the complainant testified that he wanted to run away.

16.4 She confirmed that the appellant, when confronted, told the police that he did not rape the complainant as she was his girlfriend.

[17] Direct conflicting evidence also exists in the evidence of D.W.O. Kavindja who testified that complainant had *inter alia* pointed out the house of the appellant as the place where she had been taken by the appellant after the rape at the sport stadium, while complainant testified that the police never went there because “they forgot.”

[18] Dr Chrisha Sume Percival a medical practitioner also testified to the effect that he/she examined the complainant on the day after the alleged rape. He/she compiled a medical examination report (J88) which was handed in as Exhibit "A". The doctor found bruises *at “introitus* of the vagina and tears at 5, 6 and 7 o’clock-positions which fit with an alleged rape.” However, the doctor conceded during cross-examination that the injuries could also have been occasioned as a result of the complainant not having been “ready” for the sexual act. What is of further importance in the evidence and in the report is that the complainant was in a good state of health and calm when the examination was done on her, but more importantly, the inscription on form J88 next to the paragraph dealing with “Information regarding the incident’ he/she wrote the following:

"RAPED BY KNOWN PERSON"

[19] There are other material deficiencies in the State's case:

19.1 The complainant's friend, Patricia who allegedly told the appellant "to leave the child we want to go" was allegedly warned by the appellant that if she wanted "to die also then you must continue telling me like that" never testified in the case. It is inherently improbable and unthinkable that a friend in such circumstances would not have alerted people at Peace Garden of what was taking place and would have come to the assistance of the complainant. Nothing of this happened.

19.2 No statement was apparently taken from the people of the appellant's house and nobody testified about the presence of the complainant during the night and her departure only the following morning at 09h00.

[20] There is of course criticism against the evidence of the appellant *inter alia* about

(i) the duration of the alleged relationship between him and the complainant;

(ii) the conflict between appellant's evidence and that of his brother as to when complainant had previously been at their house; and

(iii) the fact that the appellant testified that the complainant asked money from him after he had sex with her which fact was never put to the complainant during cross-examination. I have serious reservations about this part of appellant's evidence. It may however be explained by the following dictum cited from Maharaj v *Parandaya, 1939 NPD 139 at p. 143 per Feetham J P in S v Ivanisevic* and Another 1967 (4) SA 572(A) at 576 G – H:

> "*Some innocent people meet accusations by simply telling the truth. Others who may be equally innocent of the accusation, take refuge in some invented story, because they are not satisfied that the truth alone would be sufficient to carry conviction."*

[21] Despite the discrepancy in the evidence of the appellant and his brother concerning the time when the complainant visited the appellant, Gideon Siwombe testified that the complainant was the appellant's girlfriend, that the two brothers shared a bedroom, that there was a visitor, Mr Veiko, in the appellant's house that evening and that the appellant was alone there that evening, sharing a bedroom with his brother. This evidence of Gideon substantially supports the version of his brother, the appellant.

[22] It is a trite principle in criminal proceedings that the prosecution must prove its case beyond reasonable doubt and that the mere preponderance of

probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. It cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.

[23] In view of the examples set out above, I am satisfied that this court can interfere with the findings of the learned magistrate on the basis of material misdirections on the facts. The version of the accused is in my view reasonably possibly true. Particularly so in view of the corroboration by witnesses Tertu and Percival referred to above. The complainant furthermore admitted during cross examination to a statement put on appellant's behalf that she had a brother working at Parcel Force. How would the appellant have known that if he had never seen or known the complainant before the date of the alleged crime? The learned magistrate should have found that the appellant's version was reasonably possibly true.

[24] In the result the conviction and sentence are set aside.

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SWANEPOEL AJ

I concur.

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MULLER J

ON BEHALF OF THE APPELLANT:	**MR S. NAMANDJE**
Instructed by:	**Sisa Namandje & Co.**
ON BEHALF OF THE RESPONDENT:	**MS I NYONI**
Instructed by:	**Office of the Prosecutor-General**