CASE NO.: CA154/2008

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

DAVID MENGELA **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM:	**LIEBENBERG J & TOMMASI J**
Heard on:	14 June 2010
Delivered on:	14 June 2010
Reasons released:	21 July 2010

REASONS FOR APPEAL JUDGEMENT

TOMMASI J: [1] This is an appeal against the judgment of the Regional Court sitting at Oshakati. The submissions of Ms Natanael-Koch, counsel for the appellant and instructed by the Directorate of Legal Aid as well as Mr Lisulu for the respondent were heard on 14 June 2010. On this date condonation was granted for the late filing of the notice of appeal; the appeal against conviction was upheld with reasons for the judgement to follow. These are the reasons for the judgment.

[2] CONDONATION: The Appellant was charged with two counts of contravening section (2) (1) (a) read with section 1, 2(2), 2(3), 3, 4, 5, 6. & 7 of the Combating of Rape Act 2000 (Act 8 of 2000). On 7 March 2008, the appellant was found guilty on one count and sentenced to ten (10) years imprisonment. The Appellant was represented in the court *a quo* by Mr Nambili instructed by the Directorate of Legal Aid.

[3] A handwritten Notice of Appeal in terms whereof the Appellant was appealing against the conviction and sentence, as well as a letter titled "Application for Condonation" were lodged with the Clerk of Court. It appeared to have been drafted by the appellant and without the assistance of an admitted Legal Practitioner.

[4] Counsel for Respondent argued that the appeal should be struck from the roll as it did not comply with Rule 67 of the Magistrate's Court in that: (1) it was lodged out of time and (2) the Notice of Appeal did not clearly and specifically reflect the grounds on which the appeal was based. It was further argued that the Appellant, having failed to lodge the Notice of Appeal in time, failed to bring a proper application for condonation to extending the time provided for in Rule 67.

[5] In determining the issue of condonation, this Court has to take cognisance of the fact that the Appellant is a lay person who is not fully conversant with the legal provisions and it has to balance the need for efficiency and the interest of justice.

[6] Both parties submitted that the Appellant filed his Notice of Appeal and Application for Condonation on 31 March 2008 but no evidence hereof could be found on the record. It is common cause that the documents were received by the Clerk of the Court. The original documents however do not bear any official stamp of the Clerk of the Court. This is an unacceptable practice that should be guarded against. It is imperative that the Clerk of Court should record the date on which the Notice of Appeal is lodged.

[7] However it is not disputed that the Appellant filed his Notice of Appeal on 31 March 2008 i.e one day out of time. The delay is negligible if one takes into consideration that the presiding magistrate only furnished his reasons on 1 October 2008 and the copies of the record were made by the Clerk of the Court on 26 June 2009.

[8] There is no evidence on record that the Appellant was informed of his rights to appeal and the time frame within which to do so after conviction and sentence in the court *a quo*. The Appellant indicated in his letter titled "Application for Condonation" that he was only informed of time frames for lodging an appeal by someone at Oluno Prison. The underlying allegation was that he was not informed by his Legal Representative. This fact was not placed under oath and not much value can be attached to the allegation.

[9] The Respondent referred us to *S v KASHIRE 1978 SACR 25 (NM*). This matter does not entirely support the respondent's argument. LICHTENBERG AJ when considering the failure of the appellant to explain under oath why the application in terms of s 316 (1) of Act 51 of 1977 was brought out of time, stated the following:

The proper procedure for the obtaining of condonation of the late filing of a notice of appeal is by way of an application, supported by an affidavit made by the accused (the present applicant), and since he would in all probability be unaware of the time limit prescribed in s 316 he would have to rely upon a supporting affidavit by his counsel in which the latter explains how the late filing of the notice of appeal came about. I have considered postponing this application so that this procedure can be followed but, as the applicant is under sentence of death, I deem it highly undesirable that he should be kept under such sentence any longer than is absolutely necessary and that justice should be done as expeditiously as possible. (my emphasis)

[10] Having considered the already long delay occasioned by the Magistrate and the Clerk of Court who failed to comply with the provisions of Rule 67, the short period of delay in filing the Notice of Appeal and for reasons mentioned hereunder, condonation was granted for the late filing of the Notice of Appeal.

[11] The only remaining objection by the Respondent was that the grounds of appeal are vague and it does not comply with the provisions of Rule 67 that requires that the Appellant should in his Notice of Appeal set out clearly and specifically the grounds, whether of fact or law or both fact and law on which the appeal is based. Although this submission by the Respondent has some merit this Court opted not to adopt an over fastidious approach especially in view of a clear misdirection by the court *a quo* in its approach to the evaluation of the evidence of a single witness which entitles this Court to interfere with its judgment. Both counsel were asked to address the court on the apparent misdirection and counsel for Respondent conceded that the

court *a quo* misdirected itself in the evaluation of the evidence of the complainant who was a single witness.

FACTS OF THE CASE

[12] The appellant, a 45 year old male, was charged in the Regional Court with two counts contravening section (2) (1) (a) read with sections 1, 2 (2), 2 (3) 3 4 5, 6 and 7 of the Combating of Rape Act, 2000 (Act 8 of 2000) in that he on 4 February 2006 (Count 1) and on 11 February 2006 (Count 2) wrongfully and intentionally committed a sexual act with the complainant.

[13] The Appellant pleaded not guilty to both counts and gave a plea explanation in terms of section 115 of the Criminal Procedure Act, 1977 (Act 51 of 1977) in terms whereof he admitted the complainant's presence at his house as a domestic worker on the material dates but denied having had sexual intercourse with the complainant.

[14] The State called only one witness, the complainant and handed in a Medical Examination Report.

[15] The evidence of the complainant can be summarised as follow: On 4 February 2006 she was looking for employment and met with the Appellant at a place where people are informally recruited for employment. The Appellant took the complainant home and showed her the two bed roomed house where he lives with his wife and three children aged seven, four and two years respectively. The complainant was to start her employment immediately. In the main bedroom

the Appellant asked her how old she was. She produced her birth certificate to prove that that she was 19 years old. The Appellant placed it on the bed.

[16] The complainant was standing close to him. The Appellant got hold of her on both her arms and let her sit on the bed. He removed her trousers completely and placed it on the bed. He removed her panty and also placed it on the bed. He got hold of her and laid her down on the bed. He removed his trouser and had sexual intercourse with her without her consent. He kissed her and thereafter wanted to know if she loved him. She replied that she loved him. He thereafter cautioned her not to tell his wife and threatened to kill her if she would. She noticed that the Appellant had a pistol on top of the drawer or a wardrobe in the main bedroom, although the Appellant did not make reference to the pistol during this incident.

[17] Under cross examination, when asked why she did not push the Appellant away when he was removing his trousers, the complainant explained that she tried to leave the room but that the Appellant pulled her back and locked the room.

[18] This happened minutes after the complainant arrived at the Appellant's house. The children of the Appellant were present but the Appellant sent them to the shop. The Appellant's wife was at work and the complainant had not yet met her. The wife arrived later the day and the complainant made no mention of the incident that occurred earlier that day.

[19] Two days after this incident on 6 February 2006, the Appellant called the complainant into the main room to fold a shirt and to find out whether she knew how to iron. When she

finished folding it the Appellant said *"Oh I can see that you know how to iron"*. He again got hold of her, held her hands and then placed her on the bed. The Appellant tried to have sexual intercourse with her but discovered that she was menstruating and he left her.

[20] The same day, after the second incident, the complainant wrote a letter to the wife of the Appellant informing her that the Appellant wanted to have sexual intercourse with her. She did not mention the first incident in the letter for fear that the Appellant would kill her.

[21] On 10 February 2006 a meeting took place between the Appellant, the complainant and the Appellant's wife. The Appellant was confronted by his wife about the allegations. His response, according to the complainant, was that he did it purposely to see if the would mention it or not. The appellant apologised to his wife. The Appellant apologised to the complainant but she did not accept it. She did not inform the wife at the meeting of the first encounter on 4 February 2006 due to the fact that she was scared of the Appellant. She did not say anything at the meeting.

[22] On 11 February 2006 after the Appellant's wife left for work, the complainant went to the toilet and she was confronted by the Appellant who was wearing only a towel around his waist. The Appellant slapped her twice in her face wanting to know why she told his wife. He again got hold of her arms then he let her fall on the floor. He removed her trouser and her panty and had sexual intercourse with her without her consent. The children were present at the time but the door to the toilet was closed but not locked. The Appellant left the house afterwards. The complainant went to the neighbour and reported the incident to the neighbour.

[23] The complainant thereafter went to the Police Station and reported the matter. She was taken to the hospital where they did some tests to see whether she was pregnant, for HIV/AIDS and to find out whether it was true that she has been sexually abused or not.

[24] The state requested to hand in the Medical Examination Report and counsel for the Appellant offered no objection. The Medical Examination Report discloses that a medical examination was done on the same day and the observations of the Medical Officer indicated nothing abnormal. It stipulates that the date of last menstruation was 5 February 2006. A vaginal swab was taken and blood samples were taken to test for the presence of HIV. The Medical Report does not reflect any information to indicate whether a rape kit was taken or not. In short the medical report tendered in evidence does not contain any conclusion consistent with sexual assault or any other assault.

[25] The Appellant testified in his own defence. He confirmed that he employed the complainant on 4 February 2006 as a domestic worker and that he showed her the rooms. He confirms that he sent the children to the shop and that he asked for her birth certificate but avers that this was in the sitting room and not in the bedroom as indicated by the complainant. He denied the rape incident. He does not dispute that he possessed a firearm, that it was placed on top of the cupboard and that it was possible for the complainant to have seen it.

[26] He confirmed that he called the complainant into the main bedroom on 6 February 2006. According to the Appellant, he was in a hurry and he asked the complainant to fold his shirt and

place it in his bag as he was leaving for the village. He denied attempting to have sexual intercourse with her on that day.

[27] The Appellant confirmed that on 10 February 2006 he called a meeting with the complainant and his wife. He confronted her with the allegation but she did not answer or say a single word. He confirms that his wife was angry and he apologised to her as he could see she was angry. He tried to convince her that she was angry for nothing and that it was a "small thing'. He denied that he apologised to the complainant.

[28] On 11 February, the Appellant left the house early in the morning whilst the complainant was outside plaiting the hair of his daughter. He denied that he raped the complainant. When he was arrested he asked whether the complainant had a bath. It was confirmed that the complainant did not take a bath. He requested the police to take him, his wife and the complainant to be tested to ascertain whether he had sexual intercourse with the complainant.

THE JUDGEMENT OF THE COURT *A QUO*

[29] The court *a quo* rejected the complainant's version of the first incident on 4 February 2006 as follows:

> *". From the way the complainant testified as to how the Accused had sexual intercourse with her on the 4th of February 2006 that is the alleged first occasion, and the events that followed thereafter, particularly the following:*
>
> (1) *her continued residence at the Accused person's house after the alleged events of the 4th of February 2006.*

Her writing a letter to Accused person's wife and excluding the events of the 4th of February 2006 in that letter and above all, her testimony that during or immediately after the alleged rape she told the accused person she loved him casting strong doubt whether the alleged sexual act was rape as defined .....

The court found the complainant's explanation of how the first alleged rape took place, that is her graphic and detailed explanation as to how the Accused held her, how the Accused undressed her and how the Accused undressed himself and her explanation as to why she did not include the events of the 4th of February 2006 in her letter to the Accused's wife, <u>not credible enough and alive to the dangers inherent in single witness evidence.</u>.... The court further finds the sexual intercourse of 4th of February 2006 was <u>consensual</u> between the parties and was not under any coercive circumstances " (My emphasis)

[30] The court *a quo* found the complainant's version of the events that occurred on 6 February 2006 and 11 February to be credible relying on corroboration of her testimony in the Medical Report that indicated that the date of last menstruation to be 5 February 2006; the fact that the complainant did not falsely implicate the Appellant of rape on 6 February 2006 when she had her menstruation and the fact that the Appellant apologised to his wife The court *a quo* found "*beyond reasonable doubt that the sexual intercourse of 11th of February 2006 was under coercive circumstances as alleged."*

[31] The Court *a quo* found that the complainant's explanation, "*particularly the explanation of the events after the alleged first occasion"* to be reliable and rejected the Appellant's version as false. In essence the court *a quo*, although he stated that he was alive to the inherent dangers of single witness evidence, found that the complainant **<u>lied</u>** in respect of one event and told the

truth in respect of the other. This clearly was a misdirection. The fact that the court *a quo* found that the witness was not credible in respect of the one event should have alerted the court to approach her entire testimony with caution.

[32] The court is entitled to convict on the evidence of a single witness in terms of section 208 of the Criminal Procedure Act, 1977 (Act 51 of 1977) provided that the court treats the evidence with caution when evaluating the evidence of a single witness. The required standard for a single witness' evidence has been discussed in S v NOBLE 2002 NR 67 (HC) where it was held that a single witness should be credible and the evidence should be of such a nature that it constitutes proof of the guilt of the accused beyond reasonable doubt.

[33] The court *a quo* assessed the evidence and correctly found elements thereof that are not satisfactory.

[34] The complainant on 11 February 2006 reported the incident to the neighbour whereas she failed to do so on 4 February 2006 when she had the same opportunity to do so. On 4 February, as well as on 11 February the Appellant left after the alleged incidents. On 11 February 2006 the same threat by the Appellant existed and yet the complainant reported the incident. Essentially the same conditions were present on both occasions. The only difference is that the Appellant kissed her and asked whether she loves him on 4 February 2006 and slapped her on 11 February 2006.

[35] The complainant reported the incident of 6 February 2006 to the wife of the Appellant in a letter but fails to mention the incident of 4 February 2006 in the letter or at the meeting that took place on 10 February 2006. The report was made of the attempt in the face of the same threat but the event of 4 February 2006 was not made, according to the complainant, for fear that the Appellant would kill her. The complainant clearly was aware that she was entitled to report sexual abuse to the Police.

[36] The complainant testified that on 4 February 2006 the Appellant kissed her and asked her whether she loves him. The complainant response to this was "*I answered that I love him"* When the State Prosecutor asked her why she answered in this manner she responded *"I answered to the question because he asked me whether I love him."* Later she testified when pressed by the State Prosecutor to explain why she said this, she indicated that she was afraid as the Appellant threatened to kill her and had a pistol. According to her testimony the Appellant only threatened her after she told him that she loves him. She does not mention when she noticed the pistol and confirms that the Appellant did not make any reference thereto. This is an unusual conversation to have under the circumstances described by the complainant.

[37] The complainant failed to indicate in her evidence in chief that she tried to escape on 4 February 2006 and that the appellant locked the door but only mentioned it under cross examination.

[38] Having found that there are unsatisfactory elements in the evidence it should have alerted the court *a quo* to apply caution and to look at some corroboration; especially in view of the fact

that the Appellant not only denied sexual intercourse with the complainant but also volunteered to be subjected to a medical examination when he was arrested. (See S v JACKSON 1998 (1) SACR 470 (SCA).

[39] The uncontested evidence before the court *a quo* was that the Appellant did not use a condom, the complainant did not take a bath, she immediately reported the matter to the Police and on the same day was taken to the hospital where tests were done to see if sexual intercourse took place. The court *a quo* completely disregarded the fact that the Medical Report did not contain any conclusion consistent with sexual assault or, for that matter, any indication of an assault on the complainant.

[40] Reference was made by the court *a quo* in its judgment to the comment on the Medical Report which state *"Date of last menstruation – 5 February 2006"* in the following manner:

> *"In a way the J88 corroborates complainant in this regard by saying the last menstruation date by the complainant was on 5 February 2006"(My emphasis)*

[41] This conclusion is incorrect. Firstly that was not a correct version of what was written in the Medical Report. Secondly if it is interpreted in the manner that appears from the court judgment, then it does not corroborate what the complainant said. The complainant testified that Appellant desisted from having sexual intercourse with her on 6 February 2006 when he noticed that she was menstruating i.e a day after the last day of menstruation. Lastly the Medical Report does not indicate whether that was the last or first date of menstruation; thus, it could not have

assisted the court *a quo* without the evidence of the Medical Doctor who completed the Medical Report.

[42] No evidence was produced by the state to indicate the results of the vaginal swab that was taken by the Medical Officer. Although the Appellant offered what the trial court termed "a bare denial" the failure to produce this evidence leaves room for doubt.

[43] Having considered the above this Court is not convinced that the body of evidence presented by the State was of such a nature that it constituted proof of the guilt of the Appellant beyond reasonable doubt.

[44] For the reasons given the Court made the following order:

1. That condonation of the late filing of the notice of appeal be granted
2. The appeal against conviction and sentence is upheld.

TOMMASI J

I agree

LIEBENBERG J