REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CA 27/2010

In the matter between:

JOHANNES PAULUS BOCKY **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Bocky v The State* (CA 27/2010) [2013] NAHCNLD 40 (08 July 2013)

Coram: LIEBENBERG J and TOMMASI J
Heard: **28 June 2013**
Delivered: **08 July 2013**

Flynote: Criminal procedure - Trial - Verdict - Competent verdict - Accused charged with housebreaking with intent to commit crime to prosecutor unknown - Accused convicted of housebreaking with intent to rape and rape - Such not competent verdict in terms of s 262 of Act 51 of 1977 -

On appeal verdict changed on count 1 to housebreaking with intent to rape and on count 2 to rape.

Sentence – Court misdirected itself by not explaining provisions of s 3 (2) of Act 8 of 2000 to unrepresented accused – On appeal evidence in mitigation received in terms of s 304 (2)(*b*) of Act 51 of 1977.

Sentence – Set aside on appeal – Trial magistrate has resigned – Court of appeal sentenced appellant on counts 1 and 2 afresh – Cumulative effect of individual sentences considered – Appropriate order made in terms of s 282 (2) whereby effect of sentences imposed ameliorated – Similar order made in respect of count 3 set aside on appeal.

Summary: Appellant was arraigned in the regional court on charges of (1) housebreaking with intent to commit a crime unknown to the State; (2) rape; and (3) robbery with aggravating circumstances. He was convicted on count 1of housebreaking with intent to rape *and* rape; acquitted on count 2; and convicted on count 3. Section 262 (2) of the Act does not provide for a conviction of housebreaking with the intent proved (upon entering) *and* the crime committed while on the premises. The trial court misdirected itself by bringing in the rape as a competent verdict under the charge of housebreaking when convicting. The convictions were corrected and the appellant sentenced afresh. Trial magistrate resigned and appeal court sentenced appellant on counts 1 and 2 afresh. Conviction and sentence on robbery charge (count 3) confirmed, though order made for sentence to be served concurrently set aside.

ORDER

---

1. The appellant's application for condonation is granted.
2. The conviction on count 1 and the acquittal on count 2 are set aside and substituted with the following: Count 1 – Guilty of housebreaking with intent to rape; Count 2 – Guilty of rape.

3. The sentence on count 1 is set aside and is substituted with a sentence of 3 years' imprisonment, to be served concurrently with the sentence imposed on count 2.
4. On count 2 the accused is sentenced to 15 years' imprisonment.
5. The conviction and sentence on count 3 confirmed.
6. The order that the sentence imposed on count 3 must be served concurrently with the sentence imposed on count 1 set aside.
7. The sentences imposed on counts 1 and 2 antedated to 18 November 2002.

JUDGMENT

LIEBENBERG J (TOMMASI J concurring):

[1] The appellant was arraigned in the Regional Court sitting at Eenhana on charges of (a) Housebreaking with intent to commit an offence unknown to the State (count 1); (b) Rape in contravention of s 2(1)(*a*) of Act 8 of 2000 (count 2); and (c) Robbery with aggravating circumstances (count 3). After evidence was heard the appellant was convicted of Housebreaking with intent to rape and rape, and Robbery with aggravating circumstances, and acquitted on count 2 (rape). On count 1 the appellant was sentenced to 15 years' imprisonment, and on count 3, to 2 years' imprisonment, the latter sentence ordered to be served concurrently with the sentence imposed on count 1.

[2] The appeal lies against both the convictions and sentences imposed in respect of counts 1 and 2. Ms *Horn* appeared *amicus curiae* and we are indebted to her for her assistance provided herein. Mr *Lisulo* appeared on behalf of the respondent.

Condonation

[3] Whereas the appeal was lodged out of time, the appellant sought condonation for his non-compliance with the rules of court. He filed an

affidavit explaining the delay which we find reasonable and acceptable. In view of the respondent not opposing the condonation application and the conclusion we have reached in respect of one of the counts, the court will consider the application favourably and condone the appellant's non-compliance with the rules.

Grounds of appeal against conviction

[4] As regards conviction, the grounds of appeal are as follows:

- The magistrate made a material mistake when convicting the appellant on count 1 for housebreaking instead of rape, as set out in count 2;
- The magistrate erred by accepting the complainant's evidence pertaining to footprints found at the crime scene;
- The magistrate committed a misdirection by not assisting the unrepresented accused during cross-examination of the state witnesses; and lastly,
- No medical evidence was tendered as proof of the alleged rape committed, despite the appellant's request to have the report read out in court.

Conviction on counts 1 and 2

[5] The court *a quo* in its *ex tempore* judgment failed to furnish reasons for the conviction on count 1 of housebreaking with intent to rape and rape, which was impermissible under the Criminal Procedure Act, 51 of 1977 ('the Act'). It would however appear that the magistrate, albeit erroneously, acted in terms of s 262 (2) of the Act which reads:

'If the evidence on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit an offence to the prosecutor unknown but the offence of housebreaking with intent to commit a specific offence, the accused may be found guilty of the offence so proved.'

(Emphasis mine)

[6] The magistrate misdirected himself by convicting the accused of both offences ie housebreaking with intent and rape, as s 262 (2) only provides for a conviction of housebreaking with intent to commit the offence proved (in this instance to rape) and not the commission of the offence itself ie rape. Section 262 (2) provides for a competent verdict that may be imposed on a charge of housebreaking with intent unknown to the State but where the accused's intent, when entering becomes known during the trial or is admitted by the accused, he or she may only be convicted of housebreaking with the intent proved/admitted and not the offence committed once inside. The section does not provide that the accused may be convicted of two offences ie housebreaking with intent to rape and rape (*S v Dixon*[1]*; S v Blaauw*[2]).

[7] Although the accused at the end of the trial was convicted of only two counts incorporating all three charges preferred in the indictment, the conviction and acquittal in respect of counts 1 and 2, respectively, are not in order and must be substituted with the following: Count 1 – Guilty of housebreaking with intent to rape; Count 2 – Guilty of rape in contravention of s 2 (1)(*a*) of Act 8 of 2000.

[8] Therefore, although the first ground of appeal partly succeeds, it will not really benefit the appellant as he is now convicted on two counts for which he must be sentenced afresh.

[9] The second ground relates to two sets of imprints found at the homestead where the crimes were committed, the one being of a person in socks and the other being shoeprints. It was submitted on appellant's behalf that the prints indicate the presence of two persons whilst complainant testified only about the presence of one person ie the appellant. Furthermore, that the evidence adduced at the trial did not prove either of these prints to be that of the appellant.

---

[1] 1995 NR 115 (HC) at 117.
[2] 1994 (1) SACR 11 (EC) at 13c-e.

[10] The court below in its judgment, besides mentioning the presence of footprints found in the homestead where complainant resides, did not discuss in any particularity whether it relied on footprint evidence and if so, the weight attached thereto. From a reading of the judgment, it does not appear that any consideration was given to the imprints found at the scene where the person was moving around in socks. Mention was only made about shoeprints which, according to the evidence of the witness Shameulu Mwapamekange, corresponded with the imprints made by shoes the appellant had been wearing the previous afternoon when he and the appellant met at the kraal, and appellant enquiring about the presence of their parents and other siblings – none being at home at the time.

[11] The trial court, mindful that the witness Mwapamekange was a child aged 14 years and whose evidence he had to approach with caution, was impressed by the manner in which the boy testified and found him a credible witness. In our view there is nothing in the record which compels this court to come to a different conclusion. The evidence of this witness refutes counsel's contention that the evidence suggests the presence of two persons instead of one where he testified that they followed the footprints 'up to where he wear shoes'. His evidence confirms that of the complainant who testified about the sock prints they followed up to the fence surrounding the homestead where the person crossed the fence. At the same place they found shoeprints, seemingly on the outside of the fence, which suggests that the person first took off his shoes before crossing the fence. There can be no doubt that the evidence proves the presence of only one person and not of a second person. Accordingly, this ground of appeal is without merit.

[12] Counsel for the appellant further argued that the court misdirected itself by relying on the shoeprint evidence given by Mwapamekange because he was not an expert in the field of identification on shoeprints; neither did he testify about indentifying features on the shoeprints he observed. Counsel's submission would not have been without merit, had the magistrate relied on the shoeprint evidence to identify the appellant as the culprit who committed

the crimes charged. But that is not borne out by the judgment and except for referring to Mwapamekange's evidence about the shoeprints being similar to the shoeprints of shoes the accused was wearing the previous day, there is nothing in the judgment suggesting that the court relied on shoeprint evidence to identify the appellant.

[13] The import of Mwapamekange's evidence lies in the fact that he had met with the appellant the previous day, which evidence the court correctly in our view relied on when rejecting the appellant's alibi. It also supports the complainant's evidence by giving credence to her evidence on the identification of the appellant as the one who entered her room during the night and, after raping her at knifepoint, also robbed her of N$20. Complainant's identification of the appellant, being her assailant, has not been challenged on appeal. The court's reasoning in coming to the conclusion that the appellant's alibi must be rejected as false beyond reasonable doubt, in the light of all the evidence adduced, is sound in law and there is no legal basis on which this court could come to a different conclusion; hence, the appeal on this ground also fails.

[14] The next ground of appeal relates to the magistrate's alleged failure to assist the unrepresented appellant in cross-examination of the witnesses and, in counsel's view, more information could have been elicited from the witnesses during their testimonies. After careful consideration of counsel's oral submissions on this point and due regard being had to the record of proceedings, particularly the cross-examination conducted by the appellant, we have come to the conclusion that the contention is unmeritorious and those issues counsel felt could have been better ventilated by the court, relate to peripheral issues not essential to the determination of the appellant's guilt. This ground of appeal thus falls to be dismissed.

[15] The last ground turns on the fact that the State failed to produce medical evidence as proof of the alleged rape in the light of complainant's testimony that she went to the hospital where her private parts were examined; and, when the appellant requested that the report be read to him, this was not

done. The prosecution is under a duty to put all facts before the court even where some facts may be prejudicial to the State's case, but more so, where the evidence is favourable to the unrepresented accused, as in the present case. Appellant clearly wanted the court to have regard to the medical examination report and, in the circumstances, the magistrate should have assisted the unrepresented appellant to tender it as evidence, irrespective of its probative value. Failure to do so, in our view, constitutes an irregularity. However, when regard is had to the complainant's evidence about her having sustained no injury during the rape, and appellant's alibi defence, we are satisfied that he suffered no prejudice and despite the misdirection committed, received a fair trial. On this ground the appeal must also fail.

Grounds of appeal against sentence

[16] The grounds enumerated in the appeal notice are the following:

- The magistrate failed to take into account the appellant's personal circumstances; alternatively, gave insufficient weight thereto;
- The magistrate erred by finding that there were no substantial and compelling circumstances present which justify a lesser sentence;
- In sentencing the seriousness of the offence and the interests of society were over-emphasised; and
- The sentence is shocking and so unreasonable that no reasonable court would have imposed it.

[17] When the magistrate pronounced himself on sentence he did so without giving reasons and there is nothing on record reflecting that he delivered a reasoned judgment on sentence. The magistrate unfortunately is no longer part of the magistracy, which brings about that this court does not have the benefit of measuring the veracity of the grounds listed above against the reasons the court below had when sentencing the appellant as it did. Neither does the record reflect whether or not the court found the circumstances of the case to be substantial and compelling, though the sentence of 15 years'

imprisonment seems to suggest that the court had found none, and proceeded by imposing the mandatory minimum sentence in respect of the rape charge.

[18] Appellant testified in mitigation and was 28 years old, single and unemployed. He was a subsistence farmer and expressed his concern about the well-being of livestock he inherited from his deceased mother. Appellant is a first offender and at the stage of sentencing he had been in custody for over 16 months. During his testimony he did not mention that he had any dependants.

[19] In the light of what has been stated in *S v Gurirab*[3] the court should have explained to the unrepresented appellant that in the circumstances of the case, the prescribed minimum sentence was one of 15 years' imprisonment and ought to have assisted appellant to place before the court all information that would have assisted the court in deciding whether or not it constitutes substantial and compelling circumstances. Whereas the present case was finalised long before the *Gurirab* judgment was delivered, the magistrate in all likelihood did not explain to the appellant the import of s 3 (2) of the Act. Mindful that the matter could not be reverted to the magistrate to consider sentence afresh, bearing in mind the guidelines set out in the *Gurirab* matter, and that appellant might have been prejudiced not knowing what was expected of him at the sentencing stage, the court intimated to counsel that it deems it appropriate to invoke the provisions of s 304 (2)(*b*) of Act 51 of 1977 and hear evidence in mitigation of sentence. Appellant testified in mitigation and placed before the court additional information pertaining to his personal circumstances.

[20] It should be noted that the appellant's personal circumstances, as testified on by him in the court below, substantially differs from what he testified before us and in some respects, is even contradictory. He now says that he back then was a seasonal worker and not unemployed as the record reflects; that he has three minor children and two siblings who are all

[3] 2005 NR 510 (HC).

financially dependent on him; and that he has no formal education. Be that as it may, this court must take cognisance thereof and weigh up the appellant's personal circumstances against the nature of the crimes committed and the interests of society.

[21] It was further submitted on his behalf that he was a youthful offender; however, I am unable to see how the appellant at the age of 28 years can be considered as youthful. Though youthfulness of the offender is a factor that deserves consideration by the sentencing court, I do not consider it a relevant factor in the circumstances of the present case.[4] As regards appellant being a first offender, the court is mindful that first offenders should, as far as reasonably possible, be kept out of prison. However, a first offender is not shielded against imprisonment and where the circumstances of the case are such that it justifies imprisonment, the court should not shy away from imposing a custodial sentence simply because the accused is a first offender. The court should not only consider the interests of the offender but also that of society, as well as the nature of the offence committed and having done so, strike a balance between these often competing factors.

[22] Appellant was a seasonal worker and as such a productive member of society who accepted his responsibilities towards his dependants by supporting them financially. His children were in the custody of their respective mothers and were not living with him. These persons would obviously have suffered some hardship as a consequence of the custodial sentence imposed and one must feel for them. However, this court cannot allow its sympathy for them to deter it from imposing the kind of sentence dictated by the interests of justice and society.[5]

[23] Besides those circumstances already mentioned, regard must also be had to appellant having remained in custody pending the finalisation of his case, a period of 16 months. It is trite that the period an accused spends in

[4] *S v Kanguro,* 2011 (2) NR 616 (HC).
[5] *S v Sadler,* 2001 (1) SACR 331 (SCA) at 337c-d.

custody, especially when for a lengthy period, is a factor that usually leads to a reduction in sentence.[6]

[24] The crimes committed by the appellant in the present instance undoubtedly are all serious and usually attract severe punishment. Appellant invaded the privacy of the complainant's home under cover of darkness whilst armed with a knife with intent to satisfy his own sexual desires. Having made enquiries the previous day into the whereabouts of the complainant's family and learned that they were not at home, clearly shows that his actions were pre-meditated. Appellant forced complainant into submission by threatening to kill her with the knife he held against her, if she were to refuse him sexual intercourse. After he had finished, he demanded money from the complainant and again threatened to kill her. Complainant gave him N$20 and he only left thereafter. I fail to see how the fact that complainant did not sustain any injuries as a result of the rape, can favour the appellant only because the complainant did not put up any resistance as she was threatened to be killed if she were to do so. I find the reasoning, respectfully, misplaced in the circumstances of this case.

[25] The commission of the crimes clearly being pre-meditated; the vulnerability of the complainant; the crimes being committed in the safety of complainant's home; and the use of a dangerous weapon, accompanied by threats during the commission of the crimes, are all aggravating factors which by far outweigh the mitigating factors listed above.

[26] Taking into account the circumstances under which the crimes were committed, it is clear that the appellant's personal circumstances simply do not measure up to the gravity of the crimes committed by him, and the interests of society; inevitably resulting in custodial sentences to be imposed on each count.

[27] In the light of the circumstances of this case and due regard being had to all mitigating as well as aggravating factors present, we are unable to find

[6] *S v Kauzuu,* 2006 (1) NR 225 (HC) at 232F-H.

that it constitutes substantial and compelling circumstances as envisaged in s 3 (2) of Act 8 of 2000. Though it might be argued that the appellant's mitigating circumstances are substantial, we do not, in the light of *all* the circumstances presented, consider it to be compelling, justifying the imposition of a lesser sentence. In our view, the mandatory sentence of imprisonment for a period of not less than 15 years, as provided for in s 3 (1)(*a*)(ff), on the rape charge, in the circumstances of this case, would be justified.

[28] Having reached this conclusion, counsel's argument about the sentence imposed for rape being shocking and unreasonable, loses much of its persuasiveness in the light of the Legislature's direction that 15 years' imprisonment should be the benchmark for rape committed under circumstances where the offender had used a firearm or any other weapon for purposes of committing rape. In the circumstances of the present case we do not find the sentence imposed by the magistrate on count 1 shockingly inappropriate. However, the sentence imposed on count 1 erroneously incorporated the crimes of housebreaking as well as rape and, whereas it has been found on appeal that the convictions must be separated into two different counts, the sentence cannot be permitted to stand. It remains for this court to impose appropriate sentences on count 1(housebreaking with intent to rape) and count 2 (rape).

[29] The offence of housebreaking with intent to rape is equally regarded as of serious nature and likely to attract a custodial sentence. Given the circumstances of this case it should, in our view, be no different. Whereas this court must consider sentence afresh and the appellant now needs to be sentenced on counts 1 and 2, both relating to the rape committed with the complainant, it would obviously bring about that the cumulative effect of the sentences now to be served, is likely to be disproportionate to the appellant's blameworthiness in relation to the offences committed. However, the severity of the cumulative effect of the individual sentences can significantly be ameliorated by ordering the sentences to run concurrently.

[30] I now turn to the sentence imposed on count 3. The sentence of 2 years' imprisonment imposed by the court on the robbery charge is consistent with sentences imposed in similar cases by other courts. The aggravating circumstances present are such that it justifies a custodial sentence and the sentence imposed by the court below, in our view, is neither shocking nor inappropriate. There is no need or basis for interference on appeal.[7] However, in the light of this court's intention to order the concurrent serving of the sentences imposed on counts 1 and 2, the need has arisen to revisit a similar order made by the trial court in respect of count 3.

[31] Without the benefit of having the magistrate's reasons on sentence, one could only speculate why such order was made. The crimes of rape and robbery are two separate and unrelated crimes for which the appellant in respect of each had to form a different intent, albeit the robbery having been committed immediately after the rape. Unless the magistrate when ordering the sentences to run concurrently intended to ameliorate the cumulative effect of the individual sentences imposed, I find myself unable to see, in the circumstances of the present case, on what other basis the order justifiably could have been made. Given the view we have taken by making the appropriate order which would substantially ameliorate the cumulative effect of the sentences to be imposed on counts 1 and 2, we have come to the conclusion that this court should not exercise its discretion given to it by s 282 (2) of Act 51 of 1977 in favour of the appellant by making a similar order in respect of count 3, as this would not be in the interest of justice. In our view an order to that effect would virtually render the sentence imposed for robbery ineffective.

[32] In the result, the following order is made:

1. The appellant's application for condonation is granted.
2. The conviction on count 1 and the acquittal on count 2 are set aside and substituted with the following: Count 1 –

[7] *S v Tjiho*, 1991 NR 361 (HC).

Guilty of housebreaking with intent to rape; Count 2 – Guilty of rape.

3. The sentence on count 1 is set aside and is substituted with a sentence of 3 years' imprisonment, to be served concurrently with the sentence imposed on count 2.
4. On count 2 the accused is sentenced to 15 years' imprisonment.
5. The conviction and sentence on count 3 confirmed.
6. The order that the sentence imposed on count 3 must be served concurrently with the sentence imposed on count 1 set aside.
7. The sentences imposed on counts 1 and 2 antedated to 18 November 2002.

_____

JC LIEBENBERG

JUDGE

_____

MA TOMMASI

JUDGE

APPEARANCES

APPELLANT	F Kishi Of Dr Weder, Kauta & Hoveka, Oshakati,
RESPONDENT	L Matota Of the Office of the Prosecutor-General, Oshakati