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CASE NO.: CC 41/97

THE STATE versus BERNARD GUIBEB AND SIX (6) OTHERS

HANNAH, J.

1998/08/19

CRIMINAL LAW

RAPE: Rule that boy under the age of 14 is irrefutably presumed incapable of sexual intercourse is patently absurd. However, it is not for the courts to disturb deeply entrenched rules of common law especially in the field of criminal law. Repeals and amendments should be left to the Legislature.

CASE NO. CC **41/97**

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

He -

versus

BERNARD GUIBEB
PHILLIPUS GUXAB
BENNY KAMENDU
RONNY HARAEB
RODNEY GUIRAB
PENIAS KURZ GTVEN
DOeSEB

CORAM: HANNAH, J.

Heard on: 1997/12/2,3,4,5,8; 1998/04/27

Delivered on: 1998/08/19

JUDGMENT

HANNAH, J.: At the outset of this case the first three accused pleaded guilty to the indictment which contains two counts alleging the rape of two different girls on the 11th July, 1995. The other four accused pleaded not guilty. The 1st and 3rd accused were convicted but for reasons I will come to a plea of not guilty was recorded in the case of accused 2. The sentencing of accused 1 and accused 3 was then stood down to the end of the trial.

The evidence and submissions now having been completed I will first deal with the position of accused 2. As with accused 1 and 3, he admitted in a written statement made pursuant to

section 112(2) of Act 51 of 1977 all the essential elements of the crime of rape as alleged in both counts. However, what singles him out from those two co-accused is the fact that he gives his age as at the 11th July, 1995, as having been 12 years and the State accepts that that was indeed his age at the material time. There is a rule derived from Roman law that a boy under the age of 14 is irrefutably presumed incapable of sexual intercourse and therefore of rape and that rule has been accepted as part of the common law in England and the common law of this country prior to independence. And in terms of Article 140 of the Constitution such laws which were in force immediately before Independence shall remain in force until repealed or amended by Act of Parliament or until declared unconstitutional. The rule is patently an absurd one which should have no place in our common law in this day and age. But unlike the position in England and in South Africa it has not been repealed by statute. It is still part of our law. Ms Jacobs, for the State, initially submitted that this Court should now take the step of declaring that the rule is no longer part of our law but I pointed out that there were two difficulties with that submission. In the first place any such declaration or ruling would not have retrospective effect and so would not assist the prosecution in the present case. The second accused would be entitled to claim the benefit of the law as it stood in 1995 however absurd one may think it is. And in the second place courts are most reluctant to disturb rules that have become deeply entrenched in the common law especially in the field of criminal law. There is a special need for certainty as to the criminal law and for good reason courts prefer to leave repeals and amendments to the Legislature.

In final submissions Ms Jacobs realistically recognized this to be the position and conceded that the presumption should be applied. That, in my view, is the correct position and it must follow that, artificial as it is, the second accused can only be convicted of indecent assault. I express the hope, however, that the current review of criminal procedure and evidence will include a review of this anachronistic presumption.

I come now to the evidence of the complainant in the first count, Richia Garises. In the light of the pleas of the first three accused there is, of course, no question that she suffered multiple sexual assaults on 11th July, 1995 and it is no surprise that she is confused as to the details of what happened and who actually perpetrated the assaults. The major criticism to be made of her as a witness is that rather than recognize and admit her confusion she indulged in guess-work and speculation while in the witness box with the result that her evidence was full of contradictions and inconsistencies. She was a bad witness. I do not propose to set out her evidence in detail but will highlight parts. She was 14 years of age at the time and according to her events began at about 5pm outside the UDF Hall in Khorixas. She was with her friend, Magdalena Horases, when they encountered the seven accused. Accused 4, 5 and 7 took hold of her while the others took hold of Magdalena also aged 14 years and the two girls were dragged some three to four kilometres to the grounds of the Technical School. There accused 7 removed her clothes and while accused 1 covered her mouth with his hand accused 4, 5 and 7 raped her. Another boy then arrived and told the accused to desist and Richia was able to get to her feet. However, accused 2 then had sexual intercourse with her and also beat her with a wire. She was then able to run away.

That in essence was her evidence-in-chief and the fact that accused 1 and 3, who pleaded guilty to raping her, received no mention in her evidence is, of course, of significance when assessing her ability accurately to relate what occurred. And in cross-examinatiQn she maintained that accused 1 did not have sexual intercourse with her which, of course, cannot be right. She did, however, agree that accused 3 had been amongst those who raped her. She then said that all the accused raped her and then she excluded accused 1. He only held her arm, she said. And then she excluded accused 6 but shortly after re-included him saying that he had had sexual intercourse with her while her eyes were being covered. Apparently this was at the outset of the incident. She said that the order in which sexual intercourse took place was accused 7, accused 4, accused 5, accused 2, accused 6 and accused 3 but that does not

marry up with her earlier evidence that her eyes were covered at the outset when accused 6 raped her. Richia was then cross-examined on two statements which she made to the police in July and August 1995. Some substantial discrepancies between her evidence and what she told the police emerged. And at one stage the witness conceded that what she had told the Court was not the truth. It is clear that the Court has to look elsewhere in the evidence for proof of which accused in fact raped Richia.

Magdalena was a better witness. She also described how she and Richia were accosted by the accused and dragged to the Technical School although she differed to some extent from Richia as to which accused dragged which complainant. At the school accused 1, she said, threw her to the ground and while accused 3 covered her mouth accused 1 had sexual intercourse with her. She could not recall the second person to have sexual intercourse. The 3rd person was accused 4 and afterwards she was able to get up and started to run away. Accused 3 and 5 then caught her and both had sexual intercourse with her. She then ran home and the incident was reported to the police that same evening. The witness accepted that accused 6 and 7 did not have, or attempt to have, sexual intercourse with her.

In cross-examination Magdalena was able to recall that the second person to rape her was accused 2. As accused 2 admits having sexual intercourse with her nothing really turns on this sudden memory recall and, of course, it sometimes happens that when reliving events in the witness box a witness's memory improves. However, a question mark was raised over Magdalena's memory when she was cross-examined on two statements which she made to the police. In the first statement she said accused 3 undressed her while in the second statement she said it was accused 5. In the witness box she said that both were wrong. It was in fact accused 2.

In the second statement the order of rape is given as accused 1, 2, 3, 4 and 5 which differs in one respect from her testimony. And her statement goes on to say that accused 2 and then accused 1 committed a further rape upon her. In her evidence she said that there was no such further rape. It was the rape by accused 3 and 5 which was separated both in time and place from the rape allegedly committed by accused 1, 2 and 4. Magdalena said that the names in the statement may be confused. She only knew the name of accused 7 at the time. This I accept may account for the differences although I cannot be sure.

I come now to the evidence of Gottard Howoseb. He is now 17 years of age and on the evening of 11th July, 1995 he said he was passing the Technical School when he saw people in the grounds. They were the seven accused and the two complainants. He said the two girls were about twenty metres apart and accused 1, 2, 4 and 5 were busy with Magdalena while accused 3, 7 and 6 were busy with Richia. Accused 6, he said, was forced to have sexual intercourse with Richia a piece of evidence which accords with what Richia herself said. However, in cross-examination doubt was cast on this witness's evidence when he said that he only saw accused 2 raping Magdalena and accused 6 being forced to have sexual intercourse with Richia.

Another witness, Dennis Garoeb, was likewise of little value at the end of the day. He was present at the scene and gave a fairly detailed account of a multiple rape but eventually in cross-examination he said that all he saw was accused 6 being forced to have sexual intercourse with Richia. He said he did not see the other accused having sexual intercourse with the complainants. That he retracted so much of his earlier evidence casts doubt on what little was left.

The investigating officer was Constable Haraeb and he described how a complaint was laid on

the evening of 11th July, 1995 and how the accused were arrested. The only piece of his evidence to which I need refer specifically is that he took a statement under caution from accused 4 with regard to the complaint laid by Magdalena. Having been cautioned, the accused said, and I quote:

"Yes, I had sexual intercourse with the complainant". Haroeb said that the accused's parent was present when this statement was made.

I now come to the defence case. Accused 2 did not give evidence and for reasons given earlier he must be convicted of indecent assault only on both counts. Accused 4 did give evidence, however, and he related how he and his co-accused had been playing with a.tennis ball at the Technical School that evening when the two complainants arrived with Dennis. His evidence as to what occurred was vague. They were playing and grabbing each other, he said, and he join them and played with the tennis ball on the other side. Then he left and went home. And in cross-examination his evidence remained equally vague. It was clear to me that he had shut his mind to the events of that evening. As for the statement made to constable Haroeb, he said that he had been threatened by Warrant Officer Pretorius and that that was why he had made the statement and it was untrue. Pretorius, he said, had been present when the statement was made. None of this was put to constable Haroeb when he gave evidence and I have no doubt that it was an afterthought on the part of the accused when the statement was put to him in cross-examination. According to Haroeb the accused's parent was present when the statement was made. This the accused denied but not only was Haroeb not challenged on this but that piece of evidence was actually elicited by defence counsel. I have no real doubt that the accused would not have admitted to having sexual intercourse in the presence of his parent had that admission not been true and I am equally satisfied that the admission was made voluntarily. Although in view of the unsatisfactory nature of Richia's evidence some doubt exists as to whether accused 4 raped her I am satisfied beyond reasonable doubt that he was one of those who raped Magdalena. He must be convicted on the second count.

Coming now to accused 5 Ms Jacobs for the State conceded that because of the shortcomings in the evidence of Richia, he cannot be convicted on the first count. However, counsel submitted that he should be convicted on the second count of raping Magdalena. The complainant's evidence was clear, she submitted. Accused 3 and 5 chased Magdalena after the initial rapes were perpetrated and the two of them raped her again. My difficulty with this submission stems from the contradictions between the witness' evidence and her police statement regarding this accused. She said that it was not this accused who undressed her, as alleged in the statement. And also in her second statement it would appear that she thought it was accused 1 and 2 who had committed the final rape. It may be, as she said, that there was confusion as to name but I bear in mind that it was dark or darkish at the time, that a number of boys were involved and that the witness was no doubt in a state of shock. It would, in my judgment, be unsafe to convict accused 5 and he must acquitted on both counts.

In the case of accused 6 State counsel also only sought conviction on the second count. But there are two difficulties. One is the State evidence that accused 6 was forced to have sexual intercourse with Richia and the other is his apparent age. The State made no attempt to ascertain the extent of the force used to make the accused have sexual intercourse and so the Court is left very much in the dark on that aspect. But even assuming that such threats as were made did not include violence I must take into account the accused's age which, according to the indictment, was only 11 years at the time. There is a presumption that a child between the ages of 7 and 14 years lacks criminal capacity which incorporates the capacity to appreciate the wrongfulness of conduct. Did accused 6 appreciate that it was wrong to have sexual intercourse with Richia when forced by his companions to do so. The answer is I simply do not know. He may have or he may not have. I am left in a state of reasonable doubt in his case and he also must be acquitted on both counts.

Lastly I come to accused 7. He was 12 years of age at the time and I will deal with that aspect in a moment. In his evidence-in-chief he denied having sexual intercourse with Richia as she alleged. The only persons involved in any assault so far as he was concerned were Dennis and Gothard. He did not see what his co-accused were doing. And then in cross-examination he admitted that he was not being truthful. He was scared, he said, of accused 1 and accused 3 but he was now prepared to tell the truth. The truth was, he said, that accused 1 told him to have sexual intercourse with Richia and threw him down. Richia was lying down but he did nothing. He did not have sexual intercourse. He stood up and the two girls left. It was then put to him that in a statement made pursuant to section 115 of the Criminal Procedure Act he had stated "I admit that I had sexual intercourse with Richia Ganases, however I wish to point out that I acted under duress when I committed the sexual act." That statement was prepared by his counsel, signed by the accused and confirmed by him in court. Faced with that statement, the accused had to admit, and did admit, that his previous evidence had been false. He did have sexual intercourse with Richia on the evening of the 11th July. But he still maintained that accused 1 had threatened to beat him with a stick if he did not. Accused 7 clearly has no regard for the truth whatsoever. His account of being forced to have sexual intercourse receives not a scintilla of support in the rest of the evidence. I have no doubt that his claim that he was forced is just another falsehood in the litany of lies which he told. I am satisfied beyond reasonable doubt that he voluntarily had sexual intercourse with Richia without her consent. As for the question of criminal capacity, accused 7 was cross-examined on his awareness at the time of what is and what is not wrongful conduct. He admitted to knowing that theft is wrong and that assault is wrong but when it came to rape and indecent assault -he claimed ignorance. I have no doubt that this claim was as false as his initial claim not to have had sexual intercourse. He must have realized that for a gang of boys to throw these two girls to the ground, forcibly undress them, cover their mouths to prevent them from screaming and then take turns to have sexual intercourse with them was conduct which was wrong. In my judgement accused 7 must be found guilty on the first count but because of his age at the time

he is guilty only of indecent assault.

Before concluding this judgment I make brief references to the issue between the State witnesses and the defence witnesses as to how the incident began. Richia and Magdalena said that they were dragged some three to four kilometres from a hall in a location to the Technical School in town. The accused said that Richia and Magdalena arrived at the Technical School where they, the accused, were playing with a ball. I think it unlikely that these two girls would have been dragged three to four kilometres through the streets of Khorixas early that Thursday evening without someone observing what was happening and intervening. So far as it may be of relevance I am of the view that the defence version in this regard should be preferred.

For the foregoing reasons the second accused is convicted of indecent assault on counts 1 and 2. The 4th accused is acquitted on count 1 and convicted of indecent assault on count 2. The 5th and 6th accused are acquitted on both counts. The 7th

accused is competed of indecent assault on count 1 and acquitted on count 2.

HANNAH, J.