CASE NO.: CC 24/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

MOSES VAPULENI NGHITEWA

CORAM: LIEBENBERG, J.

Heard on: 24; 26 – 27; 30 – 31 May; 01; 03; 08 June 2011.
Delivered on: 09 June 2011.

JUDGMENT

LIEBENBERG, J.: [1] The accused stands indicted on a charge of Rape in contravention of s 2 (1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000), hereinafter referred to as 'the Act'. It is alleged that upon or about 19 April 2004 at or near Onandova village in the district of Ohangwena, the accused wrongfully and

unlawfully committed a sexual act with H under coercive circumstances in that (i) the victim ('H') was below the age of fourteen years and the accused more than tree years older; and (ii) that the victim by reason of age was exceptionally vulnerable. From a copy of the victim's birth certificate adduced at the beginning of the trial (Exh. 'E'), it appears that she was born on 17 August 2001; according to which she was two years and eight months old at the time of the alleged offence.

[2] The accused pleaded not guilty and other than denying that he had sexual intercourse with the victim, he elected not to give a plea explanation. During the trial he was represented by Ms. *Mugaviri*, while Mr. *Wamambo* appeared for the State.

[3] According to a copy of the accused's birth certificate he was born on the 2nd of October 1987, which means that he was sixteen-and-a-half years old at the time of the commission of the alleged offence. Currently he is twenty-three years of age.

[4] The State called six witnesses to prove its case against the accused. Dr. Kashaija was called to explain the medical report (Exh. 'G') compiled by a certain Dr. Atkins who was not available as a witness as she, in the meantime, had returned to her country of origin. Tulinanye Nashitye is an older brother to the victim and he and one Paulus Petrus testified about the alleged rape incident which, according to them, took place in their presence, making them eye-witnesses. Leonia Ndakalako is the biological mother of the victim and Tulinanye; while she regards Paulus, who grew up in their home, to be her own child. The accused's mother, Anna Hauvinga, and the victim's father, Ngidulwalungi Nashitye also testified for the State. For the defence only the accused and one Edward Petrus, also known as 'Tjapa', testified.

[5] A medical report under cover of an affidavit made in terms of s 212 (4)(a) of the Act was handed in, according to which the victim was medically examined at Engela Hospital on 27 April 2004. The history of the patient provided to the doctor prior to the examination is that there was an alleged sexual assault i.e. vaginal penetration committed on the 19th of April, eight days prior to the medical examination. The medical report *inter alia* reflects the patient's general state of health to be well and that no bruises and abrasions were observed. Regarding the genitals it was noted that there was mild swelling of the fourchette with erythema (redness of the skin); mild oedema at the vaginal introïtus (a build-up of excess serous fluid between tissues cells – see: Encarta Dictionary); furthermore, that the hymen was not intact. These findings, in the opinion of Dr. Atkins, are consistent with penetration of the vagina.

[6] Dr. Kashaija is a Principal Medical Officer at Engela Hospital and has thirty-two years of experience as medical practitioner. He was of the opinion that besides the alleged sexual intercourse, the swelling and redness of the fourchette could also have been caused by infection or another form of trauma. He was further of the view that the healing time of redness and swelling caused by trauma would be between four to five days; provided that the more severe the trauma, the longer the healing process and period would be. The fact that the hymen at this age was no longer intact, according to the doctor, was proof that there was penetration.

[7] From the medical evidence it seems clear that the injuries observed on the victim's genitals, as far as it concerns the swelling, erythema and broken hymen, are consistent with penetration of the vagina. However, from the evidence of H's mother,

Leonia, it would appear that she did not bath the victim after the alleged incident up to the time of the examination but had only wiped her and 'treated the wound' with salt water. In these circumstances it cannot, in my view, be excluded that infection had set in which *might* have contributed to the swelling and erythema observed at the time of the examination; or, even that the treatment itself (with salty warm water) could have contributed thereto. Hence, the swelling and erythema *per se*, should not be seen as proof of a sexual assault but rather as a medical condition that arose either as a result of trauma to the genitals some time prior to the examination; or unhygienic conditions; or as a result of the treatment; or a combination of these factors.

[8] The evidence of the witnesses Tulinanye and Paulus is, that their sister H, then two years old, accompanied them when they let the goats out for grazing. They were later joined by the accused (being their neighbour), who herded his own goats. At that stage Tulinanye was not yet five years old while Paulus was seven-and-a-half. Both witnesses are in agreement that after the accused undressed H, he lowered his trousers and lied down on his back. He then positioned her on top of him in such a way that her genitals were on his. He thereafter moved her body up and down. Both said that H started crying and when Paulus asked the accused what he was doing, he retorted by asking *"Is this your mother?"*, referring to H. The accused then pushed H from him, stood up, and pulled up his trousers.

[9] It was put to the witnesses in cross-examination that Ndapandula (a sister to the witnesses) arrived from school before they had left home to herd the goats and that she took Tulinanye and H back into the homestead on instructions of their father. Also that Tjapa (defence witness Edward Petrus) was in their company at the time.

Both witnesses denied these allegations saying that neither Ndapandula nor Tjapa was present at the time; also were they adamant that Tulinanye and H were present when they left home together to take the goats for grazing. Tulinanye denied that his father was at home on that day; therefore, he could not have given those instructions as claimed, which evidence was corroborated by Nashitye (the father) during his testimony. Regarding the presence of Ndapandula, Leonia testified that she, being her daughter, was not staying with them at that stage but at Ongha where she grew up. Tjapa also testified that he did not see Ndapandula or any of the other children on the day (unknown) he and the accused took their cattle for grazing to the 'forest'. The evidence of Tulinanye and Paulus on this point was thus corroborated by other State witnesses as well as one defence witness which, to a significant degree, contradicts the accused's evidence.

[10] There were however discrepancies in the evidence of Tulinanye and Paulus which, according to counsel for the defence, were material; hence, it was argued, it would impact on their credibility. According to Paulus, whilst on their way with the goats, H complained about stomach pain. When the accused heard this he said that she must come to him as he would treat her. Accused, in their presence, then undressed H and lied down on his back whereafter he lowered his trousers and positioned her genital organ onto his penis. H then started to cry and Paulus left the scene to attend to the goats. Tulinanye said he did not hear H complain about her stomach and his version is that the accused told Paulus to attend to the goats (which Paulus denied) and he then followed Paulus at a distance; that he heard H crying and when he looked back, he could see what the accused was doing to H. He and Paulus

then returned to the scene where he saw the accused moving H up and down onto his penis. He said that when the accused pulled up his trousers he saw his genitals.

Although their evidence differ as to whether the accused undressed H in their presence and positioned her onto him, they corroborate one another as to H having been undressed and her clothes hung onto a bush; that accused had pulled down his trousers; that he was lying on his back and positioned H on top of him in such a way that their genital organs had contact; that H was crying at the time; and that accused only stopped after Paulus had asked him what he was doing, or when told to stop with what he was busy doing.

A further discrepancy is that Tulinanye said H was given her clothes by Paulus and told to dress; while Paulus said H took it herself from the bush and got dressed. Another would be where Paulus said that he sent Tulinanye and H home after the incident, whilst Tulinanye said H walked back home alone as he stayed with Paulus to herd the goats.

From the evidence of these two witnesses the impression was gained that they, on that same day, reported to their mother, Leonia, what had happened; but, according to the latter, it was only reported to her on 21 April 2004, two days after the alleged incident.

[11] In my evaluation of the evidence I shall return to the contradictions mentioned above and then determine what weight should be given thereto.

[12] Leonia said that on the 21st of April in the afternoon when she was at home with her daughter H, she detected a foul odour coming from the child's body and later on observed that H experienced some difficulty when urinating. After laying her down she examined her genitals as H complained that she was paining there; she was also

crying. After wiping her with a wet cloth she observed a wound inside the vagina whilst the vagina itself was reddish. She testified that H at that stage made a report to her implicating the accused, but the content of the report must be disregarded as inadmissible hearsay evidence as H was not a witness to the proceedings. Leonia then called Tulinanye and Paulus who narrated to her what had happened between the accused and H two days before ("the day before yesterday"). The explanation Tulinanye had given at that stage is in material respects what he had testified in Court and although it should not be seen as corroboration (being self-corroborative), it certainly shows consistency in his version, expelling any notion that it was a subsequently concocted story.

She summoned her neighbour Clemensia and after they examined H together they treated H's injury with warm salt water. When the accused's mother Anna arrived at her place the following day, Leonia informed her about what was reported to her and after H narrated to them what had happened, she showed Anna the "wound and that the vagina was broken". This suggests that the wound was inside the vagina. Anna testified that she observed a reddish wound which appeared like a scratch (abrasion) and offered her some ointment she could apply on the wound.

[13] The relevance of the evidence concerning the observations made by different persons on H's body at that stage lies in the fact that there was indeed an injury visible to the naked eye, which caused some discomfort and pain to H. This evidence establishes a link between Leonia's first observation on the 21st and the medical examination performed on H on the 27th of April; and excludes any other injuries possibly sustained after the 21st – as submitted by defence counsel.

[14] In cross-examination Leonia had to explain the differences between her witness statement made to the police and her testimony in Court; and responded by saying that what she testified about is what she had told the officer who reduced her statement to writing. Other witnesses were equally confronted with alleged differences between their statements made to the police and their testimony in Court, but because the authenticity of these statements was not proved, defence counsel did not pursue this point any further. I shall return to this aspect later herein as far as it concerns the statement of the witness Leonia.

[15] It is common ground that when Leonia's husband returned home, he took the victim first to Ongha clinic from where he was referred to the police station. There he was told that they could not assist him and he was advised to go to the Ohangwena police the following day. After further delays they were eventually taken by the police of Eenhana to Engela hospital where H was medically examined on the 27th of April by Dr. Atkins.

[16] At the close of the State case defence counsel made application in terms of s 174 of the Criminal Procedure Act 51 of 1977 for the discharge of the accused. The State opposed the application and after hearing submissions the Court summarily dismissed the application and intimated to counsel that reasons would be provided in the judgment. The reasons for the dismissal follow.

[17] The s 174 application was based on the discrepancies in the evidence of State witnesses as regards (i) the date on which the alleged offence was committed and that it was not duly established; (ii) the inconsistencies in their evidence pertaining to the

positions of Tulinanye and Paulus during the alleged incident and injuries inflicted; and (iii) that penetration had not been proved.

[18] The principle is well established that the words "no evidence" in terms of s 174 means no evidence upon which a reasonable court, acting carefully, may convict. (See *S v Nakale*[1] and the authorities there cited; *The State v Pio Marapi Teek*[2]) It is trite law that the trial court has a discretion – one that must be exercised judiciously[3] – to discharge the accused at the end of the State case; but, only if there is no evidence to convict on. In the *Teek* case Brand, AJA at p. 5 paragraph [7] stated the following:

> *"Somewhat more controversial is the question whether credibility of the State witnesses has any role to play when a discharge is sought under the section. But the generally accepted view, both in Namibia and in South Africa, appears to be that, although credibility is a factor that can be considered at this stage, it plays a very limited role. If there is evidence supporting a charge, an application for discharge can only be sustained if that evidence is of such poor quality that it cannot, in the opinion of the trial court, be accepted by any reasonable court (see eg* ***S v Mpetha*** *1983 (4) SA 262 (C) at 265;* ***S v Nakale*** *supra at 458). Put differently, the question remains: is there, having regard to the credibility of the witnesses, evidence upon which a reasonable court may convict?"*

[19] When applying the aforementioned principles to the facts *in casu*, the Court is satisfied that sufficient evidence was adduced supporting the charge of rape against the accused. Defence counsel's submission was not that there was *no* evidence on which the Court may convict, but rather that as a result of the discrepancies in the

[1] 2006 (2) NR 455 (HC) at 457
[2] Unreported Case No. SA 44/2008
[3] *S v Shilamba*, 1991 NR 334 (HC)

evidence of the State witnesses, the Court should discharge the accused. There are undoubtedly contradictions between the evidence of Tulinanye and Paulus as listed above, but thát, *per se,* does not mean to say that therefore, the evidence is of such poor quality that no reasonable court, acting carefully, could possibly accept it. For the reasons set out later herein, it is certainly not the case in this instance. Accordingly, on this ground, there is no merit in point (ii) of defence counsel's submission.

[20] Regarding point (iii) pertaining to penetration, it should be noted that a sexual act as defined in s 1 (1) of the Act includes, *inter alia,* insertion of the penis into the vagina of another, even to the slightest degree. The fact that no direct evidence was adduced as regards penetration, does not deter the Court from inferring from the proved facts that penetration had indeed taken place; and in such instance the Court would obviously have regard to the medical evidence adduced when coming to such conclusion. It will suffice to say that the medical evidence deriving from the medical report compiled by a medical doctor, although not constituting proof of the alleged rape, is consistent with the rest of the evidence given by those State witnesses who witnessed a sexual act committed with the victim some days prior to the examination.

[21] As for the conflicting evidence between Tulinanye and Paulus and that of Leonia pertaining to the date on which the alleged offence was committed i.e. whether it was on the 19th or 21st of April 2004, the Criminal Procedure Act 51 of 1977 in s 92 (2) provides that:

> *"If any particular day or period is alleged in any charge to be the day on which or the period which any act or offence was committed, proof that such act or offence was committed on any other day or during any other period not more than three months before or after the day or period alleged therein shall be taken to support such allegation if time is not of the essence of the offence: Provided that - ……."*

For purposes of deciding the case against the accused, the exact date on which the alleged offence was committed would not be essential to the offence the accused is facing. Neither would he in view of his plea explanation i.e. a complete denial, would have been prejudiced at that stage of the proceedings. Hence, the exact date of the offence alleged, despite conflicting evidence given by the State witnesses, could not at that stage be a valid consideration in a s 174 application – particularly where the Court in terms of s 86 (1) may order an amendment of the charge insofar as it deems it necessary, provided that the relevant amendment will not prejudice the accused. In any event, the charge was subsequently amended in terms of s 86 (1) by substituting the date initially appearing on the indictment viz. 21 April, with 19 April 2004.

[22] For the abovementioned reasons the Court dismissed the s 174 application and put the accused on his defence.

[23] I now turn to consider the version of the accused. The defence case is based on the evidence of the accused and Edward Petrus, (Tjapa). Accused's defence is a complete denial of the charge against him and according to him he on that day met with Petrus, Tulinanye and H at their home at around 13:00 when he let out the goats for grazing. They moved together towards Tjapa, who was at the kraal busy milking and who said to him not to leave without him as he wanted to join the accused. He

said Ndapandulwa then arrived from school and went to sit under a tree until she was told by her father to take Tulinanye and H back inside the house. Accused thereafter separated his goats from those of Paulus and he and Tjapa then went their own way, leaving Paulus behind. They only returned at about sunset and the next morning he left for Angola with his brother where he remained for three weeks. Upon his return he learnt about the allegations of rape against him which he denied. He thereafter accompanied his uncle to the police station where he was arrested.

[24] Tjapa's evidence did not contribute anything to the case except, maybe, that he and the accused once, on an unknown date, herded their live stock together in the area referred to as the forest. He was unable to say on which date this happened but was adamant that it happened only once and that he on that day did *not* see any children in the accused's company, or Ndapandula, as testified by the accused. At most his evidence would support that of the accused pertaining to *another* day on which they herded live stock together (which Tjapa denied); but contradicts the accused's evidence as far as it relates to the events of the 19th of April 2004.

[25] When the Court is required to evaluate the evidence adduced during the trial, regard, *inter alia*, must be had to contradictions in the evidence given by the respective witnesses. In this regard defence counsel, in view of the conflicting evidence given by Tulinanye and Paulus in respect of the alleged incident (as shown above), submitted that the Court cannot be satisfied that the accused committed the offence as these witnesses were not truthful. Defence counsel, however, made conflicting submissions by arguing on the one hand that "the alleged rape occurred at a different time and place, independent of the accused person (if at all)", but, on the

other hand, concedes that in the light of the evidence led, the State succeeded in placing the accused at the scene of the alleged offence. It was further submitted in the light of what was said in *R v Manda*[4] and *S v S*[5] that the evidence of children should be scrutinized with care by the Court.

[26] It is trite that contradictions in the evidence of witnesses *per se* do not lead to the rejection of a witness' evidence, as it may simply be indicative of an error, as was pointed out in *S v Mkohle*[6] where the Appeal Court approved and applied the *dicta* in *S v Oosthuizen*[7] where it was said:

> *"Plainly it is not every error made by a witness which affects his credibility. In each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence."*

[27] When the Court considers the differences between the evidence given by Tulinanye and Paulus as listed *supra*, regard must be had to the nature of the contradictions which mainly relate to: the respective positions the witnesses were in at different stages during the alleged incident; whether both heard when H complained of stomach pain; whether or not her clothes were handed to her afterwards; and whether Tulinanye accompanied H home after the incident. In my view these inconsistencies are of a relatively minor nature and the sort of thing to be expected from young children giving evidence seven years after the alleged incident and where they are now required to give evidence in the smallest of detail. In 2004 Tulinanye

[4] 1951 (3) SA 158 (A);
[5] 1995 (1) SACR 50 (ZS)
[6] 1990 (1) SACR 95 (A)
[7] 1982 (3) SA 571 (T) at 576B-C and 576G-H

was four-and-a-half years old and Paulus almost seven-and-a-half. Although their recollection may not be perfect, it was not shown that these discrepancies are sufficiently material to conclude that their evidence was unreliable and that they therefore must have fabricated evidence implicating the accused; nor, that their evidence is of such poor quality that the Court must disregard it. Not only were there conflicting evidence, but these two witnesses also corroborated one another in material respects; particularly regarding the sexual act committed with the victim, which evidence was left unchallenged.

[28] The earlier view held by the courts that there are inherent dangers in the acceptance of the evidence given by children (*Manda (supra))* and that "the liberal rules governing the acceptance of children's evidence imposed a duty on the court to be cognisant of potential objections to the evidence of children" no longer finds application since the amendment of s 164 of the Criminal Procedure Act[8] by the insertion of subsection (4) which states:

> *"A court shall not regard the evidence of a child as inherently unreliable and shall therefore not treat such evidence with special caution only because that witness is a child."*

The effect of the amendment is that as regards the acceptance of children's evidence, the trial court is no longer under a duty to adopt a cautious approach when evaluating the evidence of children merely because of youthfulness; but must approach such evidence in the same way as that of other (adult) witnesses.

[8] Section 2 (b) of the Criminal Procedure Amendment Act, 2003 (Act 24 of 2003)

[29] In the present case it would therefore be wrong to adopt a cautious approach towards the evidence given by Tulinanye and Paulus simply because of their young age; however, their youthfulness at the time of the alleged incident might explain the differences in their evidence due to passage of time; a factor the Court must take into consideration. In *S v S* (*supra*) it was observed that children – in my view it could also include adults – generally have a good recall of central events but a poorer memory for detail and evidence of surrounding occurrences; something certainly borne out in this case where both witnesses gave clear account of the circumstances of the sexual act committed with their younger sister and corroborated one another on material aspects of their evidence. Regarding the surrounding occurrences such as their exact positions at specific times; on what was said at the time, and who had fetched the victim's clothes and accompanied her home, they differed. I pause here to observe that both these witnesses, despite their young age, made a good impression on the Court in the manner they testified. They gave their evidence in an open and forthright manner and appeared to be telling the truth. When asked in cross-examination on the differences in their respective versions on the issues mentioned above, Paulus attributed this to Tulinanye's yound age; an explanation that seems quite reasonable in the circumstances. When assessing the evidence of these witnesses in the context of all the evidence adduced at the trial, I am convinced that the discrepancies pointed out by defence counsel were nothing more than *bona fide* mistakes made unintentionally by the witnesses; and there seems to be no valid reason why the Court (at least) should not rely on those aspects of their evidence where they corroborate one another.

[30] Although the accused did not in so many words allege that the witnesses fabricated incriminating evidence against him, his blunt denial of the incident testified on by them, certainly suggests that. Besides lack of motive on their part, it must be borne in mind that they only reported the incident *after* being questioned by their mother as to what happened with H – who had made an earlier report to her and whereafter she examined the child. The injury on H's genitals was observed by several independent witnesses and although they gave different descriptions thereof in their testimony, it is clear that this injury was not imaginary, but real. It is furthermore consistent with the evidence given by Tulinanye and Paulus. Thus, it seems highly unlikely that the boys and Leonia had any reason to falsely implicate the accused and had joint forces in concocting their evidence in order to incriminate him. In the circumstances of the case, there is no evidence supporting such inference, nor does it appear to be probable.

[31] It was argued on behalf of the accused that the medical evidence does not support the State version as Dr. Kashaija testified that the condition of the victim could have been caused by a number of things, such as infection and *"any other form of trauma"*. Furthermore, that if the evidence of Tulinanye, Paulus and Leonia is "taken away", then there is no case against the accused – because, so it was argued, by *"Placing the accused at the scene cannot be seen as enough evidence for the commission of the offence, which is what the state, perhaps can succeed at doing."* The argument is flawed for two reasons firstly, there is no reason or legal obligation on the Court to "think away" the evidence of the three State witnesses; secondly, if the State succeeded in placing the accused at the scene where the alleged crime was committed (as conceded), why would the Court then be obliged to disregard the rest

of the evidence (given by the same witnesses) pertaining to the events taking place at the same time without good reason? The contradictions in the evidence of these witnesses form part of the body of evidence that must be considered and cannot bring about that their evidence has no weight at all and must therefore simply be disregarded.

The evidence of Dr. Kashaija can neither be seen to *exclude* the evidence of the two boys from which it may be inferred that the injuries noted in the medical report came as a result of the sexual act they witnessed. I also did not understand the doctor's evidence to mean that, in his experience, it is not uncommon to find girls under the age of two years with their hymens broken, (being a normal phenomenon). What he said is that, he did in the past examine girls of that age of whom the hymen was not intact, but that he did not have the records available to comment on those cases. Put differently, he was at this stage unable to say whether there was a history in respect of those children, explaining their broken hymens. However, what is clear from the doctor's evidence is that in order to break or traumatise the hymen of a pre-pubertal girl, as in this case, it *"would require penetration in order to break it."* This opinion is consistent with the finding made by Dr. Atkins in the report. It is not stated in the report that the injury to the hymen was fresh upon examination, which in the circumstances of the case seems unlikely, given the time lapse between the alleged incident and the medical examination i.e. eight days. There is no evidence before the Court from which it may be inferred that the injury to the hymen could have been inflicted on a different occasion, as suggested by defence counsel. As mentioned earlier, the unhygienic condition in which the victim was kept, could have caused or contributed to the erythema and oedema observed at the time of the examination. This condition, however, has no direct bearing on the victim's broken hymen.

[32] Despite these shortcomings in the State case, these injuries are consistent with the evidence of the State witnesses i.e. that it arose from a sexual act committed with the victim eight days prior to the medical examination. To that end it is supportive of the evidence of Tulinanye and Paulus.

[33] Another aspect of the State case which, according to defence counsel, is unsatisfactory and reflects adversely on the credibility of the witness Leonia, is the inconsistencies between her witness statement and her *viva voce* evidence. These were pointed out to be the following: (i) That she testified that H was "screaming" when urinating whilst saying that she was feeling pain; compared to her statement where she stated that she was *"breathing like she was in pain."* I pause here to observe that the witness never testified that the child was "screaming" of pain, but said that she "jumped up" saying she had pain and later on started crying. (ii) That she testified that she had observed a wound; compared to blood drops in the statement; and (iii) where she testified about the report made to her by the boys, according to whom the accused was lying on his back with H held on top of him; compared to the statement saying that the accused was on top of her. It was furthermore contended that these were material inconsistencies because the witness confirmed the contents of the statement to be correct – despite her explaining that it was taken down wrongly in some respects. It was also said that the witness failed to put all the details relating to the alleged offence into the statement.

It is common cause that the police officer who reduced the statement to writing was not a witness to the proceedings; hence, the witness'explanation of an incorrectly recorded statement was left unchallenged.

[34] This Court in a number of cases expressed itself on what is referred to as 'deviating statements' made by witnesses when comparing their witness statements to their evidence given in Court (see *Hanekom v The State*[9]*; Aloysius Jaar v The State*[10]*; Simon Nakale Mukete v The State*[11]*; The State v Pio Marapi Teek*[12]).

As regards the drafting of witness statements by police officers Maritz, J (as he then was) in the *Mukete* case said:

> *"It is the experience of the Court that witness statements drafted by police officers are often not all-inclusive. Police officers tend to focus the statement on what they consider – rightly or wrongly – to be the more (or most) relevant facts relating to the offence under investigation. The failure to include all the details of a series of events does not in itself mean that those events did not take place or that they have been a recent invention by the witness – especially not if the witness gives an explanation for their omission and that explanation is not gainsaid by anyone."*

In the *Jaar* case Mainga, J (as he then was) at page 12 – 13 said:

> *"A court of law should be careful in discrediting a witness because his evidence in chief slightly departs from the statement a witness should have told the police, especially in this country where it is a notorious fact that the majority of the police*

[9] Unreported Case No. CA 68/1999.
[10] Unreported Case No. CA 43/2002.
[11] Unreported Case No. CA 146/2003.
[12] Supra.

> *officers who are tasked with the duties to take statements from prospective witnesses and accused persons are hardly conversant in the English language and more so that police officers who take down statements are never called and confronted with the contradictions that an accused or a witness may have raised in cross-examination."*
>
> (Emphasis provided)

[35] As for the contention that the witness Leonia failed to give the details she had testified about in her witness statement, it is trite law that a witness is not required, at the time of making the statement to the police, to furnish a statement in all its detail. In the *Hanekom* case the Court said as *per* Hannah, J:

> *"What is set out in a police statement is more often than not simply the bare bones of a complaint and the fact that flesh is added to the account at the stage of oral testimony is not necessarily of adverse consequence."*

[36] It is clear from the evidence that the police officer who reduced the witness statement to writing translated the statement into the official language; and where that person was not called to explain the alleged contradictions, the discrepancies pointed out between the two statements cannot adversely affect the credibility of the witness in any way. Therefore, this contention is also without merit.

[37] What remains to be considered is whether there is a reasonable possibility that the accused's explanation, when weighed up against all the evidence, might be true; for if there is such possibility, he is entitled to his acquittal. What is required is that the Court must assess the totality of the evidence, not in isolation, but to properly assess whether in the light of the inherent strengths, weaknesses, probabilities and

improbabilities on both sides the balance weighs so heavily in favour of the State that it excludes any reasonable doubt about the accused person's guilt.[13]

[38] In the present instance the accused's explanation is a blunt denial of the allegations implicating him, and his version stands uncorroborated and contradicted by his own witness. He did not strike the Court as an impressive or honest witness as he was evasive at some stages under cross-examination and simply persisted in claiming his innocence, instead of providing a clear answer on the question put to him. When applying the aforementioned principles to the present facts, I am satisfied that the accused's explanation is not reasonably possibly true and that the State successfully proved beyond reasonable doubt that the accused committed a sexual act with the victim H, by penetrating her vagina with his penis under coercive circumstances, to wit: that the victim is under the age of fourteen years and the accused more than tree years older (s 2 (2) (d) of the Act).

[39] In the result, the accused is convicted of the offence of rape in contravention of s 2 (1)(a) of the Combating of Rape Act 8 of 2000.

LIEBENBERG, J

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[13] *S v M*, 2006 (1) SACR 135 (SCA).

ON BEHALF OF THE ACCUSED	**Ms. G. Mugaviri**
Instructed by:	**Mugaviri Attorneys**
ON BEHALF OF THE STATE	**Mr. N. Wamambo**
Instructed by:	**Office of the Prosecutor-General**