CASE NO.: CA 32/2009

IN THE HIGH COURT OF NAMIBIA

HELD AT OSHAKATI

In the matter between:

KAMBONDE EPAFRAS **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **LIEBENBERG J & TOMMASI J**

Heard on: 26 November 2010

Delivered on: 18 February 2011

APPEAL JUDGEMENT

TOMMASI J: [1] This is an appeal against the conviction and sentence. The Appellant appeared in the Regional Court sitting at Eenhana.

[2] The appellant, a 36 year old male, was charged that he on 9 June 2006, wrongfully and intentionally committing a sexual act with the complainant, aged 13 years, in contravention of the Combating of Rape Act,[1] and in the alternative, of having committed or attempted to commit an indecent or immoral act with a child under the age of sixteen (16) years in contravention of the Combating of Immoral Practices Act,[2] as amended[3]. The appellant was unrepresented and pleaded not guilty in the court *a quo.*

The appellant was convicted and sentenced to eighteen (18) years imprisonment.

[3] Mr Thambapilai appeared *amicus curiae* for the appellant and Mr

1 (Act 8 of 2000)

2 1980 (Act 21 of 1980)

3 by Act 7 of 2000

Wamambo for the respondent. The respondent did not persist with the points raised *in limine* and the matter was thus heard on the merits.

[4] The Court requested counsel to address only two issues raised by the appellant in his amended grounds of appeal i.e (a) whether the Magistrate correctly applied the cautionary rule applicable to a single witness and (b) whether the failure by the State to call crucial witnesses was not a factor the court *a quo* should have considered.

[5] The following is a summary of the State's case: The appellant was the stepfather of the complainant; he was traditionally married to the mother of the complainant; and the complainant lived with them. The complainant shortly before this incident left the home without her parents knowing her whereabouts and the appellant went in search of the complainant on three occasions. On the first occasion the complainant refused to return with the appellant. On the second occasion the appellant did not find the complainant at the place she was residing.

[6] On the third occasion when the appellant came to fetch the complainant, he slept at the place where the complainant was residing That evening the complainant was awoken by one Ndaheke to prepare a bed for the appellant. The complainant took blankets to the appellant and was accompanied by one Nampala Joseph (also referred to as Pali) who was carrying a candle. Whilst the complainant was preparing the bed the appellant threatened to stab Nampala with a traditional knife and instructed him to leave the room. The Appellant informed Nampala that he wanted to sleep with his "*girlfriend*' i.e the complainant. Nampala left and complainant remained.

[7] The appellant informed the complainant that he will sleep with her and threatened to kill her if she told her mother. He had a traditional knife (double edged knife) on the bed rest. He undressed and was clothed only in a "*trunkie*" (underwear). She made the bed and then left the room to urinate whilst the appellant remained in the room. The appellant came outside and informed her that they should return to the room. The appellant instructed her to: undress; lie on his stomach; and to insert his penis into her vagina. She complied and the appellant "*penetrated her vagina*". He then had sexual intercourse with her. She felt "*good pain*" (this was not clarified) whilst the appellant was having sexual intercourse with her. After he had finished, he ordered her to return to where she was sleeping with the other people, which she did.

[8] The complainant reported the incident to Ndaheke Shiluwa Tohim the next morning whilst they were pounding mahango together. She also reported it to

her mother a day after she returned home. Her mother washed her panty that had "*semen stains*" on it. Her mother wrote a letter; placed it in the complainant's health passport and sent her to a relative who took her to the Police. She was thereafter examined at the hospital. She testified that she did not sustain any injuries. The mother of the complainant verified that a report was made to her and testified that she saw "*semen*" on the legs of the complainant.

[9] The medical report stated that the complainant was examined four days after the incident on 13 July 2006. The report indicates that a whitish vaginal discharge was observed, the hymen was intact; and examination was easy. There is no indication on the report whether any specimen was taken or whether a rape kit was taken.

[10] The appellant denied that he had sexual intercourse with the complainant. He testified that the complainant, accompanied by Nampala who was carrying a candle, brought the blankets and he prepared his own bed. The complainant left with Nampala and returned to the room to ask him whether "*they have finished preparing Omahango*". The complainant left the room and he slept. The next day he returned home with the complainant. He confirmedthat he was carrying a knife in a sheath around his waist and that it was clearly visible. He disputed having threatened the complainant with the knife.

[11] The court *a quo* was empowered in terms of section 208 of the Criminal Procedure Act[4] to convict the appellant on the evidence of a single competent witness. When evaluating the evidence of a single witness the court should exercise caution. The 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[5].

[12] In S *v Nobel, supra,* Maritz J, as he then was, at page 534 F-J stated the following:

> "*The weight of authority suggests, correctly so in our view, that it is a common sense guide enumerating some of the considerations applicable when assessing the reliability and credibility of the evidence of a single witness within the totality of the evidence adduced in the trial.*
>
> *Whether a judicial officer considers the evidence of a single witness with reference to that salutary guide or not, he or she must approach such*

4 Act 51 of 1977

5 S v Nobel 2002 NR 67 HC.

> *evidence with caution He or she should not merely pay lip-service to the existence of a cautionary rule in such cases, but it should be apparent from his or her reasoning that he or she, mindful of the inherent dangers of such evidence, treated it with circumspection*." *(my emphasis).*

[13] The salutary guide referred to here-above are the guidelines for the evaluation of a single witness's evidence mentioned in *R v Mokoena* [6] which reads as follow:

> "*In my opinion that section*[7] *should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc.* "

[14] Counsel for respondent argued that the Court should not reject the findings of credibility by the trial court if there are no irregularities or misdirection and referred the Court to *S v Slinger.*[8] In this matter the Court held that it is trite law that the function to decide the acceptance or rejection of evidence, falls primarily within the domain of the trial court. This view was echoed in S *v Simon*[9] where the Court held that the Court of Appeal will not easily interfere with findings of fact by the trial court.

[15] Having regard thereto, this Court examined the evaluation of the evidence by the court *a quo* to establish whether that court applied caution.

[16] When cross-examined by the appellant, the complainant indicated that: the appellant remained in the room whilst she went outside to urinate; he came outside and pushed her into the room; other people were within hearing distance; when she returned outside, the appellant took the knife out of the sheath; pointed it at her and said they should sleep; he held the knife in his hand throughout sexual intercourse; and she did not scream as she feared that he would assault her.

[17] The first unsatisfactory aspect of the evidence of the complainant is the fact that she did not seek protection when she had the opportunity to do so. The complainant was allowed by the appellant to leave the room whilst he remained inside. Other people, who were in such close proximity that they could hear, were awake at the time. At that point the appellant already made

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6 1932 OPD 79 at page 80

7 sec. 284 of Act 31 of 1917:(the predecessor of s 256 of Act 56 of 1955 and of s208 of Act 51 of 1977)

8 1994 NR 9 (HC).

9 2007 (2) NR 500 (HC)

his intentions clear and had already threatened Nampala with a knife. It is not clear from the evidence of the complainant why she did not seek protection when the opportunity presented itself. The Court is mindful of the fact that the appellant was in a position of authority and that a threat was made earlier. The complainant however, by her conduct, made it clear that she challenged parental authority by running away from home and refused to accompany the appellant on the first occasion when he came to collect her. There may have been a good explanation for her failure to report the appellant's conduct at that stage, but same is not apparent from the evidence presented.

[18] A further unsatisfactory aspect of the complainant's evidence was the fact that she contradicted herself under cross-examination when she testified that the appellant took the knife out of its sheath and threatened her with it by holding it in his hand throughout the incident; whereas she only mentioned that the knife was on the bed rest in her evidence in chief. Although her mother testified that she informed her that she was threatened with a knife it was not clear how the appellant used the knife to threaten the complainant. The court *a quo* makes no mention of this contradiction but found that the appellant ordered the complainant to make a bed for him and then had sex with her against her will and "*under threat with a knife*" *(sic).*

[19] Furthermore, the following discrepancies were evident between the complainant's evidence and that of her mother i.e :

a) Complainant testified that her mother chased her away whereas her mother indicated that she ran away;

b) Under cross-examination the complainant's mother indicated that a certain Mr Namwongo was present when the complainant told her about the incident. The complainant did not mention the presence of a third party.

c) The complainant informed her mother that the appellant laid her on her back and had sexual intercourse with her and later told her to lie on his stomach. This differs from the account of the complainant who testified that the appellant instructed her to lie on his stomach and had sexual intercourse with her in that position.

d) According to the mother, the appellant was present when she washed the complainant's panty and just looked down when she asked the complainant about the stains. The complainant testified that the appellant was not present when her mother washed her

panty.

(e) The complainant did not inform her mother that the appellant threatened to stab Nampala with a knife, but merely told him toput the candle down and to leave as he wanted to sleep with his girlfriend.

[20] Again no mention was made of these discrepancies by the court *a quo.* The report made to the mother confirms the presence of Nampala; the sexual act; and the presence of the knife. The report substantially corresponds with the complainant's version. The trial took place just over a year after the incident and it would be understandable that some inconsistencies may have crept in due to the time lapse. The difference of the description of the actual sexual act however, is cause for concern, as it relates to a material aspect.

[21] It is well established law that a court may still find a witness to be credible despite the shortcomings, defects or contradictions; but it must at least be apparent that the court had taken it under consideration and still found the witness to be truthful.[10] This Court should be slow to interfere with a credibility finding of the court *a quo.* The credibility finding however would have been more convincing if the court *a quo* had dealt with the discrepancies and contradictions, instead of an uncritical acceptance of the evidence of a single witness. The key question however remains whether the State proved beyond reasonable doubt that the appellant had raped the complainant. To this end regard must also be had to the medical evidence and the evaluation thereof by the court *a quo.*

[22] The court *a quo* was satisfied that the State proved that the "*semen like stains*" observed by the mother, were in fact semen and found support in the medical report to corroborate the complainant's version that she did not sustain any injuries.

[23] The medical report only refers to a "*whitish discharge*" without mentioning what the cause thereof could be, or what the substance thereof was. A thorough examination would have included the taking of a rape kit containing swabs and for same to have been analyzed. It has become common practice for medical examiners not to indicate whether a rape kit was taken. The medical officer prudently did not conclude that the discharge contained semen. The court *a quo* relied, not on the medical evidence, but on the opinion of the mother that she observed "*semen*"*.* This, clearly, cannot be a reliable opinion. No medical doctor would venture to conclude that stains found on clothing or on the victim is semen without having it scientifically

10 S v Sauls and Others 1981 (3) SA 172 (A) at 180E - G

examined by qualified personnel. The court *a quo* clearly misdirected itself by relying on this evidence as corroboration to conclude that there was indeed sexual intercourse with the complainant.

[24] The medical report was inconclusive and could equally be interpreted in favour of the appellant i.e that no sexual intercourse took place. The complainant testified that she experienced pain during sexual intercourse and that the appellant "*penetrated*" her. No evidence was led as to the degree of penetration i.e whether it was slight or forceful. The complainant testified that she suffered no injuries. The medical examination, done four days after the incident, disclosed no injuries. From these facts the court *a quo* inferred that the medical report corroborates the complainant's version i.e that she did not suffer any injuries and from which it was further concluded that the appellant had sexual intercourse with the complainant without causing any injury.

[25] The absence of injuries however, may equally support a finding that there was no insertion (even to the slightest degree) of the appellant's penis into the complainant's vagina. It is possible that the following facts could also be consistent with an injury to the vagina: an adult male of 34 penetrating a young girl of 13 and painful sexual intercourse. However there is no evidence that the complainant at any point afterwards complained of pain; the examination of the doctor was easy and the hymen intact. The medical doctor who examined the complainant, if he/she was called to testify, could have shed more light on the report by indicating what the impact would have been of the time delay and whether the findings are consistent with the evidence of the complainant. However the respondent opted to hand in the medical report without calling the medical doctor who examined the complainant.

[26] The inference drawn by the court *a quo,* based on the above circumstances, was therefore not the only reasonable inference that could be drawn, as it does not exclude other possible inferences. The court *a quo* thus misdirected itself when it found that the medical report corroborates the complainant's evidence. What it corroborates is the fact that the complainant did not suffer injuries and not the complainant's entire version of the events.

[27] The appellant's untruthfulness may have been an additional safeguard against a wrong finding and it is therefore also important to consider the evaluation thereof by the court *a quo.*

[28] In weighing the evidence of the appellant the court *a quo* inferred from

the testimony of the mother that the appellant made several attempts to keep the complainant and her apart by sending both of them on errands. The import of this conclusion was that the appellant made it impossible for the complainant to report the incident earlier than she did. The conclusion reached by the court *a quo* was not supported by the evidence.

[29] The complainant arrived in the evening when her mother was not at home. The following day the complainant was instructed by the appellant to go and look for mahango and the donkeys and to fetch water, what appears to be normal chores around the house. The complainant's mother testified "*I was not suspicious of anything*". Neither the complainant nor her mother testified that there was no opportunity for her to report the incident on that day; and there was thus no basis for the court to conclude that the appellant "*made several attempts to keep complainant apart from her mother by sending either of them on an errand of some kind*". This was necessitated by the failure of the State to call the witness, Ndaheka, to whom the first spontaneous report was made.

[30] There are some inconsistencies in the evidence of the appellant in respect of the exact nature of the discussion he had with the complainant in the room. The evidence of the appellant was dealt with as follow in the judgment of the court *a quo.*

> "*For his part accused says it was complainant who insisted remaining in his room and he did not rape her. Cross-examination complainant he said complainant remained asking whether he and her mother would not assaulted (sic) her upon her return home. In his testimony he said complainant remained asking if they had finished preparing the Omahangu and later left the room.* "

[31] The appellant's version that the complainant remained in the room to question him cannot, when evaluating the body of evidence, merely be discarded without considering whether it could reasonably possibly be true. It is reasonably possibly true that the complainant may have wanted to know about the chores still to be done because her reluctance to do her chores earlier was the very reason why she had left in the first place.

[32] When the appellant put it to the complainant that the reason for her to remain behind, was to ask the appellant whether she will be beaten for eating a big goat; the complainant denied it. This question does not make any sense and sounds improbable when considering that a reasonable fear of reprisal would be the fact that she ran away for failing to do her chores and not for eating a big goat. On the other hand the complainant did harbor some fear of being beaten by the appellant and her mother and it was not apparent from the record exactly why she harbored this fear. This being the case, there a

reasonable possibility exists that the complainant may have wanted some assurance. Even if it was improbable that the complainant remained behind to talk to the appellant, it cannot be rejected as false.

[33] Although the appellant's defence amounts to a bare denial, it cannot be rejected without evaluating the body of evidence. The court *a quo* when it rejected the evidence of the appellant as a bare denial, failed to consider that the medical evidence could equally corroborate the appellant's averment that he did not have sexual intercourse with the complainant and therefore, that his testimony could reasonably possibly be true.

[34] Having had regard for the fact that the court *a quo* misdirected itself on a number of aspects in its judgment; the Court has to evaluate the evidence afresh to determine, despite the inconsistencies and contradictions in the evidence of the prosecution, whether the State proved the guilt of the appellant beyond reasonable doubt.

[35] The State proved that the appellant was alone in the room with the complainant. It was admitted by the appellant that he had a traditional knife in his possession. The complainant made a spontaneous first report to Ndaheke the next morning, who, for a reason unknown, was not called by the State to testify. This witness was available but not called by the State. The evidence of the rape incident reported to Ndaheke, would not have been corroboration thereof but would have shown consistency of the complainant's version of the event.

[36] This failure to call this witness may not have been fatal given the fact that the complainant's mother testified. However it is of some significance that the complainant reported the incident after a day of working hard at household chores. The evidence of complainant's mother was that she did not want to live with her mother and the appellant. At the heart of this was her failure to do chores. Although she returned home voluntary, there was some measure of pressure to return in the persistence of the appellant. It was clear that the complainant delayed in returning but that it was inevitable that she had to return. Common sense dictates that there was sufficient reason for the complainant to go to the extreme in order to distance herself from her unpleasant environment. It can be said that the complainant had a motive to fabricate an allegation of rape

[37] Her evidence in respect of the actual sexual act was far from satisfactory for reasons already mentioned. Insufficient evidence exists to find mendacity on the part of the appellant.

[38] Under these circumstances corroboration was necessary and this Court would have to consider the impact of the State's failure to call witnesses. I have already indicated that the failure to call the witness Ndaheka was not fatal to the State's case given the report made to her mother. Unlike many other similar cases, there was in fact a witness who was informed of the appellant's intentions and who was similarly threatened by the appellant with a knife. The court *a quo* found that the complainant got into the room and the accused told "*the boy Joseph to put down the candle and leave as he wanted to sleep with his girl friend (complainant) and threatened to poke him with his traditional knife*". The State failed to call this witness who was crucial for the State's case and no reason was advanced why this witness was not called. In view of the testimony of the appellant, the failure of the prosecution to call an available State witness becomes significant. An adverse inference that this witness's evidence may possibly have contradicted that of the complainant and thus have impacted on her credibility, would be justified under the circumstances. (See S *v Nobel (supra)* and S *v Teixeira 1980 (3) SA 755 (A))*

[39] This Court is not satisfied that the single witness's evidence was satisfactory in all material respects and that appellant's evidence is false beyond reasonable doubt. Having carefully considered the evidence the Court is not convinced that the prosecution had discharged its burden of proof i.e that the appellant is guilty of the offence charged with.

[41] In the result the appeal is upheld:

Tommasi J

I agree

Liebenberg, J