



**CASE No: CC 13/2010**

**IN THE HIGH COURT OF NAMIBIA  
MAIN DIVISION, HELD AT WINDHOEK**

**THE STATE**

VERSUS

**JACOB VAN DER BYL**

**ACCUSED**

**CORAM: NDAUENDAPO, J**

**HEARD ON: 08,09,10,12,13,15,16,30 August 2011**

**DELIVERED ON: 29 February 2012**

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**JUDGMENT**

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[1] **NDAUENDAPO, J:** The accused, Jacob van der Byl, was arraigned in this Court on;

**Count 1.** Assault read with sections 2 [1] [a] [i] and [ii], 2 [1] [b], 3 [1], 21, 25 [1] and [3] and the first schedule of the Combating of Domestic Violence Act 4 of 2003.

**Count 2.** Contravening section 2 [1] [a] read with sections 1,2, [2] ,3, 5,6 and 7 of the Combating of Rape Act, Act 8 of 2000 Rape and further read with sections. 2[1] [a] [i] and [ii] 2 [1] [b], 3 [1], 21 [1], 25 [1] and [3] and the first schedule of the Combating of Domestic Violence act, 4 of 2003.

[2] **On account 1,** the state alleged that on or about the 9 September 2004 and at or near Platjiesheuwel-Köes in the District at Keetmanshoop the accused did wrongfully and unlawfully assault Maria Afrikaner by grabbing and slapping her several times, giving her there and thereby certain wounds, injuries or hurts.

**On account 2,** it is alleged that on or about the 9September 2004 and at or new Platjiesheuwel-Koes in the district of Keetmanshoop the accused did wrongfully and intentionally commit or continue to commit a sexual act with Maria Afrikaner [the complainant] aged 14 years old by inserting his penis into her vagina under the following coercive circumstances:

1. By the application of physical force to the complainant and or,
2. Threatening by word or conduct to cause harm to the complainant under circumstance where it was not reasonable for the complainant to disregard the threat; and/or,
3. Where the complainant is unlawfully detained,
4. Where the complainant is under the age of [18] eighteen years and the perpetrator is the complainant's parent or is otherwise in a position of trust over the complainant.

[3] The accused tendered a plea of not guilty on all the counts. The basis of his defence was chastisement [on count 1] and [on account 2] he denied having sexual intercourse with the complainant.

**Mr Isaacs** appeared on behalf of the accused and **Ms Nyoni** on behalf of the State. The accused made the following formal admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977, namely:

- [4] [i] That he was at **Plaatjiesheuvel at Köes** on 9 September 2004,
- [ii] That he is the biological father of the complainant,
- [iii] That the complainant was born on 13 January 1990 and that she was 14 years of age at the time of the alleged offences,

[iv] That at the time of the incident Katrina Afrikaner was his girlfriend now his wife,

[v] On the day in question he had an argument with Katrina Afrikaner.

**The following witness testified for the state:**

[5] **Dr Verkusha** testified that he is a medical doctor and that on 9 September 2004 at 23h30 he examined the complainant **Maria Afrikaner** at Keetmanshoop hospital. He compiled a report [which was produced in evidence as exhibit "A"] and his findings were as follows:

Condition of clothing: Trace of blood in the right nostril [mild bleeding]

Bruises right cheek area. He concluded in his report that:

'Fact of penetration difficult to establish'.

[6] **Maria Afrikaner**, the complainant testified in camera. She testified that she was residing at Köes with her grandmother. She testified that on 9 September 2004 while she was asleep in the house of the accused, the accused arrived. That was around 20h00 he started an argument with her mother and pulled her inside the house. He was drunk. She woke up and went to stand behind her mother's back. He grabbed her [mother]. Whilst still standing behind her back, he slapped her. She

ran out of the house to Sanna's house [**Sanna Prins**] the accused followed her to Sanna's house, grabbed and slapped her and from there he pulled - pushed her to his house, she wanted to ran, but he grabbed her, pushed her in the bedroom and threw her on the bed. He closed the door, blind folded her eyes and tied her mouth. He pulled off her short and panty, lay on top of her and inserted his penis in her vagina. She felt something in her vagina as the accused was lying on top of her and he was making up and down more movements, she was crying. While the accused was busy with her she heard her mother calling from the outside, she responded and then the accused jumped off her. She also jumped off the bed, took of the blind fold from her eyes and mouth and run out to her aunt's house. **Johannes Kido** came there and told her that he had called the Police. The Police arrived and she was taken to the hospital in Keetmanshoop where she was examined by the doctor. During cross examination, she testified that she was bleeding from her vagina after the rape. The doctor who examined her shortly after the alleged rape did not observe any bleeding from her vagina. If indeed she was bleeding from her vagina the doctor would have observed that. I reject that evidence as false as there is no independent corroboration for that.

[7] **Nicolas Kido** testified that he was residing at Koes on 9 September 2004 he was visiting his godfather's house. While there he decided to

visit the toilet [which was outside the house] and on his return from the toilet he heard somebody screaming in a shack. He decided to go and investigate the noise as it was coming from the shack of the accused. He peeped through the holes of the shack and saw the complainant being raped by the accused. There was a candle light in the shack and he could clearly see that the accused was raping the complainant. They were naked and the accused was lying on top of the complainant raping her. He left and went to call **Johannes Kido, Jan Rooi** and **Jacobus Rooi**. They came up to the shack and they also peeped through the holes. He further testified that he saw the mother of the complainant coming running to his father's house and instructing him to call the Police. He also testified that he saw the complainant running to the house of Sanna after the incident, covered in a blanket.

[8] **Johannes Kido** testified that on 9 September 2004 while seated at his mother's house, the children of the accused came running to him and made a report. Based on that he went to the house of the accused. He peeped through the small window which was open. He saw the accused laying on top of the complainant. There was a candle light and could see that the accused was raping his daughter. He told the accused that [it is impossible to do something like that]. He returned to his mother's house and while busy telling her mother what he had witnessed, **Katrina van der Byl** [the mother of the complainant]

came running where he was and asked him to call the Police. He had a flexicall card and he went to the nearby phone box and called the Police. While waiting for the Police to arrive the complainant came running towards him and he told her that the Police were on their way. She was crying.

[9] **Magdalena Jossob** testified that she resides at Köes. On 9 September 2004 the children of the accused came running to their house and they were crying. They made a report and based on that she went to the house of the accused, the window was opened and she peeped through the window. She saw that the complainant was naked, whilst the accused was in short pants which was pulled half way. She saw that the accused busy raping the complainant. That was between 21h00 and 22h00. There was a candle light and she could clearly see what was happening inside the room. From there the complainant ran out of the house crying and saying that the Police must be called. After a short while the police arrived. She further testified that she saw that the complainant was injured and blood was coming from her vagina.

[10] **Elsie Prins** testified that on 9 September 2004 between 20h00-21h00 the complainant came running into her house. The complainant told her that her father wanted to rape her and while she was talking the accused came running after the complainant up into her house. He

started slapping the complainant. He grabbed her by the head and pulled her out of the house. He dragged her up to his house [or where he was residing] and closed the door behind him. After a while **Johannes Kido** told her to go and peep through the window of the shack of the accused. She went there and peeped through the open window and saw that the accused was lying on top of the complainant. There was candle light up next to where the accused was lying. The accused was naked as well as the complainant and he was having sexual intercourse with the complainant. The accused pants were pulled down until the knees and the complainant was completely naked. She had a t-shirt. **Johannes Kido**, was also there standing at the window watching how the accused was raping his daughter. There was moonlight and the street light - and visibility was clear. The accused left the room first and was running from the Police. The Police arrested him and also picked up the complainant.

[11] **Ervin Kazavanga** testified that he is the Investigating officer. During 2004 he was stationed at Köes Police station. On 9 September 2004 he was on standby. At around 21h00 he received a call from **Mr Johannes Kido** who informed him that the accused was busy raping the complainant [his own daughter]. He and constable **Pohamba** drove to the residence of the accused. The accused was not there and Mr **Johannes Kido** showed them where the accused went to hide. They



found the accused. The accused was hiding sitting in a corner covering his head with a t-shirt. He was a little bit under the influence of alcohol. He was reeking of alcohol. He identified himself and explained his rights to him. He informed the accused why he was being arrested and he was taken to the Police station. He further testified that the accused was drunk, but not so drunk not to know what he was doing. Before the arrest he saw the complainant and she was crying, she was covered in a blanket and having a t-shirt. He testified the shack of the accused had a window. He also observed that the complainant had some bruises on her face. That was the case for the state

[12] **Defence's case** the accused testified in person. He testified that on 9 September 2004, he was drinking with his brother. They drank wine during the day. He got drunk but knew what was happening around him. Around 19h00 he went back home. He found the complainant sleeping. His wife was outside the house. He enquired about the complainant and after the wife respondent; he told her that they should go inside the house to sort out the issue of the complainant 'because the complainant always came late at the house'. Inside the house it was dark and a quarrel ensued between him and his wife. The complainant jumped up and ran behind her mother. He slapped her with an open hand on her hips and she ran out of the house.

The mother of the complainant also ran out. The complainant ran up to the inside of the house of **Sanna Prins**. He pursued her up into the house of **Sanna Prins**, grabbed the complainant on her shoulders, slapped pulled and pushed her out of the house of **Sanna Prins** until they reached his house. At the gate of the house, he left her (broke loose) and she ran into the direction of the house of **Jan Rooi**. He proceeded to his house to look for cigarettes, it was dark in the house and he could not find the cigarettes. He left the house and went to a nearby house where he sat in the corner of the yard relaxing. He denied the allegation of rape. He also denied that he was with the complainant in the house, that he blind folded her and put something in her mouth. That in the nutshell was his evidence.

[13] In analyzing the evidence, I will first deal with the defence on the assault charge .ie. Chastisement. **SNYMAN 5<sup>th</sup> edition criminal law** under heading the: Parent's right of chastisement state the following: *['In terms of the common law parents have a right to chastise their own children, provided the chastisement is moderate and reasonable, in order to maintain authority and discipline].*

At 142 the author further states: *"the child must have acted wrongfully, or threatened to act wrongfully. The child must have deserved the chastisement"*.

[14] The evidence by the complainant and other witness was that she was not residing with the accused. She grew up and was residing with her grandmother at her house. The only reason why she slept at the house of the accused that night of the incident, was that the grandmother had travelled somewhere that night and that is why she went to sleep at the house of the accused. From his own evidence the accused found the complainant asleep when he arrived at the house. That was around 20h00. There was no evidence that the complainant was always coming late at the house of her grandmother. The evidence by the accused that the complainant was always coming late is untenable. The accused himself also admitted slapping the complainant. That was also corroborated by **Sussan Prins** who saw how the accused grabbed and slapped the complainant. There was no reason whatsoever for the accused to chastise the complainant at all. She did not deserve it. She never came late that night. I therefore reject the defence of chastisement on count one as false.

[15] On the charge of rape, the accused denied having raped the complainant

**Mr Isaacs** submitted that there were too many inconsistencies and contradictions in the evidence of the witnesses for the state and therefore the accused must be given the benefit of the doubt and be acquitted. **Ms Nyoni** on the other hand submitted that although there

were some inconsistencies and differences, in the evidence of the state witnesses those were not material. She submitted that as far as the main charge of rape is concerned, the state proved beyond a reasonable doubt that the accused committed the offence.

[16] I agree with **Mr Isaacs** that there were indeed inconsistencies and contradictions in the evidence of the witness for the state. For instance **Nicolas Kido** testified that there was no window and he peeped through the holes of the corrugated iron when he saw the accused raping the complainant. **Johannes Kido, Jan Rooi** and **Jacobs Prins**, all testified that there was an open window through which they saw that the accused was raping the complainant. The complainant also testified that her mouth was tied by the accused and therefore she could not scream. **Nicolas Kido** on the other hand testified that his attention was drawn to the house [where the rape was taking place] by the screams of the complainant. The complainant testified that she was screaming and crying before her mouth was tied and thrown on the bed and in my view that is what drew Nicolas attention to the shack. There was also contradiction about the candle in the room where the complainant was raped. The complainant testified that there was no candle light in the room whereas **Nikolas Kido, Johannes Kido, Magdalena Jossop** and **Elsie Prinz** testified that there was a candle burning. The complainant testified that she was profusely bleeding from her vagina and **Magdalena** also confirmed that. As I pointed out, there was no

independent corroboration from the doctor who examined the complainant shortly after the rape.

[17] In my respectful view, those inconsistencies and contradictions are not of material nature having regard to the evidence of the state witnesses with regard to the main charge of rape. The Court is mindful that the alleged rape took place more than 7 years ago and it is just human nature that as time wears on human memory tend to forget. **Ms Nyoni** referred the Court to the case of S v Nyembe 1982 (1) SA 835 A of 842 f-h where the Court held that:

*“I can find no merit in counsel’s criticism of this conclusion, particularly when it is borne in mind that the contradictions relate to events which had happened some eight months previously. Moreover the contradictions were of trivial nature. I am always surprised that witnesses can, or think they can, after a passage of weeks and months, recollect how they were seated in a motor car, what route they travelled and at what time they reached their venue. I am not surprised, however, when they fall into contradiction. The trial Judge knows that human memory is only too fallible, perhaps she should bear in mind that Spanish proverbs ‘memory, like women, is usually unfaithful.*

In article **“the credibility of witnesses**, R A Nicholas, An Oliver Schireiner memorial lecture delivered at Wits University of

Johannesburg on 28 August 1984 25 Published in 1985 SACS 32. The following is stated:

*“Other contradictions were pointed out. Yet I do not think that they or the ones I have listed materially affect the credibility of the persons in question. Contradictions per se do not lead to the rejection of a witness’ evidence. As Nicholas J, as he then was, observed in S v Oosthuizen 1982 (3) SA 571 (T) of 576 B-C, they may simply be indicative of an error. And at (576-G-H) it is stated that not every error made by a witness 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 bearing on other parts of the witness’ evidence.”*

[18] In my respectful view the witnesses for the state did not contradict themselves on the main allegation of rape. The complainant’s evidence on the rape was clear. She was adamant that the accused raped her despite being cross examined extensively. She stood by her evidence on that score. The accused did also not deny that at some stage he was alone inside the room with the complainant. I have no reason to doubt her evidence on that score. In addition the complainant had no motive to falsely accuse the accused, her father, of rape. Nor did the accused give any plausible motive why the complainant would falsely accuse him. Her evidence on the rape was corroborated by the witnesses for the state. The other witness for the state evidence was also clear as to what they

saw - ie the accused raping the complainant. Despite being extensively cross examined, they stood their ground on how the accused was raping the complaint. They also had no motive to falsely implicate the accused. In fact the witnesses and the accused were neighbours and they had been living as neighbors in harmony for many years. **Johannes Kido** on the instructions of the mother of the complainant phoned the Police to report the rape and this was confirmed by Kazavanga (Police Officer) who testified that he was called by **Johannes Kido** who reported to him that the accused was raping his child. He had no reason to phone the police if what he saw ie the rape was not true. The mother of the complainant also had no reason to instruct Johannes Kido to phone the police if the allegation of rape were not true. Kazavanga also testified that the accused was hiding when they found him. Why did he hide if there was nothing wrong with what he did? Kazavanga also testified that when he found the complainant she was crying and afraid.

I agree with the submission by the state that there were coercive circumstances in that the accused assaulted the complainant before he raped her. He also threatened her with harm if she told anybody about the rape. The fact that the accused is the biological father of the complainant also constitutes coercive circumstances.

I have closely observed the demeanour of the accused when he gave evidence in this Court.

He was very evasive. He did not make a good impression on the Court at all. He contradicted himself and accused all the witness for the state of telling lies. The same cannot be said of the witnesses for the state. Overall they made a good impression on the Court as far as the evidence of rape is concerned. They did not fabricate that evidence and the Court accepts their evidence on that score.

[19] Having regard to the totality of the evidence adduced before me, I am satisfied that the guilt of the accused was proved beyond a reasonable doubt and I accordingly find the accused guilty on count 1 and 2.

In the result I, find the accused guilty on count 1 and count 2.



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**I.M. Nyoni**

**Counsel for the State**

**Office for the Prosecutor-General**

**TO: The Registrar**

**High Court**

**Windhoek**

**Namibia**

**And TO:**

**Isaacks and Benz Incorporated**

**Counsel the accused**

**Windhoek**