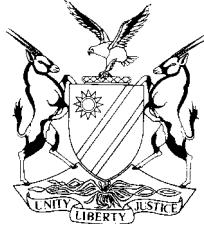


REPORTABLE

**CASE NO.: CC 29/2010  
IN THE HIGH COURT OF  
NAMIBIA**



In the matter between:

**THE STATE**

and

**MATHIAS AIBEB**

**ACCUSED**

**CORAM:** NDAUENDAPO, J.

Heard on: 17 MAY 2012

Delivered on: 27 JUNE 2012

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**SENTENCE:**

**NDAUENDAPO, J.:** [1] The accused was convicted in this Court on 3 counts of rape in contravention of sections 2(1)(A) read with sections 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 and one alternative count of – commits or attempts to commit a sexual act with a child under the age of 16 in contravention of section 14(A) of Act 21 of 1980 as amended by Act 7 of 2000. The alleged crimes were committed during 2006. When the matter came before me on 17 November 2011 for the first time, I was informed that the accused was sent for psychiatric observation during 10 July 2008 to 15 August 2008 and that a report by a psychiatrist in terms of section 79 of Act 51 of 1977 was compiled. The said report was compiled and signed by Dr. F Mthoko.

According to the report the clinical diagnosis was 'not mentally ill'. The report further reads:

*"79(4)(c) At the time of writing this report, the accused is fit to stand trial. He is able to follow court proceedings adequately 79(4)(d) At the time of commission of the alleged crime, there is no clinical evidence to suggest that he was suffering from a mental illness or defect."*

*He was able to appreciate the wrongfulness of the alleged offence and act in accordance with such appreciation.*

On 5 March 2012 when the accused appeared before me it appeared to me that the accused by reason of mental illness or mental defect was not capable of understanding the proceedings so as to make a proper defence. My observation was confirmed by his legal practitioner, Mr Tjituri. Based on that, I directed that the accused be sent for another psychiatric observation and that a report be compiled in accordance with the provisions of section 79 of the Criminal Procedure Act 51 of 1977.

On 1 June 2012 such a report was ready, but the prosecutor for the State, Ms Nyoni, asked the Court for the author of the report, Dr. Alibusa Wilfred, to be subpoenaed and to clarify the content of the report.

On 12 June 2012 Dr. Alibusa appears in Court and took the Court through the psychiatric observation report. The material part of his report was that:

*"the patient during period of observation (28 March 2012 – 30 April 2012) showed overt signs of mental illness. His conclusion was: Mathias suffers from chronic schizophrenia, committed crime under disease of the mind. He had completely no appreciation of the wrongfulness of his actions of court and cannot provide informative decisions. He has no criminal responsibility."*

In his evidence, Dr. Alibusa Wilfred testified that at the time of the commission of the crime, he suffered from disease of the mind. In her submission Ms Nyoni agreed that the reference to 'committed crime under disease of the mind' refers to crimes allegedly

committed after 2008 and not the crimes committed during 2006 and 2007. Dr Mthoko was recalled and she testified that when the accused committed the crimes in 2006 he was not suffering from any mental illness as stated in her report.

Ms Nyoni submitted correctly, in my view, that at the time of the commission of the alleged offences i.e. 2006 the accused did not suffer from a mental illness or defect. He was able to appreciate the wrongfulness of the alleged offence and act in accordance with such appreciation.

Based on the evidence by Dr Mthoko and the report, I come to the conclusion that at the time when the accused committed the alleged offences in 2006, he did not suffer from mental illness or defect. He was able to appreciate and act in accordance with such appreciation.

I also accept the report and testimony of Dr. Alibusa Wilfred that the accused is currently suffering from chronic schizophrenia and that he is unable to follow proceedings of Court and cannot provide information useful for meaningful judicial decisions. He has no criminal responsibilities.

In the result, I make the following order:

I hereby direct that the accused be detained in a psychiatric hospital or prison pending the signification of the decision of the State President.

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**NDAUENDAPO, J.**

**ON BEHALF OF STATE:**

**ADV. NYONI**

**Instructed by:**

**OFFICE OF THE PROSECUTOR-GENERAL**

**ON BEHALF OF ACCUSED:**

**MR TJITURI**

**Instructed by:**

**HENGARI, KANGUEEHI & KAVENDJII-INC.**