



CASE NO.: CC 02/2011

**IN THE HIGH COURT OF NAMIBIA:
NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

In the matter between:

THE STATE

and

ELIAS ABSALOM

CORAM: LIEBENBERG, J.

Heard on: 19 – 20, 24 – 25 April; 19, 25 – 28 June; 04 July 2012

Delivered on: 06 July 2012

JUDGMENT

LIEBENBERG, J.: [1] The accused is an adult male and stands indicted on three counts of rape in contravention of s 2 (1)(a) of Act 8 of 2000¹ (the Act), and one count of kidnapping. These charges must be read with the

¹ Combating of Rape Act, No. 8 of 2000

provisions of the Combating of Domestic Violence Act², in that the accused is the biological father of the complainant. The accused pleaded not guilty to all the charges.

[2] At the trial the accused was represented by Ms *Nathaniel-Koch* whilst Mr *Lisulo* appeared for the State.

[3] The State case is succinctly set out in the summary of substantial facts³ which appears in the following terms:

“The perpetrator and the complainant were at all relevant times involved in a domestic relationship in the nature of father and daughter relation. During August 2003, the perpetrator was at or near Oshivanda Sha Nghatanga village in the district of Oshakati. The complainant known as H⁴ was 15 years old at the time. The perpetrator threatened the complainant with a firearm, applied physical force and raped the complainant. The perpetrator left for Windhoek.

On the 5th December 2003, the perpetrator returned to Oshivanda village. He informed the complainant that she must go with him to his cattle post at Oshanja to count his cattle so that the complainant can know his property. Instead, when they got into the vehicle belonging to the accused the perpetrator drove to Windhoek at his house situated at Ombili location. Upon arrival in Windhoek the perpetrator committed a sexual act with the complainant. The perpetrator committed the acts of rape on diverse occasions and [these] were repeated over a considerable period of time. The

²Act No. 4 of 2003

³ In terms of s 144 (3)(a) of Act 51 of 1977

⁴ The name is omitted as she was under age at the time

complainant conceived a child as a result of the rape and gave birth to a baby boy who later died.”

[4] Except for admitting that he is the biological father of the complainant, the accused disputes each and every allegation contained in the respective charges.

[5] It is common cause that the accused, being a business man residing in Windhoek, occasionally travelled to the northern parts of Namibia to attend to a business venture situated in this area, during which he would stay with his family at the family homestead situated at Oshivanda Sha Nghatanga village ('Oshivanda'). There the accused had his own room (a corrugated iron structure) which he occupied during his stay. His elder brother, Ferdinand, a police officer stationed at Ohangwena, was considered the head of the household and according to the complainant, also the one who financially provided in her needs. It is further common ground that complainant was still a scholar in grade 9 and was living with her uncle Ferdinand, her aunt Eunike (a younger sister of the accused) and another aunt called Ivana. Other family members employed elsewhere would occasionally visit the family homestead. Complainant also shared the house with her cousins. Emelia Absalom, the elder sister of the complainant by four years, at all relevant times, was attending school at Oponovi and would occasionally return to the village over weekends and during the school holidays. It is not in dispute that she was at home on one such occasion during August 2003.

[6] The State called as witnesses the complainant ('H'), now aged 24 years, her sister Emelia Absalom ('Emelia'), aged 28, the aunt Eunike Mweulinale ('Eunike'), the uncle Ferdinand Absalom ('Ferdinand') and the investigating officer Sergeant Josephine Sibolile. The accused testified in his defence and called several witnesses. These are: the accused, who testified in his defence, Joseph Haushona ('Joseph'); Epifania Simeon ('Epifania'); and the accused's wife, Maria Johannes ('Maria').

[7] In her testimony the complainant described two incidents of rape; the first taking place in August 2003 in the accused's room at Oshivanda village, and the second at the accused's house at Ombili, a residential area in Windhoek, where she was taken by the accused against her will in December of the same year. Regarding the first incident, she explained that one afternoon whilst she was alone at the village home, she met with the accused during one of his usual visits. He told her that he wanted to bless her, but she refused. He then said she must bring him water in order to take a bath and sent her to fetch soap from his room. However, he followed her into the room and upon entering, locked the door behind him with a padlock on the inside. After telling her to sit down, he started caressing her and when she stood up, he bent down and produced a firearm which he pointed to the side of her head saying that if she were to make a noise, he would kill them both. He then pulled her closer, tearing her panties in the process. He pushed her down onto the sofa and had sexual intercourse with her. When he had finished he left the room first and she followed, going to her room. There she met with her sister Emelia who then asked her what was going on between

her and their father. Complainant was crying and her skirt was blood stained. She however denied that there was anything between them but when Emelia again insisted, she told her that she would tell her *after their father had left*.

[8] Complainant went on to say that the accused left that same night and the following morning she told Emelia and aunt Eunike about the accused having had sexual intercourse with her. However, according to her, nothing came from this; something that discouraged her to the point where she later on failed to make any further reports to other persons.

[9] She testified that during a subsequent visit by her father to the village in December, he told her to accompany him to the cattle post at Ombadja in order to count his cattle. They left between 4 – 5 am, but instead of driving to the cattle post, the accused proceeded driving to Windhoek. She said that during the journey she did not ask the accused the reason why they were going to Windhoek instead of the farm, as she was afraid of him. The first night in Windhoek, being the 5th of December 2003, the accused had sexual intercourse with her and when he had finished, he pointed a firearm at her saying that he will end her life if she were to tell anyone. Several incidents of sexual intercourse followed thereafter.

[10] Complainant described one such incident quite graphically; saying that she was at the accused's house at Ombili in a garage made of corrugated iron when he tied her hands together and thereafter had sexual intercourse with her three times in short succession. He again pointed the firearm at her when

saying that he would kill her should she inform anyone in the family. A few days later she realised that she was pregnant. It would appear that she came to this conclusion when she realised that her monthly periods had stopped. According to her this happened in January 2004. She brought this to the attention of the accused who then forced her to write a letter to her then boyfriend, Joseph, informing him about her pregnancy. It seems to me that the purpose of the letter was to inform Joseph that he impregnated the complainant – though, according to her, she and Joseph never had sexual intercourse before. Complainant explained that she was held captive in her father's home. She also said that her father would lock the gate every time he left, making it impossible for her to seek help from anyone outside. According to the complainant the accused was a taxi driver in Windhoek, which implies that he could not have been at home at all times. In his absence she would do the ordinary chores around the house. It emerged under cross-examination that she was not locked up *inside* the house – despite her saying so at first – but that she could freely move around in the yard, which was fenced in, but locked. When asked in re-examination about her failure to report her situation in Windhoek to anyone, she stated that she did not see other people and if she had such opportunity, she was not sure whether she would have done so because they were strangers. Complainant further related to an incident when she made a phone call to a former teacher of hers, enquiring about Joseph. The reason for this, she said, was because her father continuously enquired from her whether Joseph had made contact with her.

[11] I pause here to observe that complainant's evidence in this respect gives the impression that she was indeed able to make phone calls during her visit(s) to Mix⁵; also, that her father anticipated Joseph to contact her directly. She was unable to say on how many occasions she went to Mix, but when pressed for a definite answer, complainant said she could only remember one such occasion. This means that, at this stage of her detention, the possibility of establishing contact between the complainant and other people clearly existed. As regards Joseph, she said she expected him to respond to her letter in *writing*. I find this aspect of her evidence surprising because I got the impression during her testimony that she was quite sceptic as to whether her father had actually sent the letter she had written to Joseph; furthermore, how would the letter have reached her if she had no contact with anyone outside, one may ask?

[12] Complainant said her situation remained unchanged until she gave birth in May 2004 at Katutura State hospital. According to her a healthy baby boy was born. Two weeks after her discharge from hospital, and whilst at her father's home one day, she realised that the baby was no longer breathing. She suspected that the accused had something to do with her baby's death and asked him what he had done to the child. The accused denied any involvement and left home in order to inform the police. The baby's body was subsequently removed by the police and after some days the accused informed her that the child had died of natural causes. The burial took place in Windhoek and was attended by some family members.

⁵ An informal settlement just outside of Windhoek where the accused was running a shebeen and where the complainant says she was taken twice to count stock.

[13] In June of that same year Emelia sent a certain Nambala (now deceased) from the North to fetch the complainant from her father's home. According to her he had to break the padlock on the gate to free her and they returned together to the North; however, the complainant did not return to the family home, but instead, went to stay with a certain Leonia. After some days the accused's wife, Maria, arrived whereafter they proceeded to Joseph's house. The purpose of the visit was to inform Joseph's family about the birth and death of his child. Joseph only arrived some four days later⁶ and after some deliberations between him and his mother he "accepted". From her testimony it is not clear whether he admitted paternity or whether he only accepted that the complainant had been pregnant, but lost the baby. She moved in with him and they cohabited for an indefinite period. Complainant said she never discussed the situation about her own father impregnating her with Joseph; neither did she inform him at any stage that he was *not* the father of her deceased child as she had stated on diverse occasions in the past.

[14] Emelia testified that on a Friday in August 2003 she arrived at the village home but found no one present. She then heard someone crying and when she looked through her father's bedroom window, she saw him having sexual intercourse with H on the bed. When H came from her father's room she noticed blood stains on her skirt and when she asked complainant about it and what they had been doing, she replied by saying 'nothing'. However, later

⁶ Complainant was of the view that he knew she was waiting for him at his house and that he had "run away"; hence, deliberately staying away that long.

on she said she would tell Emelia *after* their father had left. According to her, H eventually told her that their father had sexual intercourse with her but she was uncertain whether this was on the Saturday or the Sunday when her father took her back to the school hostel. This implies that the accused was still present when complainant told her sister. She thereafter had no further contact with H until they met at their grandmother's house in Angola in 2006. During 2004 she heard from her uncle that the complainant was held against her will in Windhoek at their father's home. Emelia sent a family member by the name of Nambala to rescue ('steal') H and bring her back. However, she was not brought to her by Nambala and as mentioned, she had no further contact with H for some years. Hence, she had no knowledge of her whereabouts during this period. H then told her what the accused had done to her in Windhoek which, according to Emelia, was the reason why she appeared to be distressed. It was after complainant had been fighting their mother that she decided to take H away from their mother's home where she had been staying. When asked why she at no stage made any effort to have the matter reported to the police, Emelia replied that the complainant could have done so herself – even whilst she was in Windhoek.

[15] I interpolate to mention that it appears from the evidence that complainant only laid a complaint with the police during 2008, and her reason for this was because she had *"grown up and [was] tired of moving around"*. It has not been established in what way the report to the police would have provided stability to the complainant's situation at the time, or possibly thereafter.

[16] Eunike, the aunt, confirmed having stayed with other family members in the family's village home at Oshivanda and that the accused would pay them short visits, one or two days at a time, before returning to Windhoek. She said that during December 2003 the accused and the complainant were at home but that H then "disappeared" without telling anyone that she was with her father. She discovered that all the complainant's clothes were taken along; including her school uniform. Eunike only later on heard from an uncle of theirs, called Kremende, that H was now living in Windhoek with the accused.

She disputes having knowledge of an alleged report made to her by H about the accused having raped her during August 2003 and contradicts the complainant's evidence to that end. Her version in this respect tallies with that of Emelia i.e. that it is not correct as H testified, that she and Emelia informed Eunike about H having been raped by their father one day after the alleged incident.

[17] Eunike narrated to the Court a different incident which allegedly took place some time before H's departure, when she told the witness that the accused *tried* to sleep with her when he came into the room where the children were sleeping and *touched* her panties. This came as a result of earlier reports made by the children about a ghost coming to their room at night; upon which H said that it actually was the accused. She did not confront the accused with these allegations but told their elder brother Ferdinand about it. This eventually must have come to the accused's

knowledge for he thereafter accused the witness of turning his children against him and that he would take them away from that house. By then H was already staying in Windhoek. Eunike's response was that the accused could go and ask H about what she had earlier told the witness. Eunike also referred to a report made to her by the complainant whilst they were still together in the house, about her suspecting an unbecoming relationship between Emelia and the accused. However, she did not consider this to be true and took it to be "fatherly love". I pause here to mention that Emelia denied any such relationship ever existing between her and the accused. Eunike went on to say that she attended the funeral of H's baby, but had no chance to talk to her (about her being kept in Windhoek against her will) as she, that is Eunike, "was already in labour pain". They had no further contact thereafter.

[18] Ferdinand Absalom is the accused's elder brother and the head of the family household at Oshivanda village. During 2003 he was a member of the Namibian Police, stationed at Ohangwena, when H came to see him. She appeared pregnant and when he asked her about it, she replied that she did not 'know about it'. He advised her to discuss her suspected pregnancy with Eunike, which she clearly did not do. During subsequent meetings at her father's home in Windhoek he could see that H was indeed pregnant. I pause here to observe that before going to Windhoek he had heard from the complainant's aunt that complainant was impregnated by one Joseph. He raised this with the accused and that Joseph's family paid compensation to the complainant's family. He also informed the accused that there were

rumours about the accused having slept with his sisters, on which accused corrected him, saying that it was alleged that he was sleeping with his own children. He advised the accused in the circumstances to return the complainant to the North.

[19] Ferdinand's evidence stands in sharp contrast with that of the complainant pertaining to the circumstances under which she was kept hostage at her father's home in Windhoek. According to him the gate remained open and that the complainant moved freely in and out the house during his visits to that house. Not only did the accused run a small shop on the premises but some additional rooms were under construction on the premises and people were moving in and out the whole time. The witness was not aware of any structure being part of the accused's house referred to by the complainant as a 'garage' where some of the rapes allegedly took place. He was aware of a structure in which the shop and one or more bedrooms were. Regarding the accused's room (shack) back home in the village homestead, he at first stated that it did not have a window, but under cross-examination changed course saying that he was no longer certain about it. This becomes insignificant because the accused does not dispute that there was a window in his room.

[20] When it was put to Ferdinand that according to the complainant she had told him in Windhoek about her being raped by the accused, he strongly denied this, saying that it was not true – neither that he would have responded by saying that 'one could get killed'.

[21] Sergeant Sibolile's evidence mainly turns on the investigation conducted and the recording of witness statements. Pertaining to a statement taken from the witness Eunike, she testified that they communicated in Oshiwambo, while she recorded it in English. She was adamant that there was proper communication between them and after she had reduced the statement to writing, she read it back to the witness while at the same time interpreting the content to her. Also that Eunike was satisfied that everything was duly recorded before signing the statement; which was admitted into evidence at the trial.

[22] Sergeant Sibolile was not discredited as a witness in any way and there is no reason why this Court should not accept her evidence as credible. From a reading of the statement and her testimony in Court, it is clear that she has a proper command of the English language. This significantly reduces the possibility of miscommunication between the witness and the investigating officer, the latter also being fluent in Oshiwambo. Having been satisfied in this respect, it is obvious to me that there are material differences between what the witness Eunike had testified in Court pertaining to matters involving the complainant, and what she earlier narrated to the police, as recorded in her witness statement. Furthermore, there is no acceptable excuse that could possibly explain these discrepancies as Eunike denies having mentioned to Sergeant Sibolile certain allegations contained in her statement, claiming that she was misunderstood.

[23] Briefly these differences amount to the following: That H suspected 'something' going on between accused and Emelia; that the accused one night entered the girls' room and touched H's panties; that H during 2003 told Eunike that the accused used to 'force her to have sexual intercourse' but failed to mention that it ever happened; that while still staying at Ferdinand's house H brought boyfriends home and after some time she noticed that H was pregnant; and that H tried to abort the baby on different occasions. Looking at the nature of the disparity between the respective statements made by Eunike, it does not appear to me justified to say that it was brought about by miscommunication in view of what has been said hereinbefore. Consequently, allegations made under oath in a statement admitted as evidence, to the effect that the complainant had boyfriends and was seen to be pregnant before leaving home for Windhoek, form part of the body of evidence that must be considered, together with the rest of the evidence, when assessing the credibility of the respective witnesses. I pause here to observe that those issues, appearing in the statement and which Eunike now disputes, are consistent with the evidence given by some defence witnesses, as will become more apparent during the judgment.

[24] This brings me to the defence case. Besides the accused testifying in his own defence, he also called Joseph Haushona; Epifania Simeon; and his wife, Maria Johannes.

[25] Accused confirmed the relationship between him and the witnesses H, Emelia and Eunike; also his periodic visits to the North. It is common cause

that during 2003 the accused had a room of his own in the homestead of Ferdinand, but it is disputed that it would have been able for Emelia to look through its window from outside as she claims. Although unable to specify dates of these visits, he is certain that he on no occasion said to H that he wanted to 'bless' her, or performed any of the alleged acts testified about which would have happened in August 2003 at Oshivanda. He further denies owning a firearm – either during 2003, or present; or that he had kept his cattle at a post at Ombadja during that period. It is his testimony that during the year end school holidays, H arrived –quite unexpectedly – at his home in Windhoek by mini-bus. According to the accused H said she only came to visit. She stayed with him and a certain Rassi and Nekita, who also resided at the accused's house. It is the defence's case that the accused was operating a shebeen from his house, where Nekita was working as sales lady and that H, two to three days after her arrival in Windhoek, moved to Mix where she worked in the accused's other shebeen. Upon her arrival in Windhoek the accused did not observe that H was pregnant and only after being so informed by his wife, did he ask H who impregnated her. She said it was one Joseph. The accused said that the complainant stayed at Mix from where she also attended computer classes for which he paid. The situation remained unchanged until he sent her back to the North by bus later during the year; thus disputing that she was held hostage in Windhoek until rescued by Nambahu.

[26] It seems common cause that Joseph Haushona and H were having a romantic relationship in 2003, and although disputed by the complainant,

there was, according to Joseph, a sexual side to this relationship. During that year the complainant came to his parents' house and said she was two months pregnant (with his baby), which Joseph and his family accepted. After some months she informed him that she was leaving for Windhoek where she would deliver, where after he then left for Walvis Bay where he took up employment. He said during her stay in Windhoek they had telephonic contact. He again saw her in 2004 when she turned up at his parents' house with her step-mother, Maria. The purpose of the visit was to claim compensation from his family. It was agreed that the amount of N\$1 200 would be paid to the complainant's family; which was eventually paid over. Joseph confirms the complainant's evidence that they continued their relationship; also that she never mentioned to him that he was *not* the father of her child, or that she was kept hostage in Windhoek by her father. Their relationship only ended when H went to live with her mother in Angola.

[27] Epifania Simon is Joseph's mother and she corroborated his version pertaining to complainant coming to their house during 2003, reporting that she was impregnated by Joseph. She said H later told her that she was going to her father in Windhoek where she would give birth. She further confirmed Joseph's evidence about compensation having been paid to the complainant's family. It must be mentioned that her evidence controverts that of Joseph as regards dates and events during 2003, testified about by Joseph.

[28] The accused's wife, Maria Johannes, was the last defence witness and her evidence generally supports the accused's version regarding the

complaining arriving in Windhoek on her own being visibly pregnant; the living arrangements at the accused's house during her stay; and that she accompanied H to Joseph's family to claim compensation for impregnating the complainant. The witness was extensively cross-examined and from the outset it was clear that she had only one thing in mind and that was to put forward a version that would favour the defence case. She was evasive and self-contradicting and did not strike me at all as being credible; in fact, she must be one of the worst witnesses I had ever come across. Thus, except where her evidence is corroborated, very little weight can be given to the rest of her testimony.

[29] At the close of the State case application was made in terms of s 174 of the Criminal Procedure Act⁷ for the acquittal of accused, which I dismissed, with reasons to follow. The basis of the application was that, regard being had to the contradictions between the evidence of the State witnesses, there was no evidence on which a reasonable court may convict. It is an established principle that the court has a judicial discretion to either discharge the accused if satisfied that there is no evidence on which a conviction can reasonably be based, or to put the accused on his/her defence.⁸ In *S v Teek*⁹ at p130 – 131 Brand, AJA said the following in this regard:

“[7] Over the years the trite principle has been established - both in Namibia and with reference to the identically worded s 174 of the South African Criminal Code - that no evidence in terms of the section means no evidence

⁷ Act 51 of 1977

⁸ *S v Nakale*, 2006 (2) NR 445 (HC) at 457

⁹ 2009 (1) NR 127 (SC)

upon which a reasonable court, acting carefully, may convict (see eg *S v Nakale* 2006 (2) NR 455 (HC) at 457 and the authorities there cited). 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 and Others* 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?"

[30] After the aforementioned principles were applied to the present facts, due regard being had to the contradictions in the evidence of the State witnesses, I was not persuaded that the accused was entitled to an acquittal, and he was accordingly placed on his defence.

[31] The established rule of law is that the Court has a discretion whether or not to convict on the single evidence of a competent witness.¹⁰ However, in applying this principle, the courts have laid down that the evidence of a single witness should be approached with a measure of caution and such evidence may only safely be relied upon where it is supported by some satisfactory indications that it is trustworthy. The evidence of the single witness need not be satisfactory in every respect, but may safely be acted upon even where it

¹⁰ See s 208 of Act 51 of 1977

has some imperfections; provided that the Court at the end of the day can say that, despite some shortcomings in the evidence of such witness, the Court is satisfied that the truth has been told.¹¹ The credibility of the single witness must be considered in the context of the evidence as a whole, and in *Stevens v S*¹² the Court issued a warning against a ‘compartmentalised approach’ by the courts when assessing the evidence of a single witness.

[32] In its assessment of all the evidence, the Court will adopt an holistic approach.

[33] Regarding the first incident of rape (count 1), corroboration for the complainant’s version could be found in the evidence of her sister Emelia, who said she had seen the accused and the complainant having sexual intercourse: provided that the latter’s evidence is found to be credible. Pertaining to the alleged subsequent incidents of kidnapping (count 2) and rapes that took place in Windhoek (counts 3 and 4), complainant gave single evidence to which the cautionary rule applies.

[34] From the outset it must be said, that where a witness, such as the complainant in this instance, who was fifteen years of age when the alleged incidents occurred, but who is now twenty-four years old, is required to explain her actions and justify decisions she had made back then, it seems to me that the emotions displayed by the complainant during her testimony and her narrative of the events to the Court, do not necessarily reflect her feelings

¹¹*S v Esterhuizen and Another*, 1990 NR 283 (HC); *S v Sauls and Others*, 1971 (3) SA 754 (A) at 758

¹² [2005] 1 All SA 1 (SCA)

or reasoning at the time when these incidents occurred. It is evident that the complainant's demeanour in Court stands in sharp contrast with her decision making and conduct nine years ago, as borne out by the evidence. Obviously, this makes the assessment of the complainant's evidence problematic in the sense that it is difficult for the Court to determine the true tenor of her testimony given in Court.

[35] Material contradictions in, and discrepancies between, the evidence of a witness, compared to that of other witnesses, would normally impact adversely on the credibility of such witness; unless there is a reasonable explanation showing that, despite these inconsistencies in the witness' testimony, the truth has been told and that such evidence, notwithstanding, is reliable. In this case there are numerous discrepancies between the evidence of the State witnesses, which is considered hereinafter. This equally applies to some of the defence witnesses who controvert one another.

[36] I do not consider each and every inconsistency pointed out by counsel to be material and consequentially adversely impacting on the complainant's credibility. However, there are definitely material contradictions in the testimony of the State and defence witnesses which indeed would have some unfavourable impact on the credibility of the respective witnesses' evidence. In the end, the credibility of each witness must be assessed in view of *all* the evidence and not merely be an independent consideration of the number or nature of the discrepancies shown; thereby following a compartmentalised approach warned against in *Stevens (supra)*.

[37] I now turn to consider the contradictions and inconsistencies in the complainant's evidence, which I consider to be material.

- As regards the first incident which happened on a Friday in the accused's room, the complainant was adamant that she waited until the accused had left the following morning before telling Emelia and her aunt Eunike what had happened, because of her being afraid of the accused. However, Emelia said, though not sure whether she was told by H on the Saturday or the Sunday, that she left home with the accused who took her back to school on Sunday. This means that complainant's version about accused having left *before* her making the first report, is either not correct, or Emelia has her dates all wrong. It appears from the evidence that she thereafter had no further contact with the complainant until some years after her return from Windhoek. Though difficult to say which of these two witnesses are correct on this point, it is clear that one is not telling the truth. This raises the question whether complainant at all made a report to her sister?
- It is the complainant's testimony that after making a report to Emelia, they decided that complainant should tell their aunt Eunike about it and after doing so, Emelia was called. However, both Emelia and Eunike disputed that they were together as testified by complainant; Eunike in fact disputing that such report

was ever made to her. She was only aware of the report that the accused, on a different occasion, had entered the children's room at night. The complainant's evidence in this regard stands in sharp contradiction to that of the State witnesses Eunike and Ferdinand. If the testimony of these witnesses is preferred over that of the complainant, it then begs the question how the complainant could have felt 'demoralised' because nothing had come from her earlier reports made to her family if no such reports were made at all?

- Complainant claims to have made a third report about the rape to her uncle Ferdinand during one of his visits to Windhoek, which the witness disputes, saying it is simply not true. According to her, after making reports about the rape to Eunike and Ferdinand, both appeared to be afraid and said that they could be killed; again something not supported by the respective witnesses.
- Although at first saying that she was locked up inside the house in Windhoek at all times, making it impossible to have contact with anyone else, complainant during her testimony, changed course by saying that she did have access to the yard and that it was the gate that was kept locked at all times by the accused. She did not speak to the neighbours or approach any one of them for assistance and when asked to explain why she failed to do so, she said it did not cross her mind. Neither did she think of asking anyone for help at Mix when she was taken there by

the accused to count the stock in his shebeen. As stated, the complainant's evidence in this regard is in sharp contrast with that of Ferdinand, in whose view the complainant could freely move around in and outside the yard. There is evidence that the gate was not locked at all times as the complainant claims, because people came to buy from the accused's shop/shebeen on the premises; while others were busy constructing additional rooms on the site, and these persons could freely move in and out the yard. Thus, Ferdinand's evidence materially contradicts that of the complainant on this point while his evidence is also corroborated by the defence witnesses in this respect.

- The impression gained from the complainant's evidence about the day she was instructed by the accused to accompany him to the cattle post, but instead was taken to Windhoek, is inconsistent with Eunike's testimony. She said she discovered that all the complainant's clothes were taken along, including her school uniform. This certainly does not support complainant's averment that she was taken by surprise when realising that they were actually travelling to Windhoek, and not the cattle post. It would also explain why she failed to ask the accused why they were going to Windhoek, casting even more doubt on her explanation namely, that she was too afraid to ask. Complainant's evidence on this point is also controverted by that of Joseph and his mother who said that complainant informed

them beforehand that she was leaving for Windhoek to go and stay with the accused.

- Other differences between the versions of the complainant and that of Emelia, probably of less importance, are whether or not the complainant was crying during the sexual act or only thereafter; whether sexual intercourse took place on the bed or the sofa in the accused's room; and whether blood spots were already visible on the complainant's skirt when she left the accused's room, or only thereafter when she squatted onto her haunches in the bedroom. Emelia disputed the latter ever happening. Complainant further said she showed Eunike the blood stained skirt the following day, to which she replied, that it was shocking. However, Eunike disputes ever being informed about complainant having been raped, let alone her being shown the complainant's blood stained skirt.

[38] When assessing the aforementioned discrepancies against the total body of evidence adduced, it appears to me that particularly pertaining to peripheral issues, such as whether or not the complainant was crying during the rape; the presence of blood stains on her skirt; and whether the sexual act took place on a bed or a sofa, both the complainant and Emelia could have made innocent mistakes, not intended to mislead the Court. However, as regards the contradictions and improbabilities contained in the complainant's evidence relating to the latter events i.e. the manner in which she was taken to Windhoek against her will and the circumstances surrounding her

detention, these are indeed material differences and in the absence of any reasonable explanation showing otherwise, are considered to be strong indicators showing that, what has been testified by the complainant in this regard probably amounts to a fabrication of evidence. This equally applies to the alleged reports made to Eunike and Ferdinand. If the Court were to come to such conclusion, that, in my view, would make her an untrustworthy witness and her evidence unreliable. Thus, when assessing the complainant's evidence overall, the Court should follow a cautious approach, unless such evidence is corroborated or found to be satisfactory in material respects. Can it be said that the evidence given by Emelia satisfies this requirement? For the reasons to follow, I believe not.

[39] The picture portrayed by the witness Emelia in Court appears to be that of a caring, older sister, who came to complainant's rescue by sending someone to fetch her from Windhoek; and ultimately caused complainant to lay a charge with the police against the accused. However, this stands in sharp contrast with her unperturbed attitude even after witnessing the first rape incident. When specifically asked about this during her testimony, she responded by saying that she was in shock and thought the complainant could report the incident herself. I do not find this plausible. I interpolate to remark that according to Ferdinand, though not certain about it, the accused's shack did not have a window. However, the accused does not dispute that there was a window, though much smaller than what Emelia testified and unable to see through; evidence that was corroborated by the accused's wife, Maria. It is interesting to note that Emelia herself fell pregnant soon thereafter

and decided to keep this a secret from her family. Despite having heard rumours about the complainant being ill-treated by her father in Windhoek, Emelia did not approach him in that regard when she met with him in Ondangwa during this period, claiming as an excuse, that they had a poor relationship. In her view, the reason why the complainant did not come to her after she had been fetched from Windhoek is, because 'she was no longer by her right mind'. How Emelia was able to come to this conclusion is unknown, because she only saw the complainant for the first time at their mother's place some *two* years later. This was the first time she heard from the complainant about what had happened to her in Windhoek, yet again, nothing was done to report this to the police. When asked why she did not assist the complainant in that regard, she replied that complainant *could have done so herself already in Windhoek*. The reason why the matter was reported to the police, according to the complainant, is because she "*was tired of moving around*". I believe what is meant hereby is that since her return from Windhoek she did not stay long at either Joseph's place, or with her own mother. If what Emelia says holds true, then the report to the police came as a result of complainant's disrespectful conduct towards others and not because of the rape incidents. I am unfortunately unable to make the same connection between the complainant's conduct and the actual reason for her reporting the matter to the police much later.

[40] When the Court objectively looks at Emelia's evidence, one gains the impression that, from the outset, there was over a period of several years, no need for her, or urgency on her part, to have the matter reported, despite her

alleged concern over her sister. Her excuse for this passivity namely, that complainant could have done so herself, has a hollow ring to it. She, like the complainant, now appears to be anxious to secure the accused's conviction, yet, when one would have expected them to speak out, they remained silent – more so Emelia, who was an eye witness and as the older sister, the confidante of the complainant. For the foregoing reasons, it is my considered opinion that the Court should equally follow a cautious approach when seeking corroboration for the complainant's version in the evidence of Emelia; as least as far as it concerns the first incident. The material discrepancies in their respective versions, also, remain unexplained.

[41] I now turn to consider the complainant's evidence relating to her being taken to Windhoek and what followed thereafter. As mentioned, the complainant's evidence that she was unexpectedly taken to Windhoek by the accused is inconsistent with evidence that she had left with all her belongings – something the complainant failed to mention to the Court. Even if she had travelled with her father, and her only being fifteen years of age, it seems unlikely that she would *not* have asked him on the way why they were going to Windhoek, and not to the cattle post. The explanation that she was too scared to ask, I find unconvincing, for the accused at that stage, on her own evidence, had not threatened or exerted any pressure on her to accompany him. Complainant made no mention about her clothes that were taken along and the only reasonable conclusion to come to is that she had packed it herself. This she could only have done *knowing* that she would be leaving home, not to return soon thereafter as *all* her clothes, school uniforms

included, were taken along. Not only is this conclusion consistent with the accused and Maria's evidence that the complainant did not stay with him in Windhoek against her will; it also stands in sharp contrast with her testimony that she was kidnapped and taken to Windhoek by the accused.

[42] It is the complainant's version that since the first incident of rape up to the end she was threatened by the accused in that he would shoot her. To demonstrate how serious he was, the accused, according to the complainant, produced a firearm which was held against her head. On one such incident her hands were tied together behind her back before being raped, for reasons unknown. This was whilst staying with the accused in Windhoek. In view of the complainant's evidence that she had no contact with other people and her being locked up inside the house, I find the alleged conduct of the accused in the circumstances, peculiar, for there would have been no reason to act in such manner. Neither is there any other reason borne out by the evidence presented by the State. On the contrary, from the evidence of the State witness Ferdinand, there was no garage on the premises in which the complainant could have been raped. There was only, what appears to be a shelter under which the clients could sit and which was equally used after hours as a car porch. It seems inconceivable that the alleged rape would have taken place out in the open for all to see.

[43] Had the complainant considered her life to be in danger as a result of these threats, it seems to me that she had ample opportunities to find help or abscond during the period of her alleged detention – something she clearly

did not consider. It is also inconsistent with her explanation that she felt discouraged for not getting any help either from her aunt Eunike or her uncle Ferdinand, having made reports to both of them. However, this excuse lacks credibility in view of Eunike and Ferdinand's testimony that no such reports were made to them. On this score I am inclined to accept the evidence of Eunike and Ferdinand, as I cannot think why they would deliberately try to mislead the Court on this point; especially Ferdinand, who has not been shown to be untruthful.

[44] When looking at the complainant's evidence as a whole, including the fact that she was merely fifteen years of age, her behaviour as described to the Court, notwithstanding, appears to me to be inconsistent with that of a child of her age. I come to this conclusion bearing in mind that, on her own evidence she had to endure horrific treatment at her father's hands without seeking *any* help over a lengthy period of time – and when help ultimately arrives, she does not return to the family who had sent for her, but instead goes to live in the house of her former boyfriend, Joseph – the same person she in the open accused of having impregnated her – well-knowing it not to be true.

[45] It is further the complainant's evidence that the accused wrote a letter to Joseph saying that he impregnated her; something not testified on by the accused but which appears to be in dispute. Contrary thereto stands the evidence of Joseph and his mother Mrs Simeon who said they knew that it was Joseph who impregnated the complainant even before her departure for

Windhoek. Also Maria's evidence, that H, upon her arrival in Windhoek, told her that she was impregnated by Joseph. It is common cause that complainant, accompanied by Maria, went to inform Joseph's family about the baby's death and that compensation was sought from his family for having impregnated H. Although Joseph accepted this situation, it seems to me inconceivable that he would simply have done so if he had *never* had sexual intercourse with the complainant before, as she contends. His evidence is that they had a sexual relationship since 2002; hence, him accepting paternity already in 2003. When asked to explain why she went back to Joseph, she replied that she had earlier accepted his proposal. According to Joseph she returned because they continued their relationship, despite complainant's earlier decision to go and stay with her father in Windhoek. If Joseph was indeed not the father of the complainant's baby, then she at least created that impression with him and his family. To that end she, on her own evidence, was dishonest and deliberately deceived him. I find her excuse that the accused forced her to do so, implausible. She was no longer under threat and her explanation that the accused had told her to protect their family name, I find unconvincing. At no stage thereafter did the complainant tell Joseph the truth about who – according to her – the actual father of her child was. Furthermore, the family already in 2003 learned that Joseph was the father of her child – long before complainant even realised that she was pregnant and had written the letter at the insistence of her father (in 2004).

[46] Complainant was persistent in saying that she was unable to tell when she fell pregnant; despite Ferdinand having asked her already in October

2003 whether she was pregnant. Bearing in mind that the child was born in May 2004 she must have fallen pregnant around August/September of the previous year.¹³ Complainant was extensively cross-examined on this aspect of her testimony; however, not much came from it as she was unable to say when the last time was that she had her monthly periods; and when exactly she fell pregnant. I pause here to remark that no medical evidence was adduced pertaining to the birth of the child, and when that actually occurred. It is only the complainant's evidence before the Court in that respect and it seems to me that, due to her inability to give reliable evidence on specific dates pertaining to her pregnancy, it cannot be excluded that she might have erred on the date of birth of her deceased baby. I find the evidence given by the respective defence witnesses about complainant having known about her pregnancy even before her going to Windhoek, more credible. Bearing in mind the law of nature that the gestation period of a female person is nine months, this means that H was already four months pregnant in 2003; making it quite possible that per pregnancy could have been observed by Ferdinand and Maria when she arrived in Windhoek. That being the case, there can be no doubt that complainant already then *knew* she was pregnant.

[47] It is clear that there is no independent evidence in support of the State's contention that the baby born to the complainant was fathered by the accused. On the one hand is the complainant's evidence about her having been raped in August 2003 by the accused, opposed to the contradicting evidence of Joseph on the other, namely that he had sexual intercourse with

¹³ This probably explains the date referred to in the first rape charge, set out in count 1.

the complainant and accepted her allegation about him having impregnated her. His version is further corroborated by his mother's evidence which is consistent with the complainant's conduct afterwards, when returning to Joseph.

[47] It was submitted by Mr *Lisulo* that on Joseph's own evidence he could not have impregnated the complainant during 2003, regard being had to them having had no contact after he left in February and complainant only giving birth on 29 May 2004. Thus, it was argued, the picture painted by Joseph that he was the father of the child born to the complainant, was clearly wrong. There is merit in the argument, for if the complainant was already two months pregnant at the beginning of 2003, then she could not have given birth only in May of the next year – that is simply not possible. Does it therefore mean that the said child was fathered by the accused?

[48] In order to come to such conclusion, the Court has to disregard the evidence of not only Joseph, but also that of his mother. Complainant herself from the outset made clear that Joseph was the father of her baby and even went to claim compensation from the family and continued her relationship with him after her return from Windhoek. It is clear from Joseph's evidence that this was the reason why he accepted the baby to be his, and persisted therein. Matters are further complicated and doubtful by the complainant's inability to say exactly when she fell pregnant, and her uncertainty as regards other time periods relevant to the drawing of inferences. Thus, though

Joseph's evidence on this point is doubtful, it does not, in my view, *per se* culminate into proof that strengthens the rape charges against the accused.

[49] The accused's version was substantiated in material respects by State as well as defence witnesses, and although it could be said that he was vague on certain aspects of his evidence, especially pertaining to dates, it cannot be said that he was an unreliable witness. Throughout the case the witnesses, albeit for the State or defence, when pressed to furnish dates or specific time frames, blundered, blaming it on the long passage of time since the events took place. I consider this excuse in the circumstances to be reasonable, particularly bearing in mind that they were only required to explain themselves on their conduct or what has been said at specific stages after a passage of years i.e. firstly, five years later when charges were laid and secondly, nine years later when giving evidence in Court. That mistakes will be made in these circumstances, seems to me, to be expected.

[50] Where the Court (as in this instance) is confronted with two conflicting versions, the proper approach in such case is for the Court to "*... apply its mind not only to the merits and demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt.*"¹⁴

The onus of proof beyond reasonable doubt is on the State and there is no duty on the accused to convince the Court of the truth of any explanation he gives. Even if the explanation that he gives seems improbable, the Court may

¹⁴S v Singh, 1975 (1) SA 227 (N) at 228G-H

not convict, unless it is satisfied that it is false beyond reasonable doubt. Whether the Court subjectively believes the accused, is not the test. Neither does the Court have to reject the State case in order to acquit him. The question is simply whether there is a reasonable possibility that his evidence may be true.¹⁵ If an accused is found to have been untruthful in some aspects of his evidence, it does not mean that he is therefore guilty.¹⁶

[51] After due consideration of the evidence adduced by the State and defence witnesses, due regard being had to its merits and demerits, as well as the probabilities of the case, I am, for the reasons mentioned herein, not persuaded that the guilt of the accused, as regards the rape charges, has been proved beyond reasonable doubt.

[52] As for the kidnapping charge (count 2), I raised the question with counsel whether accused, being the biological parent of the complainant, a minor child at that stage, could have committed the crime against his own child? Mr *Lisulo*, relying on the definition of the crime of kidnapping, submitted that the accused made him guilty of kidnapping in that he took H with him to Windhoek where he kept her against her will. The learned author *Snyman*¹⁷ in his authoritative work at p 479 defines the crime as follows: "*Kidnapping consists in unlawfully and intentionally depriving a person of his or her freedom of movement and/or, if such person is a child, the custodians of their control over the child*".¹⁸ (Emphasis provided)

¹⁵S v *Haileka*, 2007 (1) NR 55 (HC) at 58A-B; S v *Kubeka*, 1982 (1) SA 534 (W) at 537F-G

¹⁶S v *Engelbrecht*, 1993 NR 154 (HC)

¹⁷*CR Snyman: Criminal Law, Fifth Ed.*

¹⁸ See also those cases cited in the footnote.

It is not disputed that the accused was the custodian of the complainant, who was a minor at the time; and even if he were guilty of taking the complainant against her will to Windhoek – which is not borne out by the evidence – then he did not make himself guilty of kidnapping simply because he cannot commit the crime against himself. *Snyman (supra)* at p 481 makes plain that a parent cannot commit the crime of kidnapping in respect of his own child.

[53] Consequently, Mr Elias Absalom, you are hereby found not guilty and discharged on Counts 1 – 4.

LIEBENBERG, J

ON BEHALF OF THE ACCUSED

Ms Nathaniel-Koch

Instructed by:

Directorate: Legal Aid

ON BEHALF OF THE STATE

Mr D Lisulo

Instructed by:

Office of the Prosecutor-General