



**CASE NO.: CA 98/2010**

**IN THE NORTHERN DIVISION OF HIGH COURT OF NAMIBIA**

**HELD AT OSHAKATI**

In the matter between:

**SHIMWEETHELENI THEOFILUS**

**APPELLANT**

**and**

**THE STATE**

**RESPONDENT**

**CORAM:                      LIEBENBERG J & TOMMASI J**

Heard on:                6 JULY 2012

Delivered on:

### **APPEAL JUDGEMENT**

**TOMMASI J:**     [1]    This is an appeal against conviction and sentence. The appellant was charged with raped<sup>1</sup> and in the alternative with having contravened section 14(1)(a) of the Combating of Immoral Practices Act.<sup>2</sup> The

1    as defined in the Combating of Rape Act, 2000 (Act 8 of 2000)

2    Act 7 of 2000 as amended by Act 7 of 2000

appellant pleaded not guilty but was convicted on the main count and sentenced to 10(ten) years imprisonment.

[2] The accused represented himself during the proceedings. He tendered an explanation in terms of the provisions of section 115 of the CPA. [after he arrive or when he arrived at home he saw a person whom he had found in the house. This person ran away. He entered the room where the complainant was sleeping and confronted her with this person who was coming from the house and she denied knowing the person. He kept on confronting her and she later admitted that it was her boyfriend. He used to hear that there is always a person who comes to the house. He had gone to the village and the neighbor informed him on two different occasions about this person whom the complainant brought into the house and it was on the third occasion that he had caught her and she confessed that it was her boyfriend. He then told his friend Johannes about the allegation of the complainant having boyfriends inside the house and his friend also advised him that he should confront the complainant. After he had confronted the complainant about the shoeprint and also bringing the person into the house the complainant went to school. She was feeling bitter about being confronted. He did not go to work that day. When the complainant came back from school she left the house in order to get assistance to call the father. He had sent an sms to the father prior to his arrest that there was something of this nature happening at home and he promised to call the father the next day when he had charged the phone as the phone was flat. He denied that he touched her and stated he only confronted her as to why she was brining a boyfriend into the house. She did not come home and he went to sleep. He was then arrested. He was surprised to be arrested.

## The complainant's evidence

The complainant was 17 years old when she testified but 15 at the time the incident occurred. She was living in Ondangwa in the house of Simon Ateya. She was a learner at Namcol. The appellant was her uncle and she had been living with him since her childhood. On the evening of 9 November 2006 she was already sleeping when the appellant arrived. Her six year old brother was sharing a room with her and her 13 year old brother was sharing a room with the appellant. They too were asleep at the time the appellant arrived. She went to open the door for the appellant and informed him that his food was on the stove. The appellant requested her to come to the sitting room. He informed her that he wanted to tell her about love. She wanted to know how he could talk to her about such things at that time of the night. He asked her to give him hugs and kisses. She informed him that she could not do that as he informed them not to sleep with boyfriends and that they were related. The accused informed her that she must sleep with him. She told him that her father told her not to sleep with boyfriends and even with her family members or relatives. He asked her when did her father tell her this and she informed him that he informed her just before he left. The appellant then wanted to know whether she loved him and she informed him that she loves everyone. He insisted that she should sleep with him and she refused and informed him that she will be injured and she would not be able to explain that to her father. The accused informed her that he will do what he wants and whatever comes. He took her off his leg and he put her on the ground. He grabbed her panty on the side and he then put his penis into her vagina. She asked him why he would have sex with her since he had raised her. He did not answer her. She reminded him that he is married and that he has children and the appellant was just quiete. She informed him that she would tell her father the next morning that he had raped her and he left her. She said she will not leave the room and she will wait for her brothers to wake up and she will inform them. He then lifted her and took her to her room. The appellant kept on asking for forgiveness and promised not to repeat it. She informed him that she will not forgive him and because she informed him..... The accused then threatened that he would kill himself. He wanted to know why she would report her own brother and she informed him that she does not have a brother or a cousin who sleeps with her. She woke up the next morning and she went to take a

bath and went to school. When she came back she found the accused in the sitting room. She went into her room and undressed. She then inform the accused that she was going to call her father and inform him. He said that she must forgive him and she should not report the matter. He had closed the room in the meantime and he was crying and offered her to give her N\$30.00 to stop her from reporting the matter. She informed her that the money he is offering him will not value her life and in any event she receives money from her parents. She kept insisting that he should let he go out to make a phone call. He was still blocking the door and insisted to wait for a child to come from church and he would send him to buy a recharge voucher so that she could call from his phone. She refused and insisted that she wanted to call from a neighbor's phone. He informed her that she should not call from Katrina's phone but rather from Sarah's phone. She informed him that she will just decide to go and make the call wherever she wished to. She went to Sarah and she called her father. Her father informed her that she must meet her mother at the police station. She described her relationship with him as good although they had an argument before the incident relating to the washing of the dishes. She emphatically denied ever bringing a boyfriend int the house. She denied having see a person that night. She indicated that she was the one who opened the door that night for the accused but she did not see any person leaving the house. She denied that he confronted him about a boyfriend. When her mother arrived at the police station they took her to Onanjokue hospital where she was examined. She testified that the appellant left her wet. She did not sustain any injuries.

#### Cross-examination

She denied that the appellant confronted her about the rumors that she was having a boyfriend. She admitted that the appellant prohibited them from watching TV at .... He apparently followed her and the kids and informed her that he wanted to talk to her in private. She responded that the day he was referring to she was going to watch a movie and he called her back for some reason. He apparently went to the village during August and he left them alone and during this time the complainant use to bring boyfriends to the house and that she in fact informed him about Mateus is her boyfriend. She responded that he asked her if Mateu had ever slept in the house and she informed him that if Mateus has slept in the house than that if he had slept in the house then it must have been the time she went to sleep at one of her relatives house as she is also alone in the house. He confronted her about the fact that he has his own key to the house but she insisted that he

knocked at their sleeping rooms and she opened the kitchen door for him and told him where his food was. During re-examination she was asked about Mateus about her testimony that she had to once put up at their house. She responded that Mateus went to his house and the people were already asleep and then he came to their house. She clarified that he came knocking on the sleeping room's window calling her name to open the door.

Sarah Kaluva Vaendanua - neighbor

Resides at erf 820 (complainant erf 826) The complainant told her about the rape on 10 November 2006 at around 15H00. She informed her that she was raped on the 9<sup>th</sup> November 2006. The complainant was crying at the time. She asked her why she did not make the report this morning. She informed her that the appellant prevented her from leaving the house. According to her the complainant informed her that the appellant wanted to have love. They proceeded to the sitting room and she was sitting on his lap. The appellant then touched her on her private parts. He laid her on the ground while holding her arms. The complainant was crying when the appellant had sex with her. She took the complainant to the police and contacted the father. She know one Mateus as he was the neighbour. She did not know whether the complainant had a relationship with mateus. She wanted to know how the accused had come to know about this because she asked the appellant about it and he said he did not know about it. She asked the appellant about this girl who is staying at her sisters house who like talking about his boyfriend she is saying that Johanna is Mateus' girlfriend. This was during the same week of the incident.

He then opened the door and she went to Her brothers were also sleeping he appellant found them sleeping

First ground that he was not given disclosure:

[ ] In the result this matter is struck off the roll.

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**Tommasi J**

I agree

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**Liebenberg J**