

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CALL-2017/00013

In the matter between:

**JOSEF THERON**

**APPELLANT**

v

**THE STATE**

**RESPONDENT**

**Neutral citation:** *S v Theron* (CC 2017/00013) [2018] NAHCMD 272 (7 September 2018)

**Coram:** NDAUENDAPO J et SHIVUTE J

**Heard:** 23 July 2018

**Delivered:** 7 September 2018

**Flynote:** Criminal procedure – appeal – rape – conviction and sentence – complainant a child – evidence - treated with caution – a sexual act in the meaning of the Combatting of Rape Act 8 of 2000 includes even the slightest penetration or genital stimulation – coercive circumstances present when being dragged and beaten with a fist in the eye – mandatory minimum

sentence of 15 years prescribed *ex lege* when complainant is under the age of 13.

**Summary:** The appellant stood charged with rape of a young girl and was arraigned in the Otjiwarongo Regional Court. The evidence leading to his conviction was that he called out a girl who was playing with her friends, dragged her behind bushes and raped her after which the girl repeated the incident to her friends and later to her mother and the police. The state's case was supported by medical evidence and the state witnesses corroborated one another. The appellant simply made bare denial and was convicted and sentenced to an effective 12 years imprisonment after having spent 6 years in custody. He now appeals against both conviction and sentence. He contends that the magistrate did not treat the evidence of a single witness with caution. He further contends that the evidence of the complainant was not clear in material respects and that the conviction on rape was not supported by scientific evidence and that the court erred in rejecting the evidence of the appellant without it being shown to be false. On the sentence, the appellant contends that the magistrate over-emphasised the seriousness of the crime and paid lip service to the personal circumstances of the appellant and that the sentence is shocking, harsh and cruel.

*Held*, that the evidence of the complainant was clear in all material respects and was corroborated by other witnesses and the medical evidence.

*Held*, further that the evidence of the complainant was treated with caution.

*Held*, further that the Court correctly rejected the evidence of the appellant as it was bare denial and shown to be false.

*Held*, further that the appellant was correctly convicted.

*Held*, further that the sentence was not shocking and that it was in accordance with the Combatting of Rape Act 8 of 2000.

*Held*, further that the appeal is dismissed.

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**ORDER**

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The appeal is dismissed.

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**JUDGMENT**

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NDAUENDAPO J (SHIVUTE J concurring):

Introduction

[1] The appellant was convicted on 3 July 2017 in the Regional Court of Otjiwarongo of one count of rape under coercive circumstances. The coercive circumstances were that he had applied physical force to the complainant by *inter alia*, beating her on the eye, that she was a minor of seven years old and that the appellant was 59 years old and therefore more than three years older than the complainant. He was sentenced to 12 years imprisonment.

[2] Dissatisfied with the conviction and sentence, the appellant now appeals against both conviction and sentence.

The grounds of appeal are stated as follows:

'AD conviction

1. The learned Magistrate erred in law when she convicted the appellant of rape because this conviction cannot be sustained and is inconsistent with the evidence presented by the state. The state has failed to discharge the onus beyond reasonable doubt it was indeed only the appellant who had caused the injuries so noted on the complainant's body and or private parts. (sic)

2. The learned Magistrate erred when she convicted the appellant on the evidence of the state witnesses, whose evidence was not clear in all material respects as required by law, more particularly as to how the complainant had sustained the injury noted.
3. The learned Magistrate also failed to approach the conflict of fact with caution, between the evidence of the state witnesses and that of the accused/appellant as required by law in that it is impermissible to approach such a cause thus: because the court is satisfied as to the reliability, sincerity and appearance of the complainant and the state witnesses that the accused's version must be rejected.  
(sic)
4. The learned Magistrate erred in rejecting the appellant's evidence without it being demonstrated that it was false or inherently as improbable as to be rejected as false, that he was never at or near the corn tree where complainant and her friends were allegedly eating some wild fruits; that he never called the complainant from her friends and that he never attempted to have any sexual activity with the complainant at all;
5. The learned Magistrate erred and or misunderstood the testimony of a certain Lisalotte, in that she never testified that she received a report from Kandjemune, that she saw and heard the accused calling the complainant on that day. While in fact Lisalotte testified that she received a report from Kandjemune that Mbapewa (Complainant) told her that she was raped and beaten by accused, while the complainant herself reported only about being beaten to her (Lisalotte). In fact, Kandjemune had testified that, she has never seen, neither heard the accused (appellant) call the victim on the day of the alleged incident.
6. The conviction on rape is not supported by objective and scientific evidence, and cannot be used to bolster the conclusion that the accused (appellant) had sexual intercourse with the complainant under coercive circumstances, which act has been consistently denied by accused/appellant.
7. The learned Magistrate erred in law and fact when she found that the "further and almost conclusive corroboration for the version of the complainant as well as for the identity of her assailant can of course be found in the content of the two medical reports which as the doctor so aptly put it, fit," thereby disregarding the

medical examination Dr. Ernest Chikwati (whose report was interpreted by Dr. Yevau Chiradza, “that there was no medical evidence of penetration of the vagina of the complainant.” Even if it could have been found, that it was the accused/appellant, who had called the complainant away from her (of which there is no reliable evidence), the learned Magistrate still in law if falling to take into account, for a conviction on rape to be sustained ‘penetration of the vagina’ need to be proven by the state (which in this instance wasn’t proven).

8. Therefore the learned Magistrate’s conclusion that “the court find no merit in the denial of the accused and further finds that even though the complainant was very young when this incident occurred, her version is sufficiently corroborated by extraneous evidence for the court to safely accept it,” is both wrong in the application of law and the factual analysis of this case on its own and another court will definitely come to different conclusion.

#### AD Sentence

9. The learned Magistrate over emphasized and gave more weight to the seriousness of the offence and the interest of society and less weight to the fact that the appellant is a first offender; is of an advanced age; and has been in custody for more than six (6) years at the time of his conviction.
10. The twelve years imprisonment sentence imposed is very harsh; shocking and cruel and that a different court may impose a different sentence, alternatively set the entire sentence aside.(sic)’

#### The Respondent’s Case

[3] The complainant, who was seven years old at the time of the incident, testified that on a date unknown, she was at the water point with 2 of her friends, Kandjemuni and Jarigo. They were eating corn beans and whilst there, a man known to her by the name Ben, the appellant, who worked for Ismael Katjiteo, came there and called her to get an orange. The appellant held her on the arm and pulled her behind the bushes. In the bushes, he made her to take off her short, he opened the zip of his trouser and inserted his penis in her vagina. When she wanted to scream he beat her with his fist

on the eye and put his hand on her mouth. From thereon, she put on her clothes and returned back to her friends. She was crying and she told them that she was raped and they said she must go and tell her mother. When she arrived at home she told her mother that she had gastro and stomach pains. In the morning her stomach was paining and she was crying. Kandjemuni came there and told her mother that she was raped and they proceeded to the police station to report the case and from there they went to the hospital where she was examined by a doctor.

[4] The complainant was subjected to lengthy cross examination and was taken to task as to why she informed the police that the appellant was unknown to her when her statement was taken. She was, however, adamant that she knew the appellant as Ben who was employed by Ismael Katjiteo as a cattle herder and that on the day of the incident he was with the cattle at the water point. She was further questioned for having confused the appellant with another Ben, but she was clear that the Ben who raped her was the one that was employed by Ismael Katjiteo. In that regard she was corroborated by Kandjemuni that the Ben, the appellant in this case, they saw on the day of the incident was the one employed by Ismael Katjiteo.

[5] Kandjemuni Mauminika a grade 9 pupil testified that she knew the appellant as Ben who was employed by Ismael Katjiteo as a cattle herder. She testified that on 5 December 2011, she, the complainant and Jarigo went to the water point to eat corn beans. Whilst there the complainant told them that she was going home. Later the two of them decided to walk home and on their way they found the complainant limping and crying and when they enquired why she was crying she informed them that, Ben, the appellant, called her and took her behind a big tree and raped her.

[6] She further testified that on 5 December 2011 earlier that day she saw the appellant at Ismael's house before they went to the corn beans tree. She further testified that she knows of two Bens the other Ben is the stepfather of the complainant. During cross examination she denied that she told the complainant's mother that complainant was raped by Ben, but instead testified

that it was her sister, Lisollette, who told the mother of the complainant after she told Lisollette that the complainant was raped by the appellant.

[7] Fillemon Joseph testified that he knew the appellant for more than five years. On 5 December 2011 he saw the appellant at the water point where he had brought cattle belonging to Ismael. He does not know where the complainant was on that day.

[8] Lisollette Kaumunika testified that on 5 December 2011, she was at home when her sister, Kandjemuni, who was with her brother Jariyo, at the corn tree, was together with the complainant. She testified further that Kandjemuni reported to her that the complainant had then reported that she had been beaten by the appellant, however, according to her testimony the complainant did not say to Kandjemuni why the appellant had beaten her and neither did she relay any incident of assault or rape to her.

[9] Katrina Nani, the biological mother of the complainant testified that on 5 December 2011, the complainant had told her that she had suffered gastric and abdominal pains and that she was only informed by the complainant, the next day, that she had been raped by the appellant. She further testified that she had not been told of the rape by anyone other than the complainant herself.

[10] Dr Ernest Chikwudi examined the complainant and the appellant. He however, could not testify as he had left the country. His findings (J88) were interpreted by Dr Yevai Tjiratsa. According to the J88 there were *'marked bruises on the clitoris, some bruises on the urethral orifice; where urine passes out it was bruised again, bruises on the frenulum of the clitoris, bruises on the posterior fouchett on the urethral orifice and fossa nauriculosis, bruises on the labia minora,* the conclusion was *'attempted penetration of the vagina'* The J88 report in respect of the appellant, the conclusion was that *'there was moderate abrasions and bruises on the foreskin'* and on the left leg on the shin there were some abrasions. The conclusion was evidence of tight sexual intercourse resulting in bruises on foreskin. The doctor further testified that if

penetration is against a small vagina or small space, it results in resistance which can lead to skin break down or for it to be bruised because it was not 'fully fitting'

### The Appellant's Case

[11] The appellant's case is a bare denial. He denied that he called the complainant, dragged her into the bush and then raped her. He admitted that he was a cattle herder and that he would take his cattle to the water point and that he met witness Fillemon Joseph on 5 December 2011 at the water point with his cattle. He further told the court that he used to give oranges to the children – the ones falling from the tree, he would put them in plastic bags and distribute them amongst the children.

### Submissions by Appellant

[12] Counsel argued that the learned magistrate erred when she convicted the appellant on the evidence of the state witnesses, whose evidence was not clear in all material aspects as required by law – more particularly as to how the complainant had sustained the injuries noted. He further submitted that the complainant could have sustained those bruises and or cuts on the back and or neck areas from the tree branches where she had gone to eat some corn beans. . He submitted that the learned magistrate failed to approach the conflict of facts with caution. He argued that the complainant was a single witness and her evidence should have been treated with caution.

[13] Counsel further argued that for the learned magistrate to rely on the speculative opinion of Dr Tjiratsa that the two medical reports and the injuries and bruises noted on the complainant and the appellant 'aptly' fit each other, without any further corroborative evidence, was a fatal error both on the facts before the court and the application of the law.



### Submissions by Respondent

[14] Counsel for the respondent, on the other hand, argued that no misdirection had occurred when the trial court found that the state proved the guilt of the appellant beyond a reasonable doubt. Counsel referred to the evidence of the complainant and argued that the evidence was clear as to what had happened to her and that she knew the appellant and that there was medical evidence to corroborate her story. Counsel further argued that the magistrate was alive to the fact that the complainant was a single witness to the sexual act and that there was need to apply caution. Counsel further argued that the *court a quo* rejected the version of appellant after finding that the complainant did not fabricate her story or deliberately lie and that the appellant's case was a bare denial.

I will now proceed to consider the grounds of appeal:

[15] Grounds 1 and 2 can be summarised as follows: that the state failed to discharge the onus beyond a reasonable doubt and that the evidence of witnesses was not clear in material respect especially how the complainant sustained the injuries. The evidence of the complainant that it was Ben, the appellant, who called her, offered her an orange, dragged her behind the bushes and raped her was, clear in all material respect. She knew the appellant as 'Ben', and that he was employed as a cattle herder by Ismael Katjiteo. That piece of evidence was also corroborated by the other witnesses. Kandjemuni, testified that 'Ben' the appellant was indeed a cattle herder who was employed by Ismael. Fillemon Joseph also corroborated her evidence. He testified that on the date of the rape incident he saw the appellant at the water point where he had brought cattle belonging to Ismael. The complainant could therefore not have been mistaken about the identity of her rapist.

[16] She further testified that in the bush he ordered her to lay down and he then inserted his penis in her vagina. Although nobody saw the actual rape, there is evidence that she was limping and had stomach and or abdominal

pain shortly after the incident. Most importantly, there is the medical evidence that shows that she had bruises and abrasions on her vagina and that according to the doctor, although the hymen was intact, there was 'attempted penetration'. According to the doctor there were also bruises and abrasions on the foreskin of the penis of the appellant, which was 'consistent with attempted penetration against a small vagina' that clearly corroborated her version that she was raped by the appellant. Those grounds are without substance.

[17] In ground 3 the appellant contends that the evidence presented was not treated with caution. Before analysing the evidence, the learned magistrate was alive to the fact that she was dealing with a child and that her evidence was to be treated with caution. She referred to authorities setting out how the evidence of a child must be treated and she clearly applied caution when she dealt with the evidence of the complainant. This ground of appeal is meritless.

[18] In grounds 4, 5 and 8, the appellant in sum contends that his evidence was rejected without being shown to be patently false. The appellant's defence was a bare denial. The *court a quo* found that the complainant did not fabricate the story that she was raped and that there was corroboration from the medical evidence that she had bruises and abrasions on her vagina, that she was not confused about the identity of the rapist and that she repeated the incident shortly after it happened. The *court a quo* was therefore correct to reject the version of the appellant.

[19] In grounds 6 and 7, the appellant contends that there was no objective scientific evidence to corroborate the complainant's case of rape and that for a conviction on rape to be sustained, 'penetration of the vagina' needs to be proven by the state. The medical evidence that she had bruises and abrasions on her vagina and that there was attempted penetration clearly corroborated her evidence that she was raped. The doctor testified that there was attempted penetration. In terms of the Combatting of Rape Act 8 of 2000 a 'sexual act' is defined as the inserting (to even the slightest degree) of the penis of a person into the vagina. From this definition it becomes clear that

the definition of rape in terms of what constitutes a 'sexual act' extends beyond the parameters of 'sexual intercourse with a complainant under coercive circumstance' and that any form of genital stimulation may satisfy the meaning of 'sexual act' in terms of the definition of rape.

[20] The magistrate can therefore not be said to have not taken objective and scientific evidence into account to support the conviction.

[21] In the result I am satisfied that the learned magistrate did not err in convicting the appellant for rape. If one is to have regard to the evidence adduced in the court below.

#### AD Sentence

[22] The appellant contends that the magistrate overemphasised the seriousness of the crime and the interest of society and paid lip service to the personal circumstances of the appellant.

[23] Counsel for the appellant further argued that the learned magistrate over emphasised and gave more weight to the seriousness of the offence and the interest of society and less weight to the fact that the appellant is a first offender; is of an advanced age; and had been in custody for more than six (6) years at the time of his conviction. It was further argued by counsel on behalf of the appellant that the advanced age of the appellant should be taken as a compelling and substantive factor and that the 12 years imprisonment imposed is very harsh; shocking and cruel and that a different court may impose a different sentence, alternatively set the entire sentence aside.

[24] Counsel for the respondent argued that in terms of section 3(1)(a)(iii) (bb)B of the Combatting of Rape Act 8 of 2000, the minimum prescribed sentence is 15 years if there are no substantial and compelling circumstances warranting the imposition of a lesser sentence. In this case the appellant spent six years in prison and the court was alive to the fact and considered that as compelling and substantial circumstances and imposed twelve years.

[25] Section 3(a)(bb)(a) of the rape Act of 2000 puts a mandatory minimum sentence of 15 years on a convicted accused, where the complainant is under the age of 13 years or is by reason of age exceptionally vulnerable. In the present case, the complainant was seven years old when the incident occurred. The court can only deviate from the mandatory sentence of 15 years if there are substantial and compelling circumstances. *In casu*, the court took into account that the appellant had spent six years in prison and considered that as compelling and substantial circumstances warranting a deviation from the mandatory sentence

[26] The learned magistrate did not over emphasise the seriousness of the occurrence of rape and the interest of the society, because the offence of rape is a scourge plaguing the most vulnerable in our society, our women and children. Oftentimes the victims of such crimes suffer long term psychological and even physical trauma that extends well into their adulthood. The minimum mandatory sentences were intended to discourage would be offenders and also stress the seriousness of the plight of this plague. I am therefore satisfied that in the present circumstance the personal circumstances of the accused stand secondary against the magnitude of both the seriousness of the offence in question and the interest of society.

[27] In the result the appeal is dismissed.

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N. G. NDAUENDAPO  
JUDGE

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N. N. SHIVUTE

**APPEARANCES:**

APPELLANT:

Mr Siambango

Of the Directorate of Legal Aid, Windhoek

RESPONDENT:

Mr Kanyemba

Of the Office of the Prosecutor-General  
Windhoek.