

IN THE HIGH COURT OF NAMIBIA

Case Title: S v Kosmos Kouyuni Sikongo and Simon Kanyewa Sikongo	Case No: CC 19/2018
	Division of Court: HIGH COURT
Heard before: SHIVUTE J Heard on: 19 JUNE 2019	Delivered on: 20 JUNE 2019

Neutral citation: : S v Sikongo (CC19/2018) [2019] NAHCMD 199 (20 JUNE 2019)

RULING ON APPLICATION TO RE-CALL A WITNESS

The order:

In the result the following order is made:

The application is refused.

Reasons for order:

(SHIVUTE J)

1. The accused persons appear on indictment containing several counts of rape in contravention of s 2 (1) (a) of the Combating of rape Act, 8 of 2000 and alternative counts of contravening s 14 (a) of the Combating of Immoral practices Act 21 of 1980 – Committing or an attempt to commit a sexual act with a child under the age of sixteen years, read with sections 1, 3 and 21 of the Combating of Domestic Violence Act, 4 of 2004.
2. The state called its last witness doctor Manhando who testified that he examined the victim and he found that the victim's hymen was still intact. No fresh tears were observed. 2' o'clock + 10 o'clock position of the clefts which are consistent with the normal position of clefts. The doctor was able to insert his two fingers easily in the child's vagina. He further testified that the clefts that are at 2 o'clock and 10 o'clock were less suspicious. In his conclusion he testified that previous sexual penetration cannot be ruled out. The doctor again in his explanatory notes testified that no actual bleeding and no discharge were found. He did not find any bruising. He further testified that there was a possibility of old genital trauma and that

penetration cannot be ruled out. When he was asked to explain as to what he meant by penetration cannot be ruled out, he explained that he could not say with certainty that penetration took place or not and that his findings were inconclusive.

3. Due to the doctor's findings, counsel for accused 1 made an application for the court to re-call the victim in terms of s186 of the Criminal Procedure Act, 51 of 1977, for the court to inquire from the victim to explain the degree of the alleged penetration of the penis into her vagina and further to explain the size of the accused's penis. Counsel was of the opinion that, the evidence of the child to that effect is essential to assist the court to arrive at the just conclusion.

4. S 186 reads as follows:

'The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the court.'

5. The court has a duty to exercise the power to call a witness where it is necessary to attempt to discover the truth in order that substantial justice is done between the accused and the prosecution. *S v Van den Berg 1996 (1) SACR 19 (NM)*.

6. Section 186 does not refer to the court to have a discretion to re-call witnesses. It refers to the court having a discretion to subpoena any witness if the evidence of such witness appears to the court essential during such proceedings to assist the court to arrive at the just decision of the case.

7. However, in terms of s 167 of the Act, the court may examine witness or a person in attendance. S 167 reads as follows:

'The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may re-call and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or re-call and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.'

8. The court is given a discretion to re-call witnesses. It is not obliged to do so. However, such a discretion should be exercised judiciously. In most cases the court acts mero motu. However, counsel for the defence or state may suggest to the court to re-call a witness.

9. It would be an irregularity by the court if the evidence of the witness to be called appears to be essential to the court for it to arrive at a just decision, if the court fails to re-call such witness.

10. This court is called upon to re-call the witness (victim) for her to come and testify about the degree of penetration of the penis into her vagina and to establish the size of the penis.

11. In terms of s (1) (1) of the Combating of Rape Act 8 of 2000 a 'sexual act' is defined to mean:

(a) the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person; or

(b) the insertion of any other part of the body of a person or of any part of the body of an animal or of any object into the vagina or anus of another person, except where such insertion of any part of the body (other than the penis) of a person or of any object into the vagina or anus of another person is, consistent with sound medical practices, carried out for proper medical purposes; or

(c) cunnilingus or any other form of genital stimulation;

'vagina' includes any part of the female genital organ.

12. The court having had regard to the provisions of s 186 read with s 167 of the Criminal Procedure Act, as well as the definition of a 'sexual act' and 'vagina' as provided for in the Combating of rape Act, this court is of the opinion that re-calling the victim or witness to come and testify about the degree of penetration of the penis into her vagina and the size will not be essential to assist the court to arrive at the just decision of the case. The size and degree of penetration are not determining factors whether a sexual act took place or not.

N N SHIVUTE JUDGE	