

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NO.: CC 6/2019

In the matter between:

STATE

and

BENEDIKTUS KOPER

ACCUSED

Neutral citation: *S v Koper* (CC 6/2019) [2020] NAHCMD 312 (24 July 2020)

Coram: RAKOW, AJ

Heard on: 24 June 2020

Delivered on: 24 July 2020

Flynote: Criminal Procedure – Trial – Evidence – of a single witness – Court must be satisfied that the testimony was satisfactory and truthful – Court accepting complainants' evidence as true.

Evidence – witnesses giving mutually destructive versions – court should apply its mind on merits, demerits and probabilities of case.

Evidence – Alibi – accused does not bear the burden of proof when raising the burden of proof when raising an alibi defence – Court required to assess alibi in the same way as any other defence – Court must decide whether it is reasonably possibly true or whether it should be rejected as false beyond a reasonable doubt.

Summary: The accused appeared on two charges of attempted murder and of Contravening section 2(1) (a) of the Combating of Rape Act, 8 of 2000. These charges relate to the rape and attempted murder of Lucia Jaartze on 27 November 2014 at or near Karasburg in the district of Karasburg. The accused person pleaded not guilty to both charges. On the day of the incident the complainant was on her way to an engagement party taking place at another house in the same settlement. She then met the accused on her way who informed her that tonight is their night. She rebuked him and said he is just a child whereafter he said that she and her man are not having sexual intercourse and grabbed her. He strangled her and they started to wrestle whereafter he pulled off her panties and inserted his penis into her vagina. He was moving his body in a very rough manner. When he was done, he stood up and walked away. During this encounter he hurt her on her breasts and mouth. He also bit her on her arm and she had abrasions on her knees. He bit her after she tried to remove his hand from her neck. She thought that he was going to kill her. She was able to see his face and recognized his voice as that of Nicky, the accused. She could see clearly as there was a strong light beam at the house of Joseph Kooper which provided light in the area. She testified that she recognized the accused when he was about 5 – 6 meters from her. She could see about 50 – 60 meters with the light from the house of Joseph Kooper. She knew the accused person very well as he visited their house like a child in the house and they fed him from time to time. The accused denied being the perpetrator in the rape of the

complainant.

Held that the complainant was a single witness as far as it concerns the allegations that she had been raped by the accused, and that although a court may convict on single witness evidence, it must be satisfied that in every material respect the testimony was satisfactory, and that the truth has been told.

Held that although the complainant, witnesses and accused made reference to different dates, they were all referring to the same events.

Held further that it is established law that the accused does not bear the burden of proof when raising an alibi defence. When faced with an alibi defence the court is required to assess the alibi in the same way as any other defence and must decide whether it is reasonably possibly true or whether it should be rejected as false beyond reasonable doubt.

ORDER

In the result I make the following order:

The court finds the accused guilty on the count of attempted murder and guilty on the count of Contravening section 2(1) (a) of the Combating of Rape Act, Act 8 of 2000 – Rape.

JUDGMENT

RAKOW, AJ

[1] The accused initially appeared on four charges, the two charges on which

this matter proceeded on trial and another set of charges relating to a murder committed in the Gobabis area and defeating or obstructing the course of justice. He pleaded guilty on the charge of murder and the charge of defeating or obstructing the course of justice and not guilty on the charges of attempted murder and of Contravening section 2(1) (a) of the Combating of Rape Act, 8 of 2000. These charges relate to the rape and attempted murder of Lucia Jaartzé on 27 November 2014 at or near Karasburg in the district of Karasburg.

The State's case

[2] The State called eight witnesses. The complainant, Lucia Jaartzé testified that she was residing in the settlement of Satco close to the town of Karasburg during 2014. She grew up in that settlement and was staying with her partner. She was born in 1974 and knew the accused person very well as he visited their house like a child in the house and they fed him from time to time. On the evening of 27 November 2014 she visited her daughter whereafter she returned to her house and started drinking alcohol, a wine called Leeukop. She finished drinking her wine and then decided to proceed to another house in the settlement where they were celebrating a proposed marriage or engagement. She cannot say how much she drank but it was many glasses of wine. She and her partner shared a 5L box of wine and she was intoxicated. She was on her way to that house when she met with the accused who informed her that tonight is their night. She rebuked him and said he is just a child whereafter he said that she and her man are not having sexual intercourse and he grabbed her.

[3] He strangled her and they started to wrestle whereafter he pulled off her panties and inserted his penis into her vagina. He was moving his body in a very rough manner. When he was done, he stood up and walked away. During this encounter he hurt her on her breasts and mouth. He also bit her on her arm and she had abrasions on her knees. He bit her after she tried to remove his hand from her neck. She thought that he was going to kill her. She was able to see his face and recognized his voice as that of Nicky, the accused. She could see

clearly as there was a strong light beam at the house of Joseph Kooper which provided light in the area. She testified that she recognized the accused when he was about 5 – 6 meters from her. She could see about 50 – 60 meters with the light from the house of Joseph Kooper.

[4] After the alleged rape the accused left in the direction of his mother's house and she stood up and went to the house where the celebrations were. She asked for assistance there and she was helped by Goggos (Katrina) Kooper. She was only in her dress and bra; she had no shoes, panty or scarf. When she arrived at the house where the celebration was, she called Nicky's (the accused's) name as well as the name of Tonton because she wanted Tonton to assist or help her. Katrina Kooper covered her with a blanket and phoned the police. At the house where she went after the incident she did not see the accused. He apparently came there while she was sitting in the house. The police came and took the complainant to the hospital where she overnighted. In the morning she was taken back home and collected some clothing and the accused and a certain Tonton was picked up by the police. She was in the vehicle when they were picked up and heard the accused saying that Tonton is also guilty of the sexual intercourse. She indicated that Tonton was not present, she only saw the accused.

[5] At the hospital a number of pictures were taken of her, showing her injuries and she also pointed out the scene where the incident took place the day there-after to the police who then also took pictures as well as compiling a photo plan. At the scene of the incident there were two sets of footprints of which one set was of bare feet. The complainant testified that she lost her shoes in the scuffle. She testified that there was blood on her bra as a result of a wound she suffered on her lip. There was also blood on the underwear that was found but that she was menstruating at that stage.

[6] The 2nd witness called by the state was Martin Ngeli Tjisupa. He is a medical doctor and currently stationed at Karasburg. He completed two J88

forms after he examined the complainant and the accused on 28 November 2014. He noted that she was stable and fully conscious, with a blood stained bra. She had bruises on her neck on both sides and a wound on the chin. The bruises on her neck were caused by the applying of some significant force on her skin. She had a bite mark on her fore-arm near the wrist as well as bruises on the left elbow and both knees. There were small lacerations on the lower and upper lip and the right cheek was swollen and tender. She smelled of alcohol. He testified that the lesions found on the complainant correlated with the incident and that no rape kit samples could be collected as there was no rape kit available. He also examined the accused and identified a scull laceration apparently caused by the cousin of the accused with a knife and some older injuries. He could not say whether there was in fact sexual penetration or not but did not rule it out due to the fact that the witness is sexually active and might have had children already.

[7] Next the State called Katrina Kooper. She knows the accused as they attended the same school and they all stayed in Satco settlement. On the 27th of November 2014 they were having her sister's engagement party at their house. She testified that at about 24h00 the ceremony ended and they started handing out food. At that stage she was looking for the accused and Tonton to ensure that they get food as they assisted her through the week with arrangements for the party. She could not find them. She at some stage wanted to barbeque some more meat and went outside to the woodpile to collect wood for the barbeque. Here she found the complainant standing in a bra and a skirt without any panties. She took the complainant inside and questioned her as to what happened but she was screaming, making a lot of noise and screaming out the names of the accused and Tonton.

[8] During this time the accused came there. He looked confused and asked why the music was off. He went to sit at the fire and asked her for some warm water to wash his hands. He looked dusty and it looked as if he was washing blood from his hands, the water dripping from his hands was red. He told her not

to get involved in the story but to hand over the complainant, who was inside the house at that stage, as he was not yet done with her. He was moving towards the door of the house but was stopped by the witness and she told him to go back home and sleep. The accused then went to the other side of the house and a quarrel broke out between him and Donovan who scratched the accused with a knife. The complainant heard them and screamed at Donovan to stab the accused as he was the one that stabbed and strangled her. This witness called her aunt and asked her to contact the ambulance as well as the police.

[9] The next witness was Hilda Kathrina Vries. She testified that she also resides at Satco settlement and she attended the celebrations the evening of 27 November 2014 at the house of Katrina Kooper. She returned to her house after 24h00 after she helped to feed the people. After 01h00 Katrina came to her house and asked her to contact the police and she then phoned the police as well as the hospital to inform them about the complaint of rape by the complainant. The next morning at 07h00 she left her house and the police vehicle passed her. She saw the accused and told him to return to his house as the police were looking for him. The police found him and placed him at the back of the vehicle where she again saw him and spoke to him. She asked him whether he knew what he has done and he answered that he was not alone. The complainant was in the front of the vehicle and heard him and told him that he was the one who did it. She conceded in cross-examination that it does not mean that the accused did anything. She further testified that the complainant was very drunk on 27 November 2014 as she came drunk already from Karasburg and continued drinking.

[10] The state witness Ignatia Elisma April testified that she picked up the panties of the complainant on the Saturday morning whilst she was on her way back to her house. It was a black panty and a pink panty and they were bloody. She gave the panties to the daughter of the complainant. She pointed out the place where she found the panties on the photo plan. She further testified that there is a strong light at the house of Joseph Kooper which lights up the area

depicted on the photo plan where the incident took place. She saw footprints at the place where she picked up the panties, two sets, one a barefoot track and one set of shoed tracks, similar to the tracks of Tommy tekkies.

[11] Luciana Ellenor Jaartzte testified that she was at the celebrations. She went there between 19h00 – 20h00. At some stage the complainant arrived there and when she saw her she had a tjalie around her. There-after the accused also came there and she observed that he looked wild, like someone who was chased or frightened. At that stage she asked Tonton to walk her home. She further indicated that the accused did not leave at 22h00 as he indicated; it was late when he left. Antonius van Rhyh then testified. His nick name is Tonton. On the evening of 27 November 2014 he went to attend the celebrations at a certain house in Satco. He was sitting with some friends and then a certain Babatjie called him to come and assist to push his car. After he assisted Babatjie, he returned to the house where the celebrations were and was then asked by Luciana Jaartzte to escort her home, which he then did. The next morning the police picked him up from his house and told him they were investigating a rape case. He rode at the back of the vehicle with the accused person who at some stage said that the witness raped the complainant. After they finished at the hospital, the accused was locked up and he and the complainant could return to Satco. He did not know why he was picked up by the police and he did not have sexual intercourse with the complainant on 27 November 2014.

[12] The state then called Louis Selvester Bostander. He testified that he knew the accused and that they spent 27 November 2014 in Karasburg. They were drinking around town. Between 16h00 and 17h00 the witness, the accused and some other friends went back home to Satco. The accused was behind them but also arrived at the house of the witness where they continued drinking. At some stage the accused was spitting all over the place and they chased him away. This was before sunset, late afternoon and still light. At about 19h00 they went to the house where the celebrations were. They sat outside, behind the tent and continued drinking. While they were still there, the accused arrived there and

wanted to drink some of the witness's alcohol. An argument started and the witness scratched him with a knife behind his right ear, on the head. From there the accused ran away. He then walked around to the front and saw his aunt, the complainant, standing there in her petticoat. She had sand and blood on her face. He did not speak to her but heard people asking her who did this to her and she answered Nicky (the accused).

The accused's case

[13] The accused testified himself and called no other witnesses. He testified that he was arrested on 27 November 2014. He was at that time, staying at a settlement called Satco, outside Karasburg. He knows the complainant as she is the neighbour of his mother, at whose house he stays in Satco. He got up that morning and was on his way to Katrina's house when the police stopped him. He was called over by a warrant officer, Ellen Beukes who showed him a charge sheet and informed him that they were going to arrest him on a charge of rape. He was locked in at the back of the van and the complainant went with the police to show them the scene where the rape took place. The complainant then pointed a spot out close to the house where the celebrations took place at the rubbish dump as the place where the rape took place. While there, a certain Hilda Vries arrived and she informed the police that it is the accused and Tonton who raped the complainant. They then proceeded to the house of Tonton. The accused also told the warrant officer that he did not rape the complainant. Tonton also denied raping the complainant. From there they proceeded to the hospital and the accused, the complainant and Tonton saw the doctor.

[14] The doctor asked him to remove his trouser and examined him. He asked him about the wound on his head and the accused explained that it was a wound he sustained when he was stabbed with a knife by Donovan the previous evening. The accused was shown exhibit "E" which was a medical report completed by the doctor from injuries he observed on the body of the accused. Some of these injuries were old injuries caused when the accused played soccer.

The injury on his left shoulder was caused when he was chased by Donovan with an open knife and he ran through a fence to get away and was scratched by the fence. The cut wound on his head and the injury on his shoulder were caused on the same day and about one to two days old. He saw the complainant on 27 November 2014 when she was in the van and they went to the hospital.

[15] According to the warrant officer the accused committed two offences on 26 November 2014. That day he woke up and went to town where he was the whole day. He returned from town at about 21h00 and then proceeded to the house where the marriage festivities were taking place. It was an engagement party as the marriage took place only later on 28 November 2014. The house of Katrina Booyesen where the party was taking place is about 1700m from the house where the accused stays with his mother. When he arrived there he found Katrina in the kitchen area. She informed him that she bought a container Overmeer wine which was with Donovan and the others who helped to set up the tent and was for them who helped her to drink. The accused went around the house and found Donovan and the others drinking the wine but Donovan indicated that he did not want to share the wine with the accused and a fight broke out and the accused was stabbed by Donovan on his head. Donovan wanted to stab him for the second time, and he ran away through the fence.

[16] He did not drink anything at the house of Katrina but he was under the influence when he arrived there. He was in the mood (op 'n plak) and had consumed a bottle of wine and two bottles of black label beer. He was not at Donovan's house, he went straight home and went to sleep. He did not see Tonton or the complainant at the house of Katrina. The accused also denied asking for warm water to wash his hands when he arrived at the house of Katrina and neither was his hands blood-stained.

[17] Although there might be some confusion about the date of the incident, the accused testified that the engagement party was the Wednesday evening and he was arrested on the Thursday, the 27th. He only noticed the cut on the lip

of the complainant but did not observe any other injuries. He denies seeing her the evening of the engagement party and also denies being at the house of Donovan earlier that day and being chased away for spitting.

Legal considerations

[18] From the onset, the accused denied being the perpetrator in the rape of the complainant. The identity of the perpetrator was therefore in dispute. In *S v Ndikwetepo and others*¹, Muller AJ as he was then said the following:

‘Various factors like the witnesses’ previous acquaintance with the accused, accused’s clothing, specific features, opportunity for observation, time lapse between the incident and the trial should be properly investigated to reject any reasonable doubt as to the identity of an accused person. In this regard the Court is more concerned about the witness’ accuracy than his sincerity.’

[19] In *S v Mthetwa*,² Homes JA said the following regarding evidence of identification and the factors that should be taken into account when weighing such evidence:

‘Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused’s face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities.’

¹ 1992 NR 232 (HC).

² 1972 (3) SA p766 at page 768.

[20] It was further evident from the testimony of the witnesses before this court that a number of them were drinking liquor that specific day and were under the influence of liquor. When evaluating their evidence, including the evidence of the complainant, the court took into account what evidence was available regarding their intoxication level. In *S v Britz* Liebenberg J, reasoned as follows regarding the level of intoxication of a witness:

‘From these facts, when considered together with the observations made by Chico and Apollus, it could reasonably be inferred that Minnie’s behaviour at different stages that night was comprehensible and rational in the circumstances. She was lucid when making the first report at the Swartbooi house and again thereafter to the police. I am therefore of the opinion that not too much should be made of her evidence that she was ‘drunk’ as that is not borne out by her conduct and appearances that night. Her subsequent qualification that she was not seriously affected by the liquor therefore appears to me to be more correct. For the aforesaid reasons, evidence on this point clearly refutes any suggestion that the witness Minnie was intoxicated to the extent that she was incapable of making any of the observations testified on by her. I am accordingly satisfied that, despite the witness Minnie having consumed liquor earlier that evening, there is no reason for this court to rule her version of the events that night unreliable.’

[21] It further appears that the accused is raising an alibi in that he went home at about 22h00 and went to sleep. In *S v Chunga*³ it was pointed out by the learned Liebenberg J

‘It is established law that the accused does not bear the burden of proof when raising an alibi defence. When faced with an alibi defence the court is required to assess the alibi in the same way as any other defence and must decide whether it is reasonably possibly true or whether it should be rejected as false beyond reasonable doubt. See *R v Biya* 1952 (4) SA 514 (A) at 521D-E; *R v Hlongwane* 1959 (3) SA 337 (A).’

[22] It is also true that various inconsistencies were pointed out between the statements made by the witnesses and their evidence in court as well as slight

³ (CC 15/2012) [2014] NAHCNLD 18.

differences between the evidence presented by each of the witnesses. In *S v Oosthuizen*⁴ where at 576G-H it is stated:

'That not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence. ... In my view, no fault can be found with his conclusion that what inconsistencies and differences there were, were "of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction". One could add that, if anything, the contradictions point away from the conspiracy relied on.'

[23] When faced with two mutually destructive versions, the court must follow the approach evaluating the evidence as set out in *S v Singh*⁵ and followed in our jurisdiction in *S v Engelbrecht*⁶ as follows:

'Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the 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. The best indication that a court has applied its mind in the proper manner in the abovementioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.'

⁴ 1982 (3) SA 571 (T).

⁵ 1975 (1) SA 227 (N).

⁶ 2001 NR p224 (HC).

Evaluating the evidence

[24] The complainant testified that she recognized the accused when he approached her. She could see his face in the light that was shining from the light pole in front of a certain Joseph Kooper's house and knew his voice and she recognized it when he told her that it was their night tonight. The issue of the lighting was corroborated by the evidence of Elisma April who also testified as to the strength of the light in front of the house of Joseph Kooper. The complainant knew the accused for a long time as he grew up in front of her and visited her house frequently. The court further took into account that she was under the influence of liquor although she testified that she was not drunk and could walk straight. Katrina Kooper however testified that she was drunk. She also reported the rape and the name of the accused to the first person she met, Katrina Kooper. When the complainant met her, she called out the name of the accused Nicky and Tonton, whom the complainant explained she wanted assistance from.

[25] In its evaluation of the complainant's evidence the court was mindful that she was a single witness as far as it concerns the allegations that she had been raped by the accused, and that although a court may convict on single witness evidence, it must be satisfied that in every material respect the testimony was satisfactory, and that the truth has been told. In this instance the court also took into account that the complainant was under the influence of alcohol when the rape took place.

[26] The complainant's panties were removed and she was strangled and bitten on the arm during the struggle on the ground. The marks around her neck and the bite mark on her arm were also observed and noted by Dr Martin Ngeli Tjisupa when he examined the complainant the next day. She was then raped and during the strangulation she thought she would be killed. Dr Martin Ngeli Tjisupa further testified that he did not find any injuries to the complainant's private parts but explained that sexual intercourse could have taken place

without leaving any marks because of the age of the complainant and because she had children.

[27] The court accepts the complainant's evidence that she felt as if she was going to die when she was strangled and Dr Martin Ngeli Tjisupa further testified that the bruising on the neck of the complainant was caused by applying substantial force to the neck.

[28] The issue of the incorrect dates were never raised in cross-examination of the state witnesses. The evidence before court is that the rape and attempted murder of the complainant happened in the late hours of 27 November 2014 and the arrest of the accused on 28 November 2014. The court find that it is clear from the evidence of the witnesses and the accused that they were talking of the same events although the dates provided by the accused do not correspond with the dates provided by the complainant and the other state witnesses, the material events referred to, is the same events.

[29] Katrina Kooper testified that the celebrations only started at 21h00 and that they finished handing out the food after 24h00. At that stage she was looking for the accused and Tonton to also give them some food, but they were not there. It was therefore after 24h00 when first the complainant appeared at the witness's house and then the accused. Donovan (Louis Bostander) also testified that he and the accused were in a fight, where-after the accused ran away and he then went to the front of the house and found the complainant already there. Katrina Kooper further phoned Hilda Katrina Vries at about 01h00 the morning to seek assistance in reporting the rape to the police. The evidence of the accused that he left the house of Katrina Kooper at 22h00 is therefore not accepted. He had the opportunity to call a witness, like his mother, to come and confirm his alibi but he failed to do so.

[30] The court finds Katrina Kooper a reliable witness and accepts her evidence. She indicated that she did not drink any alcohol and was therefore sober. She testified that she found the complainant partly dressed, bloody and

confused when she went to collect more wood. The complainant reported the rape to her and called out the names of Nicky and Tonton. There is then also no reason not to believe her that the complainant saw the accused when he went to the other side of the house and indicated that he is the one who kicked, hit and strangled her.

[31] Katrina Kooper also described the condition she found the accused in. He was covered with dust and she also testified to the fact that the accused asked for water to rinse his hands and she observed that he was washing blood from his hands. The court also accepts that the accused told her not to get involved and to hand over the complainant to him as he was not yet done with her.

[32] In light of the above, the court finds the accused guilty on the count of attempted murder and guilty on the count of Contravening section 2(1) (a) of the Combating of Rape Act, Act 8 of 2000 – Rape. The accused was already convicted on a count of murder and a count of defeating the course of justice after his plea of guilty was offered on these two charges.

E RAKOW
Acting Judge

APPEARANCES:

FOR THE ACCUSED:

T lipumbu
Titus lipumbu Legal Practitioners
Windhoek

FOR THE STATE:

H lipinge
Of Office of the Prosecutor-General
Windhoek