

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: CC  
17/2019

In the matter between:

**THE STATE**

Versus

**CHRIS VAN WYK**

**DESMOND !OWAS-OAB**

**Neutral citation:** *S v Van Wyk* (CC 17/2019) [2021] 162 NAHCMD (16 April 2021)

**Coram:** CLAASEN, J

**Heard:** 06-09 October 2020, 02-04 November 2020, 06 November 2020, 21  
January 2021, 26 January 2021, 04 February 2021, 19 March 2021

**Delivered:** 16 April 2021

**Flynote:** Criminal Law – Rape – under coercive circumstances – In the absence of evidence from the complainant, it has to be determined whether the proven facts, are sufficient to make an inference that sexual penetration occurred. Cardinal rules of logic

from *S v Blom* 1939 AD 188 – The inference sought to be drawn must be consistent with all proved facts and the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.

Penetration – Vaginal penetration – Absence of injury on genitalia – Injuries may provide proof of the insertion, but penetration can occur without injury to the vagina – Hymen need not be ruptured – Physical injuries to the genitalia is not an indispensable requirement for proof that sexual penetration occurred.

**Summary:** The accused and co-accused were indicted on multiple charges. After an application for Discharge in terms of s174 of the CPA the accused was placed on his defence on count 2.

One evening a resident of Swakopmund, noticed something unbecoming at an open space area as he came from a bar. He observed that four men were pulling a lady and she screamed that the men should leave her. He ran to the Mondesa police station. He and two police officers returned to the scene about 20 minutes later.

That resident and two police officers observed that a naked lady was lying stretched out on the ground. Three men were holding her by the arms whilst a fourth man, the accused was found was found in *flagrante delicto* on top of the lady. Once the vehicle's lights were switched on, the three men that were holding the lady ran away. The accused also tried to run, but was held by the lady and his knees on the pants further prevented him from making a successful getaway.

The lady had injuries on her face and multiple abrasions on the body and a cut panty, brassiere which belong to complainant and a cell phone that belongs to accused was found on the scene. The identity of the accused proven by the State, as he was apprehended and on the scene.

The complainant passed away before the trial commenced as such there was no

evidence from the complainant. Question arise whether penetration was proven? Court relies on inferential reasoning. Court found that based on the facts proven through evidence of Mr Ndjalo and the two police officers at the scene, sexual penetration flows logically and reasonably from the facts. Furthermore court also found that the evidence excludes any reasonable hypothesis of innocence by the accused.

Accused opted not to testify. During cross-examination his version, which was never put under oath, alluded that he was a victim and was attacked by a group of four men. Defence also insinuated that the movements of the accused on the complainant could have been a different or new type of dance performed by the accused. To perform a dance in the dark of night, amidst rough stones and sand, on the naked body of another person, do not fit in with a dangerous situation of being under attack and having to defend oneself against lawbreakers.

Held – The State had to prove beyond reasonable doubt that the accused intentionally committed a sexual act under coercive circumstances.

Held – The identity of the accused was successfully proven as he was found in *flagrante delicto* on top of the naked lady lying on the ground.

Held – In a criminal case the purpose of a witness statement was to obtain details of an offence to decide whether or not to institute a prosecution. It is unrealistic to expect from a lay person to anticipate what issues will arise in court and insert that into his witness statement. A witness statement is the skeleton and flesh is added in court.

Held – The accused's version, which he did not attest under oath, was that he was walking with the lady and they were attacked. If the accused was on the scene to defend him and the girl against the attackers, it does not account for the fact that he was found busy in the act, penis exposed on top of the naked lady. A person who is a victim of an attack is not likely to want to flee, once the police arrive.

Held – The accused's inference proposed in court that the movements made by the accused, could as well have been a new type of dance. To perform a dance in the dark of night, amidst rough stones and sand, on the naked body of another person, does not fit in with a dangerous situation of being under attack and having to defend oneself against lawbreakers. It is farfetched and unreasonable.

Held – In the absence of evidence from the complainant, it has to be determined whether the proven facts, are sufficient to make an inference that sexual penetration occurred. The court applied the two cardinal rules of logic that the inference sought to be drawn must be consistent with all proved facts and that the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.

Held – Although injuries may provide proof of the insertion, penetration can also occur without injury and specifically that the hymen need not be ruptured. Thus physical injuries to the genitalia is not an indispensable requirement for proof that sexual penetration occurred.

Held - After considering the explicability of the defence's version and the facts as attested to by the three state witnesses who arrived on the scene, the court is satisfied that sexual penetration flows logically and reasonably from the facts and that it excludes any reasonable hypothesis of innocence by the accused

Held – It could not be disputed that the complainant had physical injuries, was intoxicated and held down on the ground when found. A cut panty, a brassiere and a tablet cell phone found on the scene. Complainant hit accused on the scene with a stone on his forehead. This action considered in the context of the surrounding circumstances leads to the conclusion the injuries were caused by the group of men, of which the accused was the only one caught in the act on the scene. State proved the presence of coercive circumstances.

Held – There is no onus on an accused to prove his innocence. However once State established a prima facie case against the accused which remains unchallenged, the court may, in appropriate circumstances, conclude that such prima facie evidence has become conclusive. Principle from *S v Katari 2006 (1) NR 205 HC* applied. Whether such a conclusion can be made depends on the weight of the evidence in the particular case. This is one of those cases where the accused could not have remained silent in the light of the overwhelming evidence of the elements of the offence.

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### ORDER

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Count 2: Guilty of Rape, in contravention of s 2(1) (a) of Act 8 of 2000.

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### JUDGMENT

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CLAASEN J

*Introduction*

[1] The accused stands before court to answer a charge of rape; it being alleged that on 01 November 2015 at or near Masilo street, Mondesa in the district of Swakopmund, he wrongfully, unlawfully and intentionally committed a sexual act under coercive circumstances with Trudy Cloete, by inserting his penis into the vagina of the complainant. The coercive circumstances were that physical force was applied to the complainant and or the complainant was affected by intoxicating liquor or drug which mentally incapacitated her and or circumstances where the presence of more than one person, namely Desmond !Owos-oab and Chris van Wyk was used to intimidate the complainant.

[2] The accused and a co-accused were indicted on multiple charges of rape, assault with the intent to do grievous bodily harm and theft of a cell phone. Both accused

persons were represented and pleaded not guilty. They furthermore exercised their right to remain silent.

[3] The State presented the evidence of eleven witnesses:

3.1 Mr Toivo Ndjalo, a resident of Swakopmund who walked along the open area that evening where the alleged incident took place;

3.2 Mr Immanuel Nzinga, the boyfriend of the complainant at the time;

3.3 Mr Alfred Kooper, an uncle of the accused;

3.4 Dr Kenneth Manando a qualified medical doctor who practiced at the Swakopmund State Hospital and examined the complainant and the accused;

3.5 Police Officers namely:

3.5.1 Constable Rebecca Petrus, previous surname Shinjoba, who was on duty at Mondesa Police station at the material time and went to the scene;

3.5.2 Constable Andreas Kwedhi, the driver of the police vehicle that drove to the scene at the material time;

3.5.3 Constable David Haidula, of Mondesa Police Station, who was the arresting officer;

3.5.4 Sergeant Onesmus Shiweva of Mondesa Police Station, who compiled the photo-plan of the alleged crime scene;

3.5.5 Sergeant Charmaine Kongoro, to whom the docket was assigned at some point in time and who discovered that the complainant passed away in 2017;

3.5.6 Sergeant Hileni Kutondoua an officer at the Gender Based Violence subdivision at the coast, who investigated why the surname on the death certificate of complainant is different than her surname in the docket;

3.5.7 Warrant Officer Ndapunikwa Haimbodi also attached to Gender Based Violence Protection subdivision in Walvisbay who interviewed complainant after the alleged incidents and who received real evidence which was collected at the scene.

[4] The State also tendered, the following documentary evidence which was admitted by consent between the parties:

4.1 The medico-legal report and the collection of forensic evidence form for accused marked as exhibit 'C1' and 'C2') and the medico legal report in respect of the complainant, marked exhibit 'D' which documents were completed by Dr Kennedy Manado;

4.2 A photo-plan of the alleged crime scene, registered as negative number 269/2015, marked as exhibit 'E'

4.4 Witness statements of the following state witnesses:

4.4.1 Mr Toivo Ndjalo, exhibit 'B';

4.4.2 Mr Immanuel Nzinga, exhibit 'F';

4.4.3 Constable Rebecca Shindjoba exhibit 'G';

4.4.4 Constable Andreas Kwedhi exhibit 'H' and

4.4.5 Death certificate of the complainant, exhibit 'I' which indicates date of death as 17 February 2017.

[5] The State also presented real evidence, admitted by consent namely:

7.1 A cut panty, white with pink, blue and yellow stripes, marked as exhibit '1';

7.2 A brassiere, black in colour with pink hearts, marked as exhibit '2';

7.3 A tablet cellphone, dark in colour, exhibit '3'.

[6] Both accused brought applications in terms of s174 of the Criminal Procedure Act, No 51 of 1977 as amended. They were successful on all the counts, with the exception of the above charge, which is count 2 in the trial. As such only accused 1 was placed on his defence on the charge allegation as specified in the introduction. All references in the transcript by state witnesses to accused 1, in fact refers to the current accused.

[7] At the close of the State's case, the accused elected to exercise his right to silence, and did not call any witnesses.

### *The Evidence*

[8] Mr Toivo Ndjalo employed at the Municipality of Swakopmund, is a plumber by profession. He testified about events that he came across on the evening of 01

November 2015. He was coming from a certain bar and walked across an open space area. The scene was illuminated by a street light and he saw four men forcing and pulling a lady in different directions. He stood still and heard the people spoke Afrikaans which he understood. The lady shouted leave me, and one of the men said that once they are finished sleeping with her they must kill her because she saw them and will report them.

[9] That prompted him to run to the police station. It took about 20 minutes to get there. He reported it to a female and male police officer. The three of them hurried to the scene with a Toyota bakkie of the Namibian Police. Upon arrival at the scene, he saw the following: ' Accused 1 we found him on top of the lady My Lady, and the girl, the lady was naked<sup>1</sup> and that 'he was busy having sex My Lady.'<sup>2</sup> He described that the lady laying on her back on the ground, with her arms stretched out.

[10] Once the lady noticed their arrival she grabbed the accused and held on to him, while the other three men ran away from the scene. The accused was apprehended on the scene. He saw that the lady was assaulted, in particular that her lip and eye was red. When asked what else the complainant did, apart from grabbing the accused, he said that:

'My Lady the girl herself spoke that day she said "he is not my man, he is raping me, he is not my man."<sup>3</sup>

[11] During cross-examination Counsel for the accused crucified the witness for details that were omitted from his witness statement, such as, that the lady screamed 'leave me', that the lady said 'the accused was not her man and raped her', that the accused was naked and the sex part. Mr Ndjalo said he cannot account for how the police wrote down his statement, that the complainant must be fetched to come and say, and that regardless of the details that were not written, he is now in court and he is explaining the details in court.

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<sup>1</sup> Page 17 of transcript.

<sup>2</sup> Page 18 of transcript.

<sup>3</sup> Page 21 of transcript.



[12] During the interrogation, Mr Ndjalo's evidence that the accused was found naked on the scene was juxtaposed with information from Andreas Kwedhi's statement that the accused's pants were hanging on his knees. Mr Ndjalo repeated that the accused was naked.

[13] The version of the accused was also put to Mr Ndjalo. The components were that the accused and complaint knew one another, that they agreed at Shinedima bar to have sex in the toilet, which could not materialise due to disturbances, that thereafter they walked home and were attacked by four guys. Mr Ndjalo was unable to comment on these aspects.

[14] Constable Rebecca Petrus, testified that she was on duty with Constable Andreas Kwedhi when Mr Toivo Ndajo came running and reported about the four men that attacked a lady. The location of the attack was described as an open space, situated behind the Mondesa Youth Opportunity (MYO). They rushed to the scene in a police bakkie.

[15] Upon arrival at the scene, the spot lights of the vehicle were switched on. She saw three boys sitting on the ground. They were holding the arms of a lady who was lying, naked on her back, whilst the fourth boy was on top of the lady, making movements with his lower abdomen like someone who was engaged in sex. Before they could disembark from the vehicle the three boys who were holding the lady ran from the scene. As for the position of the fourth boy, she described that he was between the stomach and lower abdomen. He could not run because the lady held on to him. The lady picked up a stone to hit the accused. She approached the lady and removed her own jacket to cover the lady's nudity. She held the lady and told her to calm down. By then, she turned to the accused who were pulling on his t-shirt. She noticed that the zip of his pants was open.

[16] Constable Petrus collected the torch from the vehicle and picked up the lady's clothes from the ground. It was a dress, a brassiere and a panty. The panty was cut open. She furthermore collected a cap, a phone and 'All Star' shoes. Constable Kwedhi

and Mr Njalo loaded the accused in the back of the bakkie and they returned to the police station.

[17] At the station, Constable Petrus waited a short while before talking to the lady, who was drunk and somewhat disoriented. The lady had blood on her and her face was swollen. The lady told her that four men attacked her. One of the men removed her clothes, put her down and had sex with her without a condom. The lady also said that the accused, who was on top at the time of discovery, was the second one of the group who had sex with her.

[18] She furthermore asked about the owner of the cell phone, and the accused identified it as his property. Constable Petrus identified the items depicted in photo 8 and 9 as the items that she collected on the scene. She also attested that there were street lights in the vicinity, though it was a bit far from the scene. Counsel for the State put to her what if the accused denies that he was on top of the lady, and says that he was next to the lady. She refuted that by saying she saw it with her own eyes and also referred to her conversation with the lady.

[19] During cross-examination Constable Petrus was asked to comment on the accused's version. Constable Petrus was unable to comment on that, except for the notion that the accused and the lady were attacked by four men and that was how he was assaulted. She refuted that by reiterating that she was present when the complainant hit the accused with the stone on his forehead, it happened at the scene.

[20] The witness's interpretation of what she saw or construed the scene to be was tested. It was stated that if it was sex it could have been consensual sex, or it could have been a new type of a dance that the accused was performing on the complainant. Constable Petrus conceded that it may have been a dance. It was put to her that she does not know for a fact that it was indeed sex that occurred and she replied that he was making movements akin to sex.

[21] Her evidence as regards to the open zip of the accused's pants were pursued, as being different to that of Mr Ndjalo or Constable Kwedhi's witness statement. Constable Petrus answered that by the time that she managed to get out of the car and reached the accused and complainant, both were standing. That is when she noticed an open zip of his pants and that she as a fellow lady, first focused all her attention on the naked victim.

[22] Constable Petrus was questioned about the sobriety of Mr Ndjalo that night, in view of her testimony that he spoke in a repetitive manner. She first stated that she got the impression he was drunk, but she later adjusted that answer to he was either drunk or confused or afraid.

[23] In clarification the witness was asked about the proposition advanced by Counsel for the accused that it could have been rough consensual sex. Constable Petrus stated it could not have been consensual sex, because if the lady agreed, she could not have held on to the accused and hit him with the stone. As for her earlier agreeing to the proposition by counsel for the accused that it was a new type of dance, Constable Petrus had a change of heart and answered as follows: ' --- It does not look like a dance, because the lady was totally naked. I do not think the person can dance on top of a naked person.'<sup>4</sup>

[24] Constable Andreas Kwedhi was the other police officer that went to the scene. He confirmed the report by Mr Ndjalo. He devised a strategy as they approached the scene, in that the vehicle's lights were off so that the suspects cannot be alerted. He switched on the lights only once they arrived on the spot.

[25] According to him they found three guys and one guy on top of the lady. His account was that: 'The other three boys run away and the fourth one who was on top of the girl also rise up and when he was running his trouser was up to his knees.'<sup>5</sup> In further explication of what he observed upon arrival, he reiterated that the one of top of the lady was making up and down movements like a person having sex and the other there boys were holding down the lady by her arms. Constable Shinjoba, now Constable Petrus, screamed that

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<sup>4</sup> Page 209 of record.

<sup>5</sup> Page 218 of record.

they are police and want to help. The girl then grabbed the t-shirt of the guy that was on her and held on to him.

[26] He testified that he and Mr Ndjalo focused on the accused and Constable Petrus focused on the lady. Both the accused and the lady smelled of alcohol. Still at the scene, the lady took a stone and hit the accused on his forehead. The accused bled a lot, which is why he took him to the hospital later on.

[27] He enquired as to what they saw and the accused said the lady was his girlfriend and it was not rape. The lady denied that. She said that one of the others in the group already had sex with her and the accused was the second one to do so.

[28] During cross-examination he was taken to task about some of the details in his oral testimony that was not written in his witness statement. Particular aspects mentioned were that the one laying on top of the lady was between the private parts and pelvic area of the complainant and that the accused told him on the scene that it was his girlfriend and that it was not rape. Constable Kwedhi agreed that some of the details were missing. His explanation was that at the time he wrote his witness statement he was new on the job.

[29] He was asked to clarify the accused position and location whilst on top of the lady. He stated that accused's head was up but that his private parts were between the legs of the victim and in particular that it : 'Was touching the private parts of the victim'.<sup>6</sup>

[30] It was put to Constable Kwedhi that they were lying about the accused being found naked at the scene. That he said was because according to Mr Ndjalo the accused was naked, whereas Constable Petrus referred to an open zip and this witness spoke of pants on the knees. Constable Kwedhi answered that each of them are correct and alluded to the fact that each of them told the story as they observed it and can remember it.

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<sup>6</sup> Page 234 of record.

[31] Constable Kwedhi was also asked whether he could see the private parts of the accused and he answered as follows: '--- Yes I could see it but at that time he was trying to pull his trouser up, it is when he stood up or rise up from the victim.'<sup>7</sup> A similar question followed about the preceding moment. He was asked: 'At the point when you saw him laying on top of the lady when you arrived at the scene, could you see his private parts at that time? --- No it is impossible, if people are busy in an act, or are busy having sex, to see the private parts, it is impossible.'<sup>8</sup> It was proposed to Constable Kwedhi, because of that, he is not in a position to say whether there was sex or rape. The witness answered in the negative and stated that a person cannot just be naked and not do anything.

[32] Counsel for accused 2, canvassed the sobriety of Mr Ndjalo that night. This was in view of Constable Petrus's initial impression that he was drunk because he kept on repeating himself. Constable Kwedhi disagreed and explained that: '--- No my lady what I hear he repeat himself, every time he say hurry up let us go, drive fast, because maybe the person will be killed. And he repeat himself every time but he was saying the same thing.'<sup>9</sup>

[33] As far as forensic analysis was concerned, though Dr Manado collected swabs from the relevant parties, it came to nothing. He passed it on to the police and could not answer as to what happened thereafter. As for injuries on the accused, Dr Mananado noted down a laceration on his forehead, bruises on both legs and that there were blood stains on his clothes.

[34] In recording the complainant's history, she informed him that she gave birth four times. In respect of the complainant's gynaecological examination the hymen was not intact and there were no bruises on the genitalia. The physician did however noted down a deposit in the vagina, which sample was collected and handed over to the police for microscopic analysis, which results were not procured.

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<sup>7</sup> Page 238 of record.

<sup>8</sup> Page 241 of record.

<sup>9</sup> Page 253 of record.

[35] Dr Manado attested of soft tissue injuries on the complainant that he observed and recorded in exhibit 'D.' In particular, he referred to bruising on the lip, bruising and swelling on the left eye, multiple abrasions on the chest, abrasions on the back part of the right elbow, and abrasions on both legs, below the knees. The condition of her clothes were also blood stained. He came to a conclusion of 'recent trauma evident'. When asked what formed the basis for that stated that he relied on the physical condition as well as the depressed emotional state of the patient.

[36] Dr Manado was also asked whether sexual intercourse can take place without any bruising to the vaginal area and he answered in the affirmative. He explained it is possible when there is lubrication which could be provided by the body's secretions or by a condom if that was used.

[37] Sergeant Onesmus Shiweva, testified that he compiled the photo-plan. He explained that photo 7 to photo 13 was taken on 02 November 2015. That is as opposed to, that is photos 1 to photo 6, were taken on 22 November 2015 and the points were identified by the complainant, Ms Cloete.

[38] Photo 1 demarcated certain pertinent points, such as point 'D' being the position in the sand where the alleged rape took place. A close up photo of 'point D' depicts a sandy area in the middle of adjacent sand heaps with stones. Photo 8 depicts a tablet cell phone, a torn or cut panties and a brassiere. Photo 13 shows the complainant, and injuries on the left eye and her lip are clearly visible.

[39] Warrant Officer Ndapunikwa Haimbodi's involvement in the case is that she was contacted by Constable Petrus to attend to this rape case urgently. She drove to Mondesa Police Station. There she interviewed the victim who relayed the ordeal to her. She furthermore also attested that at the time she received a panty, a brassiere and a cell phone from Constable Petrus. She identified the items which were admitted by consent and marked as exhibits '1', '2' and '3' respectively. She was also asked about

what happened to the results of the rape kits and answered that she does not know as she handed the case docket over to another officer.

[40] Sergeant Charmaine Kongoro, was also employed at the Mondesa Police Station. At some point in time the docket was assigned to her. She stated that one of her tasks was to locate a certain Bono and Dawid !Owos-oab. She learnt from the mother of Dawid !Owos-oab that he went to school in Katima Mulilo. They agreed to resume contact during the December holidays. Subsequent thereto the mother informed Sergeant Kongoro that David was in the mental ward of the Swakopmund State Hospital. Upon verification at the Hospital, she discovered that indeed David is sick as he was confused and could not really understand what she was saying.

[41] Sergeant Kongoro also informed the court that during her investigations she discovered about the complainant's death. The death certificate was admitted and marked s exhibit 'I' and it shows the date of death as 17 February 2017.

[42] Sergeant Hileni Kutondoua is employed at the Gender Based Violence subdivision. She was called to explain that that the death certificate was issued in a different surname. The reason for that was because the uncle of the complainant gave his surname to the officials, when he reported the complainant's death.

[43] Immanuel Nzinga is the boyfriend of the complainant. They cohabited for a long period and have children together. He testified that on the evening of 01 November 2015 he and the complainant went to Makiti bar and thereafter to Shinedima bar. He testified that he drank beer and the complainant drank Castle Light. By the time that they went to Shinedima bar he was drunk. The bar was full and he wanted to go home, but could not find the complainant. He went home under the assumption that she will be at home. She was not there and he called her, but the call went unanswered. He collected their kids from a friend's house and went to sleep. The next morning he received a call from the complaint. She informed him what happened. In summary his recollection was that three

guys attacked her and when the police arrived the one guy, the accused was still on top of her.

[44] During cross-examination the version of accused was postulated, about him and the complainant agreed to have sex earlier at Shinedima bar, which could not materialise and thereafter they were attacked as they walked home. The witness was unable to comment on the version.

[45] The issue of identification of accused as being the person on top of the complainant was canvassed, and he said that the complainant told him the person is slim and light in complexion and that at the first appearance at court the complainant told him, referring to accused that he was the one of top of her that evening. This witness was asked if he can recognise any of the real evidence, as depicted on the photo plan and he answered that he can recognise the

[46] Mr Alfred Kooper is an uncle of the accused and he rented at the house of the accused at the material time. He attested that the accused did not sleep at home on the night of 01 November 2015 and that a friend of the accused, whose name he cannot recall, came looking for the accused on 02 November 2015. Mr Kooper referred that person to the residence of accused 2 to search for the accused. That person returned with the news that the accused was arrested. In addition, he testified that the accused's father purchased a tablet for the accused that resembles the one in photo 8.

### *Closing Submissions*

[47] Both parties drew on the selective portions of the evidence, in pursuit of their paths, which I will summarise. Counsel for the State, Mr Lisulo emphasized the evidence of the three witness who drove to the scene and the injuries on the complainant. From that he argued the only reasonable inference that can be made is that sexual penetration has occurred under coercive circumstances. He submitted, that accused's silence in the face of incriminating evidence is a fatal mistake for him. He prayed for a conviction, on rape, alternatively on attempted rape or indecent assault.



[48] Counsel for the accused, Mr Siyomundji argued that the evidence was not sufficient for a conviction, especially in view of no rape kit, no DNA and no complainant. In that vein, it was not necessary for his client to testify as there is no onus on him to prove anything. He also lamented the attitude of the State to belatedly come with competent verdicts and stated that it was not feasible.

### *The law and analysis*

[49] For the State's case to succeed, it will have to prove, beyond reasonable doubt, that the accused intentionally committed a sexual act under coercive circumstances.

[50] I revert back to the scene, and unpack the salient features of the three witnesses who discovered the scene. Though there is no street light at the exact spot of the scene, visibility is not in issue, as once the vehicle's lights were switched on, it illuminated that scene. It is not in dispute that they found four boys, and a lady. The lady was naked, on her back, arms stretched out. She was held down on the ground by her arms by three of the boys. A fourth boy was on top of the lady.

[51] The identity of the fourth boy and whether he was on top of the naked lady at the moment of discovery were unsuccessfully explored by counsel for the accused. In this regard Mr Ndjalo, testified, referring to the accused: 'he was on top my lady, that's why the girl caught him.'<sup>10</sup> Further in the record he reiterated that the other boys got away, but accused 1 was caught on the scene. Constable Kwedhi and Constable Petrus' oral testimony corroborated him on that. Incidentally, the fact that the fourth boy was on top of the lady was expressly recorded in the written statements of both Mr Ndjalo and Constable Kwedhi. Constable Petrus' statement expressed it as 'and the boy who was busy that time with the lady try to run also...' As for the configuration of the bodies, Constable Kwedhi's evidence was that the accused's penis was aligned to and touched the vagina

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<sup>10</sup> Page 60 of the transcript.

of the complainant. The evidence uncontrovertibly shows that the accused was caught on the scene.

[52] It is also germane to consider whether the accused was dressed or undressed at the material time. On this aspect there was slight variance in the evidence by the three witnesses on the scene and Counsel for the accused construed it as an indicator that they lied. That was in view of Mr Ndjalo account who said the accused was naked, Constable Kwedhi referred to the pants on the knees and Constable Petrus spoke of an open zip pants. It has to be remembered that the scene changed rapidly once the police vehicle arrived and put on the lights. That exposure caused the three boys to immediately run and the accused getting up from the lady, also in preparation to run. It was clear from Mr Ndjalo and Constable Kwedhi's recollection about that precise moment, that the accused's penis was exposed. Constable Kwedhi attested that he was able to see the private parts of the accused as he rose from the lady. The description of the pants on the knees was made in reference to a time when the accused wanted to flee but was prevented by the pants on the knees, amongst others. The same goes for the reference to the open zip description. By then, moments have passed and the position of the accused had changed. He was now upright and putting on his t-shirt, that was explained by Constable Petrus. In this regard I endorse that principle in the headnote of *S v Auala*<sup>11</sup> that it is not uncommon for witness to differ in minor respects and that does not necessarily render their evidence unreliable. In view of this the evidence of the witness were not inconsistent with each other. The bottom line is that the accused was caught pants down, private parts exposed, which constitutes a compromising position.

[53] Moreover the accused was not lying motionless on top of the naked lady. The evidence of all three of the witnesses that arrived at the scene leave no doubt that they the accused was found in *flagrante delicto* on top of the naked victim. Mr Ndjalo, again, when asked in cross-examination he re-iterated: 'The people had sex My Lady.'<sup>12</sup> Both Constable Kwedhi and Constable Petrus got to the same conclusion, namely that the accused made sexual movements while he was on top of the lady. That much was

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<sup>11</sup> *S v Auala* (No 1) 2008 (1) NR 223.

<sup>12</sup> Page 65 of record.

deposed in the witness statements of the police officials and they did not deviate from that stance during oral evidence. Constable Kwedhi deposed in his statement that 'there was one guy who was on the top of lady busy rape the lady.'

[54] I briefly turn to Counsel for the accused's criticism about lack of details in the witness statements, as pursued in cross-examination. In this regard, in *Hanekom v S*<sup>13</sup> it was held that:

'What is set out in a police statement is more often than not simply the bare bones of a complaint and the fact that flesh is added to the account of oral testimony is not necessarily of adverse consequences.'

In comparing the content of the respective witness statements, it conveys the same message as the one attested to in court. Furthermore the gist of the above reference in the Hanekom case is that a witness statement is the skeleton and the flesh is added in court. Frankly speaking, it is unrealistic to expect from a lay witness, to anticipate what issues will arise in court as insert it into the witness statement. As regards to the purpose of a witness statement in a criminal case, in *S v Govender and others*<sup>14</sup> it was explained that the purpose of such statement was to obtain details of an offence in order to decide whether or not to institute a prosecution and that the statement was not intended to be a precursor to the witness's court testimony.

[55] I also pause to deal with the attempt to discredit Mr Ndjalo's evidence, by virtue of the notion that he was drunk, which was in vain. For starters, Counsel for the accused never pursued this topic with Mr Ndjalo himself when he was on the stand. Counsel for accused 2 explored it, but Mr Ndjalo in no uncertain terms testified that he is not a consumer of alcohol. The issue was tagged on by counsel for the accused after Constable Petrus' testimony that Mr Ndjalo repeated himself. The repetition of words by Mr Ndjalo was put in perspective by Constable Kwedhi's testimony that Mr Ndjalo was urging them to speed up as he was apprehensive that the lady might be killed. A certain degree of anxiety is to be expected by a person who finds himself in the shoes of Mr Ndjalo. He overheard the sinister intentions of the group of men, to be executed with the

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<sup>13</sup> *Hanekom v State* (unreported) case no CA68/1999.

<sup>14</sup> *S v Govender and others* 2006 (1) SACR 322.

lady, who was helpless in the hands of the group. That's why he ran to the police station and why he urged on the police to act speedily.

[56] Generally speaking, the evidence of the person who was allegedly raped is of cardinal importance. That is because that person is the original source of the evidence that forms the subject matter of the trial. But what happens when the complainant is not able to come and testify in court? In this case, the complainant passed away in 2017, almost 3 years before the trial commenced. Does that mean that Counsel for the defence is correct in his argument that, on that basis the State cannot secure a conviction? The answer will become clear as the court turns to the other evidence that may or may not have been present in this case.

[57] Counsel for the accused also petitioned the court because the gynaecological examination did not reveal injuries such as a torn hymen or bruises to the genital area. In the criminal textbook 'Principles of Criminal Law'<sup>15</sup> it is opined that ... 'it does not matter that the women's hymen is not ruptured in the act.' Still on the topic of vaginal injuries and whether that is a necessity in a rape conviction, in *S v David*<sup>16</sup> it was stated that although injuries may provide proof of the insertion, penetration can also occur without injury and specifically that the hymen need not be ruptured. Thus, physical injuries to the genitalia is not a *sine quo non* for proof that sexual penetration occurred. In our case the question was posed to Dr Manande and he explained it by referring to the lubrication of the secretions of the female body.

[58] Generally speaking DNA results can also play it part in supporting or disproving sexual assault cases. In this case the possibility of such forensic evidence was negligently lost in the process of the docket being transferred between various investigating officers.

[59] The question then remains, whether these shortcomings mean the death knell for the prosecution? To answer that question, I return to the oral, documentary and physical evidence as presented. The ultimate question is whether, the proven facts in this regard,

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<sup>15</sup> Burchell and Milton, *Principles of Criminal Law* Juta & Co Ltd 2<sup>nd</sup> ed (1997) p 492.

<sup>16</sup> *S v Leonard Tangeni David* (unreported) case no CC 10/2009. Delivered 18.12.2009 para 53

are sufficient to make an inference that sexual penetration occurred? For that, we have to evaluate it against the two cardinal rules of logic that emanated from *S v Blom*<sup>17</sup> wherein it was held that:

'(1) The inference sought to be drawn must be consistent with all proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

[60] As referred to earlier, the proven facts are that on the evening of 01 November 2015 the naked complainant was lying on her back on the ground. At the time she was held captive by three men sitting on the ground and holding on to her arms. Simultaneously the accused, whose penis was exposed, was busy on top of the complainant. His body was aligned in such a manner that his penis and her vagina touched and he was making sexual movements. These deeds were abruptly interrupted by the light that illuminated the scene and the people that arrived. The three men who detained the complainant immediately fled from the scene. The accused, wanted to flee, but was held on to by the complainant. His pants on his knees also hampered his efforts to get away. These facts were not refuted, not for a lack of trying by the Counsel for the accused, but the State's material witnesses credibly held their ground as to who and what they observed upon their arrival on the scene.

[61] The defence's version that emanated from cross examination was that the accused, when found on the scene, was merely walking home with the lady. They fell prey to a group of attackers and were assaulted by them. At some stage during cross-examination, Counsel for the defence insinuated that the movements of the accused on top of the complainant could have been a different or a new type dance that the accused was performing. If the accused was on the scene to defend him and the girl against the attackers, how did he end up, penis exposed, on top of the lady? A person who is a victim of an attack is not likely to want to flee, once the police arrive. Such person is likely to report the hooligans, especially if they stripped him. Instead the accused reacted the

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<sup>17</sup> *S v Blom* 1939 AD 188 at 202.

opposite way, by wanting to get away. Similarly if it was consensual sex, there would have been no reason for him to run away. Then there is the inference proposed in court that the movements made by the accused, could as well have been a new type of dance. To perform a dance in the dark of night, amidst rough stones and sand, on the naked body of another person, do not fit in with a dangerous situation of being under attack and having to defend oneself against lawbreakers. Not even if one has an elastic imagination.

[62] After having considered the explicability of the defence's version and the facts as attested to by the three state witnesses who arrived on the scene, I have no hesitation to find that sexual penetration flows logically and reasonably from the facts. Furthermore I am also satisfied that the evidence excludes any reasonable hypothesis of innocence by the accused. I have already alluded that the inference as suggested that it could have been a dance by the accused on top of the victim is farfetched and unreasonable.

[63] The remaining issue is whether the sexual act was committed under coercive circumstances. Coercive circumstances is circumscribed in s 2(2)<sup>18</sup> to include acts of force, threats of force and situations that enables a perpetrator to overpower a person or to take unfair advantage of the person.

[64] The un-controvertible evidence by the state witnesses were that not only was the complainant pulled in opposite directions at the beginning of the incident, but also that upon their arrival on the scene, the complainant was physically held down on the ground by the other three men whilst the accused was having sexual intercourse with her. It was not disputed that the complainant was intoxicated, which evidence came from Mr Nzinga, Constable Petrus and Constable Kwedhi.

[65] Furthermore, it could not be disputed that the complainant's face had physical injuries, when found. These injuries were seen by the three witnesses who arrived on the scene. They were confirmed by Dr Kabanje in exhibit 'D' which shows a swollen eye, bruises on the lip as well as multiple abrasions marked on the body and legs. The injuries

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<sup>18</sup> Act 8 of 2000

on the face and legs are also visible in exhibit 'E' photos 11 to 13. The untested version of the accused was that he was assaulted by unknown person, which was credibly refuted by the evidence of the three state witnesses who arrived on the scene and attested that the lady hit the accused with a stone. That happened on the scene, in their presence, before they went to the police station. If the accused was innocently on the scene, the complaint would have had no reason to hit him with a stone. This action considered in the context of the surrounding circumstances leads to the conclusion that the injuries on the complainant were caused by the group of men, of which the accused was the only one caught in the act on the scene. These injuries and the complainant's underwear, of which the panty were cut at the time of being found of the scene by Constable Petrus adds credence that the lady as not a willing partner and that it was an instance of violent sexual intercourse forced upon the defenceless complainant.

[66] In this case the accused's version were mere instructions, and not evidence under oath, subjected to cross-examination. While it is true that there is no onus on an accused to prove his innocence, it is a decision to be taken with due regard to body of evidence already before the court. It cannot be taken lightly. It will only operate in favour of the accused if the weight of the State's evidence is weak and insufficient. In *S v Katari*<sup>19</sup> it was held that once the State established a prima facie case against the accused which remains unchallenged, the court may, in appropriate circumstances, conclude that such prima facie evidence has become conclusive. That of course will only happen when the accused's silence is not reasonably explicable on other grounds. Whether such a conclusion can be made depends on the weight of the evidence in the particular case. This is one of those cases where the accused could not have remained silent in the light of the overwhelming evidence of the elements of the offence, which I find has been proven beyond reasonable doubt.

For these reasons the accused is found guilty of Rape, in contravention of s 2(1)(a) of Act 8 of 2000.

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<sup>19</sup> *S v Katari* 2006 (1) NR 205 HC.

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C Claasen

Judge



APPEARANCES

FOR THE ACCUSED

Mr Siyomunji  
Siyomunji Law Chambers

FOR THE STATE

Mr Lisulo  
Of the Office of the Prosecutor-General,  
Windhoek