

REPUBLIC OF NAMIBIA

HIGH COURT
WINDHOEK
JUDGMENT



OF NAMIBIA MAIN DIVISION,

Case No: CC 2/2021

THE STATE

versus

JEREMIA VAN WYK

ACCUSED

Neutral citation: *S v Van Wyk* (CC 2/2021) [2022] NAHCMD 299 (16 June 2022)

Coram: SHIVUTE, J

Heard: 7 June 2022 and 10 June 2022

Delivered: 16 June 2022

Fly note: Plea of guilty – Accused pleading guilty to rape – Disputing the insertion of the penis into victim’s vagina – Asserting he inserted his finger into female genitalia of victim – State adducing forensic evidence – Presence of semen intra-vaginally highly indicative of penal insertion.

Summary: The accused pleaded guilty to the offence of rape contravening s 2(1) (a) of Act 8 of 2000. However, he disputed that he inserted his penis into the victim’s female genitals. Instead, he said he only inserted his finger. The State led forensic evidence that the semen that was found in the intra-vaginal swab collected from the victim and matching accused’s DNA profile, is highly likely to have been deposited by

penal insertion than a finger. Accused found guilty of rape by inserting his penis into the victim's vagina.

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VERDICT

1st count:

Rape contravening section 2 (1) (a) read with sections 1, 2(2), 2(3), 3, 4,5,6,7 and 18 of Act 8 of 2000 – Guilty.

Alternative to 1st Count:

Committing or attempting to commit a sexual act with a child under the age of 16, contravening section 14(a) of the Combating of Immoral Practices Act 21 of 1980:

Not guilty and acquitted.

2nd Count Abduction:

Guilty.

Alternative to 2nd count, kidnapping:

Not guilty and acquitted.

SHIVUTE J:

[1] The accused stands indicted on an indictment containing two counts. The 1st count being that of rape contravening section 2(1)(a), read with sections 1, 2(2), 2(3), 3,4,5,6,7 and 18 of Act 8 of 2000. Alternative to count 1, is committing or attempting to

commit a sexual act with a child under the age of 16, contravening section 14(a) of the Combating of Immoral Practices Act 21 of 1980 as amended.

It is alleged that on or about 1 August 2019 and at or near Windhoek in the district of Windhoek, the accused did wrongfully, unlawfully and intentionally commit a sexual act under coercive circumstances with L M, a minor child, by inserting his penis into her vagina and the coercive circumstances are that:

The perpetrator applied physical force to the complainant and/or the complainant was affected by helplessness and/or the complainant was under the age of 14 years, in that she was five years of age and the perpetrator was more than three years older than the complainant, as he was 49 years of age.

[2] The offence in the alternative count is alleged to have taken place on the same date, the same place, and in the same district. The allegations are that the accused wrongfully, unlawfully and intentionally committed or attempted to commit a sexual act with a child under the age of 16, to wit, L M and the perpetrator was more than three years older than the complainant, who was aged five and the perpetrator 49 years of age.

Count 2:

Abduction

It is alleged that upon or about 1 August 2019 and at or near Windhoek, in the district of Windhoek, the accused did wrongfully, unlawfully and intentionally take and abduct L M an unmarried girl under the age of 21 years, out of the control and against the will of her parents MLLA and/or J M, for the purpose of having sexual intercourse with her or with the intention to marry her.

Alternative to count 2 kidnapping:

It is alleged that on the same date and on the same place in the district of Windhoek the accused did wrongfully, unlawfully and intentionally deprive L M a child aged five years of her liberty of movement and/or caused her to be out of the control of her parents, against the will of MLLA and/or J M her mother and father respectively.

[3] The accused pleaded guilty to all the counts. His legal practitioner prepared a statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 in respect of count 1 of rape and in respect of count 2 of abduction. The accused admitted all the allegations and elements of the offence of abduction and he was convicted accordingly. He was found not guilty on the alternative count of kidnapping and he was acquitted.

[4] A plea of not guilty was entered in respect of count 1 of rape in terms of s 113 of the Criminal Procedure Act, because the accused disputed that he had sexual intercourse with the complainant by inserting his penis into her vagina. Instead, he said he had sexual intercourse with her by inserting his finger into her vagina. However, the accused was informed that all the admissions he had made will still stand as proof to such allegations.

[5] In proving its case, the State called two witnesses, namely the doctor who examined the minor child after the alleged rape and a forensic expert. The first witness was Doctor Ivor Orlam who testified that on 2 August 2019 he examined the complainant and prepared a medical report, J88. He read the report into the record. According to his observation, the complainant's pants as well as her underwear were soiled and blood stains were observed on them. She had bruises on her interior thighs and both thighs were red. According to his opinion, the thighs had bruises which may be caused by friction while walking or by forceful opening of her legs. Upon gynaecological examination, swelling was noted and it was more apparent on the labia majora and minora. Her hymen had fresh tears and bleeding was noted. Furthermore, foreign bodies of a whitish discharge and pubic hair were observed around the vulva and vestibule. The victim had not yet reached the age of puberty.

[6] At the time the child was examined she had not bathed or changed her clothing since the offence took place. The entire vulva or genitalia were slightly swollen on the external as well as the inner structure. The deposit of the whitish discharge was at the front third of the vagina. According to the doctor, it is not normal for a child of 5 years to have that discharge. The doctor concluded that the patient had been sexually assaulted and the presence of the whitish discharge could possibly be semen. The extent to which the hymen was torn and open is more indicative of penetration by male genitalia.

[7] The second witness called by the State was Maryn Swart, a forensic expert who was employed as Chief Forensic Scientist and who co-signed the first report. She also compiled the second report. The two reports were read into the record and admitted in evidence as exhibits 'J' and 'K'. The witness testified that they received two rape kits in connection with this matter from the police, DNA reference samples as well as samples from an unknown source for scientific examinations. The rape kits were from the victim as well as from the accused.

[8] Findings of the DNA test showed that the sperm samples collected from the vulva swab, intra-vaginal swab and the vestibule swab of the victim matched the accused's DNA profile. It was the witness' testimony that for the semen or sperm samples to be found on the intra-vaginal swab and on the vestibule swab it is very likely that it was deposited there through a normal sexual intercourse or through the insertion of an object that might have contained a spermatozoa. Apart from the above swabs, the accused's DNA was found on exhibit 'D' the unknown source, on the swabs from the victim's underwear and on a swab from the victim's pants.

[9] After the State closed its case, the accused exercised his right to remain silent and called no witnesses.

[10] Counsel for the State argued that according to the doctor, the injuries sustained by the victim conform more to the penal penetration than the finger. Ms Swart testified

that semen was found on the swab collected from the vulva and intra-vaginally. The samples of semen found matched the DNA profile of the accused.

[11] On his part, counsel for the accused readily conceded that the fact that the semen or sperm that was found on the swab collected intra-vaginally matched the accused's DNA is an indication that the sexual intercourse was committed by the accused by means of accused inserting his penis into the victim's vagina.

[12] This court is called upon to determine whether the sexual act was committed by the insertion of the accused's finger in the victim's vagina as he is alleging or by the insertion of the accused's penis into her vagina as the State is alleging. In assessing whether the accused's version can be reasonably possibly true, the salient facts should be considered carefully.

[13] First, there is evidence from the doctor who examined the victim that a whitish discharge was observed at the front third of the vagina of the victim. He further testified that it is not normal for a child of 5 years to have that discharge. It was his conclusion that the extent to which the hymen was torn and open is more indicative of penetration with the male genitalia. This evidence was corroborated by forensic evidence that established that the whitish discharge was indeed semen. Secondly, the second State witness testified that the sperm sample that was collected from the victim's intra-vaginal swab was highly likely to be deposited by means of penial insertion. The DNA samples that were found in the victim's rape kit matched the accused's DNA profile. I am impressed by the State witnesses' evidence and by their demeanour as witnesses. In my judgment the evidence they gave is of the damning kind.

[14] Having due regard to the forensic evidence adduced by the State, I am fortified in my conviction that there is no doubt that the sexual act was committed through the insertion of the accused's penis into the victim's vagina. The version advanced by the accused that he inserted his finger cannot in my opinion be reasonably possibly true and it is therefore rejected. This court is satisfied that the State has proved beyond a

reasonable doubt that the accused raped the victim by inserting his penis into her vagina under coercive circumstances. The coercive circumstances are that the victim was affected by helplessness and was under the age of 14 years in that she was five years of age and the accused was more than three years older than the victim as he was 49 years old at the time.

[15] In the premise, the following verdict has been arrived at:

1st count:

Rape contravening section 2 (1) (a) read with sections 1, 2(2), 2(3), 3, 4,5,6,7 and 18 of Act 8 of 2000:

Guilty

Alternative to 1st Count:

Committing or attempting to commit a sexual act with a child under the age of 16, contravening section 14(a) of the Combating of Immoral Practices Act 21 of 1980:

Not guilty and acquitted

2nd Count Abduction:

Guilty

Alternative to 2nd count kidnapping:

Not guilty and acquitted.

NN Shivute
Judge

APPEARANCES:

THE STATE:

Ms Shikerete
Office of the Prosecutor-General

ACCUSED:

Mr Andreas of Andreas Hamunyela Legal Practitioners
Instructed by: Directorate of Legal Aid