REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC 12/2012

In the matter between:

THE STATE

and

NALWENDO LASCO LIKEZO **ACCUSED**

Neutral citation: *The State v Likezo* (CC 12/2012) [2013] NAHCNLD 34 (12 June 2013)

Coram: TOMMASI J

Heard: **13 May – 17 May 2013**

Delivered: **18 June 2013**

Flynote: Criminal Law – Contravening s2(1)(a) of the Combating of Rape Act – the intentional commission of a sexual act with a complainant under coercive circumstances as defined in s2(2) of the Act – Accused pleaded ignorance of the law - State bears the onus to prove intent – onus to prove that the accused was aware of the age of the complainant and that she was below the age of 14 – subjective perception of the accused to be examined – accused illiterate and unsophisticated - accused knew it was wrong for an adult to have sexual intercourse with a child and that complainant was young - State however failed to prove beyond reasonable doubt that accused was aware of the definitional elements of the offence i.e that the

complainant was 12 years old and that she was legally incapable of giving valid consent.

Summary: The accused admitted having sexual intercourse with the consent of the complainant. He however pleaded that he did not know the complainant was 12 years old and furthermore that he was ignorant of the law. The complainant version was that the accused grabbed her from behind, held her mouth and carried her into a nearby field where he raped her. After he raped her she heard her grandmother calling and she did not immediately respond. She only responded after her grandmother continued calling. According to her grandmother it took her a while to locate the complainant and had gone to look for her at a neighbour's house. The court found that there were inconsistencies and shortcomings in both the evidence of the complainant and the accused but the court was unable to rely on the single uncorroborated evidence of the complainant. The court found that the accused knew that it was wrong for an adult to have sexual intercourse with a child and that the complainant was young, The court was however not satisfied that the State had succeeded to discharge the onus to prove beyond reasonable doubt that the accused was aware of the definitional elements of the offence which include knowledge of her age and that she was legally incapable of giving valid consent. The accused is found not guilty and discharged on both counts.

ORDER

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1. Count 1 – Kidnapping – The accused is found not guilty and discharged.
2. Count 2 – Contravening section 2(1)(a) read with sections 1, 2(2), 2(3), 3, 4, 5, 6 and 7 of the Combating of Rape Act, Act 8 of 2000 – Rape – The accused is found not guilty and discharged.

JUDGMENT

TOMMASI J

[1] The accused was charged with kidnapping in that he on 20 November 2009 in Chikelenge Village, Katima Mulilo district deprived the complainant of her liberty by carrying her from her home to a nearby field. He was further charged with contravening s2(1)(a) of the Combating of Rape Act, Act 8 of 2000 in that he on the same day and place wrongfully and unlawfully and under coercive circumstances committed a sexual act (by inserting his penis into the complainant's vagina) under the following coercive circumstances: he applied physical force to the complainant and/or he verbally or by conduct threatened to cause harm to the complainant and/or the complainant was under the age of 14 years (12 years old) and the accused was more than three years older than her (25 years old). Mr Lisulu, counsel for the State however correctly conceded that a conviction on both counts would amount to an impermissible duplication of convictions.

[2] The accused pleaded not guilty and gave the following written plea explanation in respect of count 1 (Kidnapping): "I met the complainant close to the traditional shower place. We walked together behind some hut where Munyenda used to stay. I did not force or carry her to the place where the sex took place. She walked on her own." The following plea explanation was given in respect of count 2 (Rape): " I admit having committed a sexual act with the complainant. The sex was by consent. I did not know the complainant was 12 years old. I did not use any physical force or any form of force either verbally or by threat" It furthermore became apparent from his testimony that the accused raised the defence of ignorance of the law which prohibits him to have sexual intercourse with a girl under the age of 14 years old.

[3] The only issues in dispute are whether the accused had used force or threats; he knew the age of the complainant; and that it was unlawful to commit a sexual act with a complainant below the age of 14 years.

[4] On the said date at around 21H00 the complainant and her sister took a shower. The traditional shower was situated separately from the sleeping hut where the complainant shared a room with her grandmother and younger sister. Her younger sister returned to the sleeping room leaving the complainant behind. When the complainant did not return to the sleeping hut, her grandmother grew concerned. She went looking for the complainant and called her name several times without receiving any response. She went to the neighbour's house which was approximately 20m from her own house in search of the complainant. She did not find the complainant at the neighbour's house. On her way back she found the accused under a tree. He informed her that he was coming from Mulumba Village without her asking him anything. She continued calling the complainant and still did not receive any response. She realised that the complainant may be afraid that she would be given a hiding. She then reassured the complainant that she would not give her a hiding. The complainant hereafter came forward and reported to her that she was raped by a boy who was working for their neighbour (the accused). The grandmother testified that it took her a while to locate the complainant. She was of the view that the complainant was too young to have sexual intercourse. She testified that the complainant's breasts were small and she was short and thin at the time.

[5] The complainant described the events that took place after her sister left the shower as follow: She was on her way to take the basin to a hut when the accused grabbed her from behind, kept his hand over her mouth and carried her to a nearby field. He put her down and whilst still holding her mouth lifted her skirt and removed her panty. She was dressed in a t-shirt and skirt at the time. The accused was only wearing a pyjama pants with no shirt. He removed his pyjama pants whilst still holding her mouth. During cross examination she added that she was not able to run away because the accused had pinned her legs down with his knees. The accused

then inserted his penis into her vagina and had sexual intercourse with her. The accused hereafter left. She did not testify that the accused had verbally threatened to cause her harm if she should report the incident. After the accused had raped her, her grandmother called her. She kept quiet for a while and did not answer immediately. After she had heard her grandmother's persistent call she decided to go to her. She told her grandmother that the accused had raped her. She was subsequently taken to the police and the doctor for a medical examination. She knew the accused since September 2009 as a person who was employed by their neighbour. She denied that she spoke to the accused during this period.

[6] The accused, a Zambian citizen, started working for the complainant's neighbour during January 2008 as a cattle herder. His father informed him during 1998 that he was 25 years old and this was the age he kept. He did not count from that date. He did not attend school and is illiterate.

[7] According to the accused he met the complainant coming from the shower that evening and she was only wearing a panty. He was wearing a pyjama pants and a t-shirt. He was looking for food after he had been drinking in Lumba village earlier the evening. She wanted to know who it was and he identified himself. They had a conversation and he developed a desire because of her state of undress. She asked him for money and he informed her that he did not have money on his person. She persisted and he offered to give it to her in exchange for sexual intercourse. He invited her to his room where he kept the money. It was not clear from his testimony whether he intended giving her the money the same evening or the next day. The complainant agreed to have sexual intercourse in exchange for the money. He heard the complainant's grandmother calling. The complainant expressed anxiety that she would be beaten but he advised her to tell her grandmother that she had been to the toilet. He decided against going to his sleeping hut when he saw or heard her grandmother going to his employer's house. The grandmother's calls stopped and they had sexual intercourse behind Munyenda's hut. Whilst having sexual intercourse with the complainant he heard that the grandmother calling the complainant. They separated and he met the complainant's grandmother on his way

to his sleeping hut at the neighbouring house. She asked him where he was coming from and he responded that he came from Lumba village. He overheard complainant's mother asking her where she had been. He however did not overhear the entire conversation.

[8] He was confronted the next day with having raped the complainant. He explained that he was not aware what he was doing as he was drunk. He only became aware of what happened the next day when he was confronted.

[9] It was further his testimony that the complainant looked like a grown woman to him. He interpreted her state of undress as an indication that the she was looking for a man. According to his understanding a girl is grown up if she knows things like sleeping with a man although he did not know whether or not she was sleeping with other men before this occasion. I note that her consent could have been construed by the accused as knowledge of what sexual intercourse was. He further was of the view that a women is grown up if she is able to have a child and the complainant's body status showed him that she was grown up. It was not determined whether he was of the view that the complainant was old enough to have a child. He agreed that she did not tell her him her age or misrepresented her age at any stage. He confirmed that he had seen the complainant going to school and that he did not "propose love" to her before this date. He did not know that she was 12 years old at the time and neither did he know the laws of Namibia. He admitted though that a grown man is not allowed to sleep with a child in Zambia.

[10] The State bore the onus to prove beyond reasonable doubt that the accused had intentionally committed a sexual act under coercive circumstances. The version of the complainant and that of the accused are irreconcilable.

[11] In Sakusheka and Another v Minister of Home Affairs 2009 (2) NR 524 (HC) Muller J cited the following from Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) 11 (SCA) at 14I - 15D para 5:

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[12] In assessing the evidence of the complainant the court has to bear in mind that the complainant was a single witness in respect of the rape. The court should caution itself as to the inherent dangers of convicting on the evidence of a single uncorroborated witness[1].

[13] The complainant was a confident 15 year old grade 9 learner at the time she testified. Her evidence in chief in respect of her abduction and the sexual intercourse was brief to the extent that she had to be prompted to provide more detail. Ms Kishi, counsel for the accused, pointed out that there were some shortcomings in her

[1] S v NOBLE 2002 NR 67 (HC)

evidence i.e her failure to give a clear description of how the accused had lifted her up and carried her. The complainant gave different demonstrations of how the accused held her when he carried her to the field. The complainant further failed to mention during her evidence in chief that the accused had pinned her down with his knees. It is conceivable that the complainant may have forgotten that she was pinned down but this evidence was offered when she was asked why she did not run away when the accused had one hand on her mouth and the other undressing her. These discrepancies, when viewed in isolation, may be explicable. Most rape victims vividly recall the actual rape whilst the peripheral circumstances fade with time.

[14] Ms Kishi submitted that the court should take into consideration that the complainant did not sustain any bruises or injuries as a result of the complainant being pinned down with the knees of the accused. The absence of injuries was not sufficiently canvassed with the complainant in order for this court to conclude that she had sustained injuries as a result of being pinned down. As was pointed out by Mr Lisulu the lack of injuries does not necessarily mean that the complainant was not raped.

[15] A further argument by Ms Kishi was that the court should draw an adverse inference from her failure to respond to her grandmother's call. i.e that the complainant knew what she was doing was wrong and therefore failed to respond to her grandmother's call. Mr Lisulu argued that the complainant's explanation, that she stood there and gathered her thoughts around what had just happened to her. was plausible.

[16] The court gained the distinct impression from the complainant's testimony that she failed to respond for a short time. The complainant, like the accused must have been in a position to hear her grandmother going to the neighbour's house and that she had stopped calling whilst there. Her failure to inform the court of this fact created the impression that she delayed responding for a short while.

[17] The complainant's grandmother gave a frank and unbiased account of the events that had occurred that evening. She refrained from testifying on aspects she herself had not witnessed and conceded facts not favourable to the complainant. I found her to be a credible witness. I accept her evidence that it took her quite a while and that the complainant only came forward when she promised not to give her a hiding. The complainant failed to inform the court that she only answered after her grandmother promised not to give her a hiding. The accused testimony was that the complainant told him she feared that her grandmother would give her a hiding. The complainant however denied that she was scared of her grandmother and that this was not the reason why she did not respond. Relying on her grandmother's evidence this court concludes that the complainant deliberately failed to inform the court of the exact duration of the delay in responding to her grandmother's calling and was not truthful when she testified that she was not scared of her grandmother.

[18] It is likely that the complainant was shocked and scared of her grandmother. It is not uncommon for victims of rape to feel ashamed and reluctant to report it. The question which comes to mind however is this: Why would the complainant be less than candid about being scared of her grandmother and the duration of the delay? The court would not draw an adverse inference only from the length of the delay between the commission of the sexual and her report thereof. It is however not her delay in responding to her grandmother's call that is called into question but her omission to give a true account of the duration and her untruthful explanation for it.

[19] The accused version was also not without discrepancies and shortcomings. His version however in some respects is corroborated by the complainant's grandmother. He explained that the complainant did not respond because their "deal was not done." His testimony as to why they eventually had sexual intercourse behind the hut and when he was supposed to have given her the money was contradicting. It was not entirely clear when he heard the grandmother call and where exactly they had sexual intercourse. He testified that he invited the complainant to his room to give her money but ended up not going to the room. He later adjusted his version by testifying that they had agreed that he would give her the money the next day.

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[20] The complainant's evidence that she was dressed was not challenged during cross-examination. He however testified that he informed his legal practitioner of this fact. Mr Lisulu requested the court to draw an adverse inference from the accused failure to cross-examine the complainant on this aspect. When counsel representing an accused fails to cross-examine a witness this court would be entitled to draw the inference that such evidence is a mere afterthought. Ms Kishi did not respond hereto at all and the court must infer that she had received such instructions and had failed to cross-examine the witness on this issue. Legal practitioners are reminded of their duty to properly cross-examine witnesses in accordance with their instructions and to inform the court when an accused deviates from his initial instructions. Under these circumstances the court cannot draw an inference that it was a mere afterthought which negatively impacts on his credibility as a witness.

[21] The accused's evidence however in certain respects was very frank. He admitted having developed desires for the complainant, that he had not proposed to her before and that he had no intention of being seen in public with a girl he had no intention of marrying. In other aspects referred to above his testimony was vague. He could recount what had happened that evening in considerable detail and yet he testified that he was not aware what he was doing as he was drunk. He was able to appreciate that he had to avoid being detected. I have no hesitation to reject his testimony in this regard as being false. His testimony that her breasts were a bit big was contradicted by the testimony of the complainant and her grandmother. I find the evidence of the complainant's grandmother in this regard more plausible. I am mindful however that concepts such as "a bit big" and "very small" are terms which are based on one's perception.

[22] The court in determining whether the accused had in fact used force should consider the totality of the evidence. The complainant's evidence of the force applied by the accused should not be considered in isolation. It must be viewed against the evidence of her grandmother which to some extent corroborates the evidence of the accused. The mere fact that the court has found parts of his evidence as being

untruthful does not mean he should be convicted. The State bears the onus of proving beyond reasonable doubt that the accused had used force when he committed the sexual act. The complanant's evidence viewed against the shortcomings pointed out falls short of the standard which is required of a single witness to satisfy the court that the truth has been told. Consequently the accused's version is found to be reasonably possibly true.

[23] In the result I conclude that the State has failed to prove beyond reasonable doubt that any force or threats were used and that the complainant voluntarily accompanied the accused. The evidence therefore does not support a conviction of kidnapping or that the accused had committed an intentional sexual act with the complainant whilst using force or threats.

[24] The remaining issue for determination is whether the State proved beyond reasonable doubt that the accused had intentionally (intent in the form of dolus) committed a sexual act with the complainant who was below the age of 14 and he more than 3 years older. It was not disputed that the accused was more than three years older than the complainant. The accused did not dispute that the complainant was 12 years old at the time. His defence was that he did not know she was 12 years old at the time and he was not familiar with the laws of Namibia.

[25] Mr Lisulu referred this court to S v Tjikuzu[2]an unreported judgment. This court in that matter dealt with a contravention of section 14 of the Combating of immoral Practices Act, Act 21 of 1980 and not with rape as defined in the Combating of Rape Act.

[26] The Act specifically provides that an intentional sexual act with a complainant under 14 years where the perpetrator is more than 3 years older than the complainant constitutes rape. A complainant under the age of 14 years cannot give valid consent and consent is not a defence. This provision serves to protect children from being sexually exploited by older persons. The rationale for determining 14 as the age of consent is that children below this age are considered not to have the

[2] An unreported case, Case NO 31/2998 delivered on 1 March 2011

requisite cognitive development and intellectual maturity to understand the nature of sexual activity and to give valid consent thereto.

[27] The State had to discharge the onus of proving intent i.e that the accused had willed the commission of the act; in the knowledge of the existence of the definitional elements of the relevant crime; and in the knowledge of the unlawfulness of the act.[3] Intent would thus be proven if the accused had knowledge of the definitional elements of the offence which would include knowledge of the age of the complainant. In short the State bore the onus to prove not only that the complainant was below the age of 14 but also that the accused knew that she was under 14 years old and that the legal age of consent was 14 years.

[28] The accused claimed to be ignorant of the law. This I interpreted to mean that he was not familiar with the provisions of the Act. I have to point out that it must be accepted that the accused would form part of a large group of persons who are not acquainted with the provisions of the Act. I requested counsel to address me on whether the accused's ignorance should exonerate him from blame. In S v Maseka 1991 NR 249 HC where O'Linn J, A-D sets out the legal position as follows:

"In South African and Namibian law, ignorance of the law is a defence in certain circumstances and the maxim 'ignorantia iuris neminem excusat' is not the general rule, certainly not since the decision in S v De Blom 1977 (3) SA 513 (A) at 529. In that case Rumpff CJ declared that it had to be accepted at that stage of our legal development that the cliché 'every person is presumed to know the law' could no longer be justified and that the view that 'ignorance of the law is no excuse' could in the present-day view of mens rea no longer have any application in our law.

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However, it seems to me that S v De Blom at present correctly sets out Namibian law.

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[3] Snyman, Criminal Law, Fifth Edition, p181

view that 'ignorance of the law is no excuse' could in the present-day view of mens rea no longer have any application in our law.

The defence of ignorance of the law is a defence in common-law crimes as well as in the case of statutory offences, unless the Legislature has expressly or by clearest implication provided for strict liability.

The required mens rea can be in the form of dolus or culpa. If, owing to ignorance of the law, an accused does not know that his or her conduct is unlawful, such accused lacks the required mens rea. If culpa is the required form of mens rea, then the accused would have a defence if he or she proceeded with the necessary caution to acquaint him or herself with what the law expects. See Snyman (supra at 180). But as Snyman points out, even where knowledge of a legal rule is required, it is sufficient if the accused is aware of the possibility that the rule may exist, and reconciles himself or herself with this possibility. Nor need the accused have known which section of a statute forbids an act or the exact punishment prescribed; for the accused to be liable it is sufficient that he or she be aware that the conduct is forbidden by law.

There is no doubt that the onus would be on the State to prove mens rea as stated in S v De Blom (supra at 532E-H) and S v Ngwenya (supra)"

[29] The court should be slow to conclude that an accused was ignorant of the law and each case should be dealt with on its own merits and with regard to its own circumstances. Although the specific details of the Combating of Rape act may not be generally known, it cannot be said that it is not known that rape is an offence. The general perception of rape is the common law definition of rape ie. sexual intercourse without consent. The accused, although not aware of the specific provisions of the act, understood that it was wrong for an adult to have sexual intercourse with a child. This court however has to be satisfied that the accused in was aware of the definitional elements of the offence created by s2(1)(a) read with section 2(2)(d) of the Act.

[30] The court is mindful that the subjective state of mind of the accused should be examined to determine whether he knew that she was below the age of 14 years and that he knew that she was not capable of giving valid consent.

[31] The accused is an unsophisticated illiterate person. He started working for the complainant's neighbor during January 2008. The complainant was 10 years old at the time. Although her grandmother testified that she had just started developing breasts, it was not determined when this development started. He saw the complainant going to school. There was however no indication that he could determine her age from the fact that she attended school. It was not evident that he knew that she was in grade 4 at the time and furthermore what the general age group was for this grade. Although he had spoken to her, he never proposed to her. The court can only speculate that he did not propose because he considered her too young. The reason for not proposing to her earlier was however not explored during cross-examination.

[32] Mr Lisulu submitted in argument that there was nothing in the appearance or the behaviour of the complainant which could have led the accused to believe that she was older than 12. Ms Kishi on the other hand submitted in argument that appearances are not necessarily a precise index of age of the bearer. The accused no doubt knew that the complainant was young and that he had taken advantage of this fact but that does not mean that he knew she was 12 years old or that he was breaking the law when he so took advantage of her youthfulness. The accused was unable to keep proper count of his age and I am not sure if he could meaningfully interpret any numerical age

[33] Moreover I am unable to determine on the evidence whether the accused believed that the complainant was a "child". His understanding of when a girl can be considered to be a woman was not adequately explored during cross-examination. This court cannot with reasonable certainty conclude that the accused considered her to be a child or at least entertained that possibility.

[34] If the accused was unaware of her age then it cannot be said that he knew that the complainant was below the age of 14. The accused may have appreciated that his conduct was morally wrong but I have to be satisfied that he knew that his act was unlawful. This would include knowledge of the age of the complainant.

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[35] I am unable to conclude, in the circumstances of this case, that the accused knew or even entertained the possibility that the complainant was 12 years old and that she was in terms of the law, not capable of giving valid consent. The State thus failed to prove beyond reasonable doubt that the accused had the requisite intent.

[36] In the result the following order is made

1. Count 1 – Kidnapping – The accused is found not guilty and discharged.
2. Count 2 – Contravening section 2(1)(a) read with sections 1, 2(2), 2(3), 3, 4, 5, 6 and 7 of the Combating of Rape Act, Act 8 of 2000 – Rape – The accused is found not guilty and discharged.

MA Tommasi

Judge

APPEARANCES

THE STATE :	Mr Lisulu Office of the Prosecutor-General, Oshakati.
ACCUSED:	Ms Kishi Dr Weder Kauta & Hoveka, Oshakati (Instructed by the Directorate of Legal Aid)