



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC18/2012

In the matter between:

THE STATE

and

FRITZ GARAB

ACCUSED

Neutral citation: *S v Garab* (CC 18/2012) [2013] NAHCNLD 47 (29 July 2013)

Coram: TOMMASI J

Heard: 15 July 2013 – 19 July 2013,

Delivered: **29 July 2013**

Flynote: Evidence – cautionary approach in evaluation of single witness's evidence – despite contradiction and shortcomings the court is nevertheless satisfied that the truth had been told.

Criminal Law – Abduction – State to prove that the accused had the intention to remove minor permanently or at least for a substantial period – accused intended to temporarily remove the complainant in order to facilitate sexual intercourse – abduction not proven.

Criminal Law – Kidnapping – not specified in the indictment that the accused intended to deprive the custodians of their control- court constrained to adjudicate on the charge as per indictment – accused found to have formed a separate intention to deprive the complainant of her freedom of movement - accused took the complainant

to a confined space to restrain her from making good a third escape – found guilty of kidnapping.

Criminal Law – Contravention of s2(1)(a) – coercive circumstances – accused threatened the complainant and used physical force – the accused unable to tell his own age or that of the complainant but aware of the possibility that his conduct is prohibited by law and reconciled himself with this possibility

Summary: The accused was charged with abduction alternatively kidnapping and two counts of rape in contravention of s 2(1)(a) of the Combating of Rape Act, 8 of 2000. The complainant testified that the accused had pulled her out of the hut of her friend where she was sleeping, threatened to beat her with a stick, dragged her to his daughter's hut and raped her twice and ordered her thereafter to return to her friend's home. She reported the incident to her friend on her return and to her mother the next morning. The accused admitted that she walked away from him. He denied that he later that evening dragged her from her friend's hut, threatened her with a stick and raped her twice. The court applied caution to the evidence of the complainant, a single witness, considered the inconsistencies and on the totality of the evidence accepted the complainant's version of events. The court held that the State succeeded in proving beyond reasonable doubt that the accused had the intention to deprive the complainant of her liberty and committed a sexual act with the complainant twice under coercive circumstances. Accused was convicted of kidnapping and two counts of rape in contravention of the Combating of Rape Act, 8 of 2000.

ORDER

Count 1 Main Count – Abduction - The accused is found not guilty and discharged

Alternative – Kidnapping the accused is found guilty

Count 2 The accused is found guilty of contravening section 2(1)(a) of Act 8 of 2000 – Rape

Count 3 The accused is found guilty of contravening section 2(1)(a) of Act 8 of 2000 – Rape

JUDGMENT

TOMMASI J :

[1] The accused was charged with abduction alternatively kidnapping and two counts of rape in contravention of s 2(1)(a) of the Combating of Rape Act, 8 of 2000.

[2] Given the youthfulness of the complainant I shall refer to her as such. Her friend who was 10 years at the time of the incident and 13 when she testified will be referred to as “the complainant’s friend”. This is done in order to protect the identity of these two witnesses.

[3] The complaint’s version of the evening of 19 November 2010 up until approximately 6H00 the next morning can be summarized as follows: The complainant after sunset went to play with her friend who lives close to her house. They were instructed to collect Mied,’s (the accused’s daughter) child at Kanime’s bar. They met Meid outside the bar where she handed them her child. The three of them went to sleep slept in Meid’s hut situated close to her friend’s mother’s house.

[4] Sometime during that night the accused knocked at the door and when no one responded he entered the hut. The complainant saw him undressing. He kept his red shorts on and lay behind her. The accused started touching her breasts and stomach. She woke her friend, told her what was happening and they ran out of the hut. They stood a short distance from the hut. They saw the accused exiting Meid’s hut and entering his own hut. Her friend went to sleep at her house and the complainant remained standing outside. They left the Meid’s child in the hut.

[5] After a short while, the accused came out of his hut and started chasing her. She ran to Kanime's bar where she met Erastus (now deceased) and Moses. She informed them that someone was chasing her and asked them to escort her. They escorted her up to Munyenda's house, not too far from Kanime's bar. From this point she walked unaccompanied until she reached her friend's house. Just as she was about to enter the house, the accused came up behind her and started chasing her again. She ran back to Kanime's Bar where she again enlisted the help of Erastus and Moses to once again escort her. She informed them that the same man was chasing her again. Close to her friend's house they met the accused. He was still clad only in a red shorts and was carrying a stick. The accused asked her escorts what their problem was with her. They replied saying that they were only escorting her. She left them talking and ran to her friend's house. She entered through an opening in the door and found her friend's mother asleep. Although she was of the view that her friend was awake at the time, she could not with certainty say that it was the case.

[6] She slept for about an hour when the accused entered her friend's house. He pulled the blankets of her and pulled her outside and threatened to beat her with a stick he had in his hand if she screams. He took her Meid's hut where he managed, despite her struggles, to take off all her clothes. He threw her down on the bed (blankets arranged on the floor) and had sexual intercourse with her. After he was done she complained that she was in pain. He advised her that the second time would not be painful and offered to pay her N\$10. He threw her down a second time and had sexual intercourse with her. Afterwards he threatened to kill her if she should tell anyone. He told her to return to her friend's house. She told her friend what happened but her friend did not respond.

[7] The next morning she returned home. Her mother noticed blood on her skirt and wanted to know what caused the blood stain on her skirt. She started crying and did not answer her mother. Her brother arrived and informed her mother that Moses and Erastus told him the accused had chased the complainant the previous night

She thereafter told her mother what had happened. Her mother took her to the police and she was taken to the hospital in Grootfontein the same day.

[8] The accused admitted that he came to Meid's hut during that evening as he had heard voices emanating from there. He found the complainant and her friend sleeping there and asked them what they were doing in the hut. They ran out. He closed the door and turned around. When he turned around he saw the complainant standing alone. He wanted to propose to her (propose to have sexual intercourse) but she turned away from him. He followed her asking her to wait as he wanted to talk to her. She kept on walking. He stopped to relieve himself. Whilst he was still busy relieving himself he saw the complainant returning with Erastus and Moses. He wanted to know where they are taking the child. He asked them because he wanted to know what they were doing with the girl he wanted. They informed him that they were escorting her. He lost interest in the complainant because she was accompanied by Moses and Erastus and returned to his hut. He did not see the complainant again that evening again. According to him he was fully dressed at all times and was not carrying a stick at the time he spoke to Moses and Erastus.

[9] Dr Bwahula testified that he examined the complainant on 20 November 2010 and observed stains of blood on the labia majora, the vagina and cervix. He also observed that her vulva was inflamed and her hymen torn. In his view these injuries were fresh and indicative of penetration. It was however not evident from his report that the medical examination was done on 20 November 2010. Mr Bondai took issue with the absence of a date on the report during cross-examination of this witness. He however failed to challenge the testimony of the complainant and her mother when they testified that the complainant was taken to the hospital and examined the same day her mother noticed the blood on her skirt. I am satisfied that the medical examination was in fact done on 20 November 2010 despite the absence of the date on the report. The medical evidence is thus consistent with the complainant's testimony that sexual intercourse took place the evening prior to the examination.

[10] Almost all the witnesses including the accused had no or very limited knowledge of dates and times. The birth certificate of the complainant was handed in by agreement and the veracity of the contents thereof was not disputed. I am therefore satisfied that the State proved the age of the complainant as being 12 years and 7 months old at the time.

[11] The accused was unable to tell his age and did not agree that he was 49 years old at the time. At the time of the incident the accused was a grandfather. It would be reasonable to infer from these facts that he was older than 15 years at the time i.e more than three years older than the complainant.

[12] The complainant was a single witness in respect of the rapes and her evidence should be treated with caution. Mr Bondai pointed out that the evidence of the State was flawed in that there were a number of inconsistencies and contradictions. He submitted that the evidence when viewed in its totality, does not support a conviction. Mr Wamambo argued that the witnesses should be evaluated taking into consideration their background and lack of formal education. He submitted that the State succeeded to discharge the onus to prove beyond reasonable doubt that the accused dragged the complainant from her friend's house to Meid's hut and that he then raped her twice.

[13] I shall deal with some of the discrepancies and contradictions highlighted during cross-examination. The complainant admitted that she did not inform her mother that she would be going to her friend's house whilst her mother testified that the complainant informed her. The complainant's admission, adverse to her interest, rings true whereas her mother undoubtedly did not want to portray her daughter in a negative manner. This contradiction does not detract from the central fact that the complainant had gone to her friend during the early hours of that evening. To my mind this was not a material contradiction.

[14] A second contradiction was between the testimony of the complainant and her friend. The complainant and her friend were extensively cross-examined on their visit to Kanime's bar. The complainant testified that her friend's mother sent them to fetch Meid's child, whereas her friend testified that Meid requested them to collect the child from Kanime's bar. Meid, a witness called by the court, denied that she

requested the two girls to collect her child or that she was at Kanime's bar. Meid was a very poor witness and no reliance can be place on her evidence. She was extremely vague about her and her child's whereabouts that evening. The only clear fact which the court could establish from her testimony was that her child was not with her that evening. This contradicted the accused testimony that he saw Meid returning from the location the next day with the her child.

[15] The complainant's friend, despite her youthfulness maintained that it was at Meid's request even when confronted with the complainant's version. I am persuaded by this young witness' confidence that it was indeed Meid who requested them to collect her child as Meid admitted that she did not want her child to be in the location. The complainant's recollection in respect hereof was less than accurate. The complainant may have been mistaken in this regard but it does not make her a dishonest witness.

[16] The complainant testified that she saw the accused undress in Meid's hut at the time she was sleeping there with her friend. She later during cross-examination testified that she did not see him undress. She also indicated that she had identified the accused in the hut and later testified that she stood outside to see who had entered the hut. These contradictions have to be viewed in conjunction with the accused's testimony. It was not disputed that the accused knocked on the door. The complainant would not have been able to hear the knock unless she was awake. It was further common cause that it was a moonlit evening. The accused was able to identify the complainant and her friend inside the hut. It was thus equally possible for the complainant to identify the accused.

[17] The complainant was the only witness to what can be termed an indecent assault perpetrated by the accused. I pause to mention that the accused was not charged with this offence. It is however important for the court to examine the complainant's evidence in respect hereof as it forms part of the chain of events that evening. The complainant's testimony that the accused had on a red shorts or "trunkie", was corroborated by her friend and Moses. Her friend corroborated her evidence that she informed her someone was touching her. Both testified that they got scared and ran out. The accused's testimony was that they ran out when he

asked them what they were doing in the room. The accused's testimony as to what he did when he arrived at the hut was equally inconsistent. He first testified that he asked who they were after he had opened the door but testified that he could see who was sleeping in the hut. He also during cross-examination changed his testimony to having asked who was inside before he entered.

[18] Having accepted that the two girls were sleeping in the hut with Meid's child it is improbable that they would flee from the hut instead of explaining their presence in the hut. The accused lied about Meid's child only returning the next day with her mother to support his denial of the presence of the child in the hut. I find it improbable and to be not reasonably possibly true that the complainant and her friend would run from the hut merely because the accused asked them what they were doing in the room. The complainant's testimony was sufficiently corroborated for this court to rely on her testimony in this regard. Despite the contradictions and shortcomings in the evidence of the complainant in respect of this incident I am nevertheless satisfied that the complainant told the truth.

[19] The complainant's evidence that she was chased twice is corroborated by Moses who testified that the complainant twice sought their assistance that night. Moses readily conceded that he did not see the accused chasing the complainant, that the complainant did not inform them who was chasing her and they did not enquire from her who the person was. There were some contradictions and inconsistencies in his testimony. The complainant testified that she entered her friend's hut through an opening whereas he exaggerated her entry into the house by testifying that he heard her knocking and opening the door. His testimony and that of the complainant's brother also differs slightly. I am however of the view that these contradictions are not material. The accused confirmed that he saw the complainant going to the house of her friend and Moses was clearly some distance from the door when the complainant entered her friend's house. His evidence however in respect of the number of times the complainant approached them and his interaction with the accused was clear and not shaken under cross examination.

[20] The accused admitted that he "followed" the complainant with the intention of proposing sexual intercourse with her. He disputed chasing her but testified that she

“ran away” from him. He testified that he followed her only once and stopped to relieve himself. This does not adequately account for the time it would take the complainant to reach Kanime’s bar, enlist the assistance of Moses and Erastus and walk back to a point close to her friend’s house. The complainant made it clear was not interested in the accused’s advances by fleeing from him. He decided to ignore her clear rejection of his advances and pursued the complainant with the intention of having sexual intercourse with. I am not persuaded that the accused did not wait for the complainant to return.

[21] Considering the evidence adduced in respect hereof I found the accused’s denial improbable and not reasonably possibly true. The accused had ample time to return to his hut when he saw the complainant was not interested but he remained lurking under a tree on the path the complainant had to use to return to her friend’s house. The accused further made his intentions clear to her companions by asking them where they were taking the child that he wanted. His interrogation of Moses and Erastus is inconsistent with his testimony that he lost interest. He was still very much interested to determine what they were doing with the girl he wanted. I am satisfied that the complainant’s evidence as corroborated by Moses may safely be accepted.

[22] The complainant and Moses testified that the accused was still clad in his red shorts or “trunkie” and that he was holding a stick. The accused denied this. It must be borne in mind that the complainant fled from the accused’s persistent pursuit to have sexual intercourse with her. It is plausible that he collected the stick to overcome any resistance from the complainant given the fact that she was able to outrun him on two previous occasions. The accused clearly was not pleased that the complainant was being escorted. The conduct of the accused as described by Moses and the complainant is consistent with his admitted intention to pursue the complainant in order to have sexual intercourse with her.

[23] Mr Bondai argued that the complainant’s failure to scream should raise doubt in the mind of the court in view of the fact that she was taken from a room where her friend and her friend’s mother were present. He furthermore argued that although she testified that there were footprints visible and that she had shown this to the

police, the State failed to adduce evidence to corroborate the complainant's evidence in this regard.

[24] The complainant's failure to raise alarm explains why her friend was unaware of the fact that the complainant was dragged out of the hut. Her friend's mother was not called as a witness and the court under these circumstances must draw the inference that she too was unaware of the fact that the complainant was pulled out of the hut. The State's thus rely on the single uncorroborated evidence of the complainant to prove that she was indeed pulled out of the room, taken to Meid's room and raped twice. Her failure to alert an adult who was sleeping right next to her should be carefully examined.

[25] The first time the complainant encountered the accused she alerted her friend of the accused's presence in Meid's room. She did not scream. Once outside, both the complainant and her friend failed to raise alarm. Her friend did not report the incident to her mother. The complainant failed to disclose the identity of the person who was chasing her to Erastus and Moses. Her failure to mention or to raise alarm on these occasions however does not mean that she fabricated his presence in the room and the chase. Her explanation was that she was scared and confused as this was the first time she was exposed to things of this nature.

[26] It was furthermore her testimony that she was asleep when the accused pulled the blankets off her and her friend and pulled her out of the hut. She further testified that she was sleeping close to the door. This would leave the complainant with very little response time. She explained her reaction in the following manner: "When he pulled me out of the house I was not screaming. I was just quiet but I was trying to defend myself from him." Once outside the hut her evidence was that the accused had threatened to beat her with a stick. The complainant was a child in every sense of the word who still played with her 10 year old friend. The events of that evening must have been confusing and frightening. The court must not lose sight of the fact that the accused was a senior member of that community. Her reaction at this stage was no different from her earlier reaction. I thus do not agree that her failure to scream under these circumstances should be reason for the court to distrust her evidence.

[27] The complainant testified that although the accused was serious when he threatened her, she decided not to believe him. This explains why she reported it to her friend when she returned to her friend's house. Her friend confirms that she told her that she was raped. Her friend's evidence in this regard however was less than satisfactory and her version hereof cannot safely be relied particularly if one considers the fact that she was sleeping prior to being told. The complainant recalls that although her friend's eyes were open she did not respond. She further testified that she trusted her friend. It is not uncommon for victims of rape to confide in their peers rather than in an adult. She testified that she told her friend how the "man" came and pulled her out of the house and slept with her. The complainant therefore did not disclose the identity of the person who raped her to her friend. The contradiction is explicable when the court takes into consideration that her friend may have been mistaken given her state of mind at the time she had the conversation with the complainant; and she may have added information which came to her knowledge afterwards.

[28] The complainant did not answer her mother when she asked about the blood stain on her skirt. Her mother admitted that she asked the complainant whether it was the accused who had sexual intercourse with her. In view of this no weight can be attached to the reply given by the complainant. When the complainant was cross-examined to determine why she did not reveal the rape to her mother she responded as follow: I was angry and I was crying. I thought if I will cry and finish (and that) is the time when I will tell her. While I was preparing to tell her it is when my brother came and started telling her." This was a genuine response from the complainant about her state of mind at the time. Her mother confirmed that she started crying when she started asking her questions.

[29] It must be born in mind that reports made by the complainant merely serve to prove consistency. S v V 1995 (1) SACR 173 (T) Moseneke AJ at page 177 G-H stated the follow:

"It is trite law that corroboration is independent evidence which confirms the testimony of a witness. One's previous consistent statement is not corroboration. Similarly, proof of a complaint in a sexual case is not corroborative of the complainant's evidence.

Such a proof of a complaint in a sexual case is adduced to establish consistency, not corroboration”.

[30] The accused’s defense from the outset was that the complainant had fabricated the fact that he was the one who had raped her. Mr Bondai’s argument was that the complainant had incorrectly identified the accused. All the witnesses, including the accused testified that it was a moonlit evening. The accused himself was able to identify the complainant and her friend in Meid’s hut where the complainant testified the rape took place. The accused was known to the complainant and on her version of the events, she had ample opportunity to identify the person who had pulled her from the hut and who had raped her. There can thus be no question about the complainant’s ability to properly identify the perpetrator which she indicated was the accused.

[31] What remains of argument is that the complainant lied about the identity of the person who had sexual intercourse with her. Mr Bondai further submitted that the evidence of the complainant that she was dragged out of her friend’s hut was a fabrication. He argued that the complainant sneaked away from her mother’s house earlier that evening. He submitted that in view of this fact the possibility cannot be excluded that she had sneaked out of the room to have sexual intercourse with some other person. The reason why the complainant sneaked away from her mother’s house was to play with her friend who was 10 years old and she was afraid that her mother would stop her. Nothing in the evidence suggests that the complainant had any other reason to sneak away at that time of the evening.

[32] Later that evening she went to Kanime’s bar to collect Meid’s child. The evidence does not support an inference that she had any other reason for going to the bar. She went to sleep and would have continued doing so if the accused did not enter Meid’s hut. After being chased by the accused, the complainant wanted to reach the safety of her friend’s home hence her request to be escorted. It is improbable that the complainant would leave the safety of her friend’s house to venture outside where the danger of the accused remained given the proximity of his residence to her friend’s house. It is furthermore unlikely that the complainant would

willingly participate in a sexual encounter after her traumatic first sexual encounter with the accused.

[33] Mr Bondai argued that the court should draw an adverse inference from the State's failure to adduce the footprint evidence. The footprint evidence would have corroborated the complainant's evidence that she was dragged from her friend's house to Meid's house. The complainant testified that she had pointed out the footprints to the police. She however could not say whether they had taken photographs of the footprints. From the affidavit of the officer who took the photographs it is apparent that the photos were taken two days after the incident occurred. Given the traffic around the area it would have been pointless to have taken any photographs at that stage. Under these circumstances I cannot conclude that photographs were taken and withheld from the court.. I pause to mention that the issue of footprints was only raised during cross-examination of the complainant. None of the other resident witnesses were questioned to determine whether they had seen any footprints or any marks indicating that the complainant was dragged. In view of the State's failure to call the police officer referred to by the complainant the court has to disregard the evidence of the complainant that there were footprints.

[34] What remains is the complainant's uncorroborated evidence that the accused dragged her from her friend's house to Meid's house It is indeed so that that there are contradictions, inconsistencies in the evidence presented by the State. Some of the anomalies were satisfactorily explained. The court found sufficient corroborating evidence in all the important peripheral events and found the complainant a credible witness in respect thereof. The accused's defense that the complainant had fabricated his involvement is flawed and improbable particularly when one considers that there was no evidence that she had any motive to falsely implicate the accused. I am satisfied that despite the shortcomings in her testimony that the complainant had told this court the truth. The State thus succeeded to establish beyond reasonable doubt that it was the accused who had forcibly removed the complainant from her friend's house and thereafter raped her twice.

[35] Mr Wamambo submitted that the State succeeded in proving that the accused had abducted the complainant. He was furthermore of the view that it did not amount

to a duplication of convictions. Mr Bondai submitted that the State had failed to prove that the accused had the intention to permanently or least for a substantial period remove the complainant from the control of her parents. He further submitted that the State had failed to prove that the accused had the intention to deprive the complainant of her liberty and that under these circumstances the accused could also not be convicted of kidnapping. In addition he argued the charges amount to a duplication of convictions.

[36] Mr Wamambo referred this court to *S v Katamba*¹ in support of his submission that abduction had been proven whereas Mr Bondai argued that the facts of that case are distinguishable from the facts in this matter. I respectfully agree with the view expressed by Mr Bondai as the accused in that case had “taken” the complainant in Grootfontein and took her to Berg Aukas where she was found three days after being taken. The learned author Snyman in *Criminal Law, Fifth Edition*, at page 403, sets out the element of this offence as follow: (a) the removal (b) of an unmarried minor (c) from the control of his or her parents or guardian (d) with the intention of marrying or having sexual intercourse with the minor (e) without the consent of the parents or guardian (f) unlawfulness and (g) intention.

[37] It was not disputed that the complainant was an unmarried minor. The accused had removed the complainant from the house of her friend. This does not mean that the complainant’s mother had relinquished control. She knew that the complainant was at her friend’s house which was not too far from her own house; and was aware that the friend’s mother was always present. The accused removed the complainant with the intention of having sexual intercourse with her and to allow her to return afterwards. The accused knew very well that her mother would not consent. Not only was the complainant a minor but she was also related to the accused. It was however evident that he had removed the complainant temporarily in order to facilitate sexual intercourse. Under these circumstances it cannot be said that the State had proven the offence of abduction.

[38] Mr Bondai’s submitted that the accused’s intention at the time he removed the complainant was not to deprive her of her liberty but to have sexual intercourse with

¹2000 (1) SACR 162 (NmS)

her. The offence of kidnapping can either be committed by depriving a person of his or her freedom of movement and/or, if such person is a child, the custodians of their control over the child. The charge however only reads that the accused wrongfully and unlawfully deprived the complainant of her liberty and I am constrained to consider only that which is contained in the indictment. The accused not only removed the complainant with the intent to have sexual intercourse with her but also formed a separate intent to remove her from her friend's mother's house to a confined space in order to restrain her from making good a third escape. His restriction of her freedom of movement was deliberate and carefully orchestrated. I am thus satisfied that the crime of kidnapping was also committed in addition to the two counts of rape.

[39] The accused had committed sexual acts with the complainant by inserting his penis into her vagina on two separate occasions under coercive circumstances. He had used force by dragging the complainant from the friend's house, he had threatened that he would beat her if she screams and he would kill her if he should hear any news about what he did to her from other persons. The accused however disputed that he knew what the complainant's age was at the time. He conceded however that he knew her since her birth. Despite this it is plausible that he did not know how old she was as her own mother was unable to tell her age. The accused however knew that she was a child. This is evident from his testimony. When he met Moses and Erastus he asked them: "where are you taking this child" The accused when cross-examined admitted that he knew that it was against the law for an adult to have sexual intercourse with a child. His denial of this fact later during his testimony, contradicted his earlier admission. I am satisfied that the accused was aware that the law prohibits sexual intercourse between an adult and a child. According to his own understanding he knew she was a child and he referred to her as such during his testimony. The accused was aware of the possibility that by having sexual intercourse with the complainant he was committing an act which was prohibited by law and he reconciled himself with this possibility.

[40] In the result the following order is made:

Count 1 Main Count – Abduction - The accused is found not guilty and discharged

Alternative – Kidnapping the accused is found guilty

Count 2 – The accused is found guilty of contravening section 2(1)(a) of Act 8 of 2000 – Rape

Count 3 - The accused is found guilty of contravening section 2(1)(a) of Act 8 of 2000 – Rape

MA Tommasi
Judge

APPEARANCES

THE STATE :

Mr Wamambo

Office of the Prosecutor-General, Oshakati.

ACCUSED:

Mr Bondai

Directorate of Legal Aid, Ondangwa