REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, WINDHOEK

JUDGMENT

Case no: CC 07/2011

In the matter between:

THE STATE

and

KUNOWEE KUAIMA **ACCUSED**

Neutral citation: *The State v Kuaima* (CC 07/2011) [2013] NAHCNLD 07 (26 February 2013)

Coram: TOMMASI J

Heard: **20 October 2012; 19 -20 February 2013, 26 February 20x13**

Delivered: **26 February 2013**

Flynote: Evidence – evaluation of evidence of a child under the age of 14 –in terms of s164(4) court precluded from treating evidence of a child as inherently unreliable and to apply special caution – no per se precluded from careful approach, as is the case with any witness, where there is a lack of ability to recall and recount past events

Circumstantial evidence – court not enjoined to speculate on possibilities where same not founded on the evidence adduced.

Identification evidence – witness satisfied court that they correctly identified the accused – accused to some extent also corroborated allegation that he was seen.

Alibi – where State discharge evidential onus placing accused at the scene – totality of evidence and mendacity of accused in respect of his whereabouts evaluated

Summary: The complainant who was 3 years and 11 months old gave direct evidence that the accused who was 19 at the time and in a domestic relationship as envisioned by s3(1)(e)(i) of the Combating of Domestic Violence Act, 4 of 2003, had raped her by inserting his penis into her buttocks. In view of material contradictions between her evidence and other State witnesses the court could not rely on her evidence.

Her guardian, the accused brother and medical doctor gave circumstantial evidence. The guardian and brother of accused saw the accused in the immediate vicinity where the complainant was found after they heard her screaming. The court was satisfied that the accused was properly identified. The accused gave untruthful evidence of his whereabouts at the material time.

The court, by inferential reasoning concluded that it was the accused was responsible for causing complainant to scream and leaving her with sperm like substance running down her legs. The latter fact and the medical evidence were found to have been consistent with the complainant having been raped by the insertion of his penis into her anus.

The only reasonable inference drawn from the proven facts was that the accused had raped the complainant by inserting his penis into the complainant's anus. The accused according convicted of the offence he was charged with.

ORDER

The accused is convicted of having contravened section 2(1)(a) read with sections 2(2), 3, 5, 6 and 18 of the Combating of Rape Act, 8 of 2000 and section 1, 3 and 21 of the Combating of Domestic Violence Act, 4 of 2003 - Rape

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JUDGMENT

TOMMASI J

[1] The accused had been charged with having contravened section 2(1)(a) read with sections 2(2), 3, 5, 6 and 18 of the Combating of Rape Act, 8 of 2000 and section 1, 3 and 21 of the Combating of Domestic Violence Act, 4 of 2003 in that he committed a sexual act by inserting his penis into the anus of the complainant on 28 July 2007. According to the indictment as amended by order of court in terms of the provisions of section 86 of the Criminal Procedure Act, 51 of 1977, the accused was 19 years and the complainant was three years and 11 months old at the time.

[2] The State called Dr Melitta Bosshart; the complainant, her guardian at the material time; and the accused's older brother as witnesses. The accused testified in his defence. The names of the witnesses and the complainant are omitted for her protection.

[3] The State adduced direct evidence by the complainant that she was raped by the accused in that he inserted his penis into her anus. In support hereof it further adduced circumstantial evidence by the guardian and the accused's brother.

[4] A brief summary of the evidence adduced by the State was that, on 28 July 2007, the complainant was living with her guardian. On this day, her guardian and the accused's brother went to a neighbouring house to fetch milk. They left the

complainant, boys younger than the complainant; the accused; and according to the guardian another adult, at the house.

[5] When they returned between 14H00 and 15H00, they heard a child cry (loud screaming according to the accused's brother) and saw the accused running away. They found a spot with marks on the ground and thereafter found the complainant. Both observed a substance, resembling sperm, running down the complainant's legs (buttocks and left leg according to the guardian). The guardian observed that she walked with her legs wide apart. This led the guardian to conclude that the complainant was raped by the accused. Both these State witnesses testified that she did not tell them what had happened.

[6] The accused's brother went to summon other neighbours to the guardian's house and together they followed the footprints of the accused from the spot where he was seen running away by his brother. They found him at his parental home and brought him to the guardian's house. The accused was questioned in the presence of the guardian and his brother by a person who was not called as a witness by the State. The guardian testified that the accused was not threatened or assaulted and that he admitted that he had anal sexual intercourse with the complainant.

[7] The guardian testified that she did not wash the complainant as she was aware that this was discouraged where complaints of a sexual nature is made. The complainant was taken to the hospital after two days and was examined by Dr Melitta Bosshart. Dr Bosshart testified that the injuries the complainant suffered, was consistent with a conclusion that the penetration into her anus took place.

[8] The accused pleaded not guilty. His plea explanation was that he was not present at the time. He, during his evidence in chief, denied that he was at the house of the guardian at the time they left the house and that he had raped the complainant. He testified that he was questioned at the house of the guardian and although he was assaulted and threatened, he still denied that he had raped the complainant. During cross-examination, he testified that he took his father's cattle for

grazing at around 8H00. He thereafter went to his cousin's house at 14H00. He was back at his own house at 14H30. He admitted that he was seen by the guardian and his brother during the afternoon. When they saw him, he turned around and walked away from them. He denied that he ran away or that he was seen at the spot where the guardian and his brother testified they had seen him. He was however unable to recall the time he was seen but testified that it was after he had left his cousin's place.

[9] The court has to determine whether the State has proven beyond reasonable doubt that it was the accused who committed a sexual act i.e inserting his penis into the anus of the complainant under coercive circumstances i.e being the fact that the complainant was under the age of 14 and the accused more than 3 years older than her.

[10] The complainant was a single witness in respect of the actual sexual act and it is trite law that such evidence should be treated with caution. Ms Mainga submitted that a further reason for caution was the tender age of the complainant. This court, by virtue of the provisions of section 164(4)[1], is however precluded from regarding her evidence as inherently unreliable and to treat her evidence with special caution merely on the ground that she was a child. Section 164(4) aims to abolish the application of a general cautionary rule in a criminal trial.[2] The trial court is called upon to assess the reliability of a witness' evidence in respect of his/her, powers of observation, ability to remember, ability to relate events; and the truthfulness or credibility thereof. Once a witness, irrespective of their age, display a lack of any of these abilities the need for greater care is required when evaluating such a witness's evidence. It is not my understanding that section 164(4), per se, preclude a court from taking into consideration a witnesses' youthful age where it is evident that it impacts on such a witness' ability to accurately recall and recount past events.

[11] The complainant was 9 years old when she testified and in grade 3. She intelligently answered some of the questions posed by the court to establish whether

[1] Of the Criminal Procedure Act, 51 of 1977
[2] See Kapia v State, unreported case, Case No CA 91/2010 NAHCNLD (20 June 2011) at para 29 - 30

she understood the difference between truth and lies. The court is mindful of the fact that she testified more than five years after the event.

[12] She immediately started testifying about the central issue of having been raped. She recalled that her cousin (her guardian) was not at home and they went looking for her. She met the accused on the way. The accused told her to lie down and when she refused he beat her with a stick. She then lied down and he raped her. When her aunt returned the accused ran away and her aunt took her to the water place to wash her. A car came and she was taken to Ongama. After being prompted by the prosecutor to again describe in more detail what had happened she added that the accused told her to "stand on her knees" and to remove her panty.

[13] The fact that the complainant was not able to recall some of the finer details may be ascribed to the passage of time. One would however expect the complainant to have a good recall of the central event namely the actual sexual act. The fact that the complainant omitted to independently narrate that she was requested to take off her panties and contradicted herself in respect of the position which the accused told her to take, raises the concern about the complainant's ability to recall the actual event.

[14] The complainant recalled that she was left at home with her younger cousins on the fateful day, a fact which was corroborated by her guardian and the accused's brother. The complainant and the accused's brother testified that there were two younger boys whereas the guardian recalled that she left the complainant with three younger boys. I am of the view that this was not a material discrepancy and explicable if one has regard to the passage of time. In this regard the guardian's recollection of events was generally clear and credible.

[15] Ms Mainga argued the there was a discrepancy between the complainant's testimony and the other two State witnesses in respect of the presence of the accused at the guardian's. The complainant testified that she met the accused on the way whereas the other two State witnesses testified that the accused was present at

the guardian's house. The accused denied that he was present. The guardian testified that the accused was sitting under a tree with another adult. It was not specifically testified where the children were left at home and they clearly had moved from the house to a place which was some distance from where they were left. From these facts it cannot be inferred that the complainant must have seen the accused where he was sitting. I am not able to conclusively find that the complainant gave contradictory evidence in this respect.

[16] The complainant testified that her guardian left with one Amuzembi. This contradicts the evidence of her guardian and accused's brother. Their evidence was that it was in fact he accused's brother who accompanied the guardian. Amuthembi, according to the guardian, was not present at her house on that day. The complainant further testified that she told her guardian and Amuzembi that she was raped by the accused. The guardian impressed the court with her ability not only to recall the events but she was able to give clear evidence in respect of the finer details without any hesitation. She testified that she asked the complainant what had happened but she did not reply. This was confirmed by the accused's brother.

[17] Ms Mainga argued that the court should take into consideration the lack of a report. The court first has to determine however whether or not it was made. The overwhelming credible evidence by the guardian and the accused's brother was that the complainant did not make a report. The complainant's evidence that she made a report to the guardian and Amuzembi, cannot under these circumstances be correct and I find that no such report was made. No adverse inference is drawn from the fact that she did not make the report given her age and trauma she clearly suffered. The discrepancy between her evidence and that of the other two State witnesses, was however material. The fact that she mistakenly identified the person who was with the guardian at the material time is indicative of a poor recollection.

[18] When asked what rape was she answered that it was to have sex. She also described that the accused had sex with her in her buttocks and that he was using his penis. When asked what a penis was used for she answered that it was used for

having sex. During cross-examination she was asked how she was came to know words such as rape, sex and penis. She explained that she heard the words from children when they were insulting. The court also wanted to know if she knew these words before or after the incident and she responded that she did not hear these words at that time. If the complainant did not know these words at the time, it stands to reason that she would not have had the words to describe what had happened to her at the time. It thus improbable that she reported what had happened to her. Furthermore it begs the question: how did she afterwards find the words to describe what had happened to her. Ms Mainga argued that this must have been suggested to her. Such an inference would be a reasonable one under the circumstances. This court can under these circumstances not rely on her narration of the actual sexual act as the real possibility exist that it did not come from her own recollection.

[19] A further contradiction was her testimony that she was taken to the water place and washed. Her guardian specifically denied that she washed the complainant. I have already alluded to the fact that this court found the guardian to have been a credible witness and one who impressed this court with her ability to recall the events in detail. This is yet another indication that the complainant could not accurately recall the events that took place on that date.

[20] When the complainant’s evidence is considered in its totality the court has to be satisfied that, despite the contradictions and shortcomings, the truth has been told. In this case the nature of the contradictions and defects were material and I am unable to find that the complainant could satisfactorily recall or narrate what had happened to her on that date. This court therefore cannot rely on her testimony that she was raped by the accused.

[21] This however does not mean that the complainant was not raped. The accused, by raising a defence that he was not present, essentially did not dispute the medical evidence that penetration of the anus took place. Since there were no eyewitnesses, only circumstantial evidence remains to be considered.

[22] The guardian and the accused's brother placed the accused at the guardian's house at the time they left. The accused denied this allegation and testified that he was either fixing the fence at a cousin's house or at home. Both witnesses did not give the time they left the house. It was put to the guardian that the accused was not present at the time they left but that the he had already gone to the well. This created the impression that the accused was at the house but that he had already left at the material time. However the accused, when he gave an account of his whereabouts on that date, never mentioned the fact that he was at the guardian's house at any stage during that day. He also testified during cross-examination, that his brother was with him when he fixed the fence at his cousin's house. This was never put to his brother when he testified. These discrepancies lead the court to conclude that the accused fabricated his evidence that he was not at the house of the guardian at the time the two State witnesses left. I am satisfied that the two State witnesses' evidence, despite the omission to give a specific time, was credible in this regard and reject the accused's version that he was not present at the house when they left, as being false.

[23] The second time the accused was seen by the two State witnesses on that day was after they heard the cry of a child and between 14H00 and 15H00. Even before seeing the accused and the complainant, the guardian remarked that the accused was raping the child. The accused's brother confirms that she made this remark. She was unable when cross-examined on this aspect, to adequately explain what prompted her to make this remark. This evidence is irrelevant as it amounts to baseless speculation. Its only value is to demonstrate that the guardian has a tendency to exaggerate. Her evidence that she had seen the accused was however corroborated by the accused's brother.

[24] The accused's brother testified that he saw the accused running away approximately 50 meters from the place where they found the complainant. The accused's brother at times could not recall certain detail about the dates but he honestly admitted thereto. This is explicable given the passage of time between the incident and giving his testimony in court. He displayed no favour nor dislike for the

accused contrary to the testimony of the accused who laboured under the impression that his brother disliked him for no rhyme or reason. His evidence was to the point to the extent that it at times lacked detail. He however was clear and credible in respect of the material facts.

[25] The version of these two State witnesses that the accused was seen at a certain spot was strengthened by the uncontested evidence of the accused's brother that he in fact followed the accused's footprints from a spot where they found marks on the ground and traced it to where he found the accused. The accused's brother, despite the mobility of the scene, identified the accused. Both State witnesses testified that it was during the day and visibility was therefore not in issue. The guardian testified that, although she only saw the back of the accused, she recognised him as she knew him since 1995.

[26] The accused admitted during cross-examination that the two State witnesses saw him. He however denied that it was at the place where they testified they saw him. The accused could accurately indicate that he was at his cousin's house for 30 minutes and that he was home by 14H30. He however evaded a specific question as to the time he was seen by the two State witnesses. When pressed for an answer he testified that he could not recall. The same evasiveness occurred when he was asked where the complainant was at the time when he was seen. The accused when asked during his evidence in chief where he was on that day omitted from his account that he went looking for cattle after he had fixed the fence which coincidently happened to be the time he was seen by the two State witnesses.

[27] When weighing these two versions, I find that the accused's version that he was seen at a different spot unconvincing. The cumulative effect of the evidence leads this court to conclude that the accused was properly identified as the person whom the two State witnesses saw running away from a position which was in close proximity to the place where the complainant was found. This conclusion is to some extent confirmed by the accused himself. I accordingly reject the accused's defence that he was not present in the vicinity where he was seen by the two State

witnesses, as false. I find that the State succeeded to place the accused within a 50 meter radius from where the complainant was found.

[28] The only material aspect in which the two State witnesses contradicted one another, relates to the admission made by the accused when he was questioned. The State did not call the witness who questioned the accused and no reason was advanced why this witness was not called. Under these circumstances this court can only draw the adverse inference that his testimony would not have corroborated that of the guardian. I accordingly find that the State did not prove beyond reasonable doubt that the accused admitted during the meeting that he had anal sexual intercourse with the complainant

[29] The accused confidently testified that the fact that he was seen by the two State witnesses does not mean that he committed the offence of rape. It is indeed so that they did not see him committing the offence. They however both observed a substance running down the legs of the complainant which resembled sperm. The accused also challenged this evidence by asking whether there was proof that it was his sperm. The guardian and the accused's brother were both adult enough to reach this conclusion from their mere observation of the substance and their ability to do so was not challenged during cross-examination. The guardian testified that the complainant was wearing only a traditional cloth which covered her genitals. It would therefore have been possible for them to have observed the substance on her buttocks and legs. This does not necessarily lead to the conclusion that the sperm belonged to the accused.

[30] In S v HN 2010 (2) NR 429 (HC) the following guidelines for evaluating circumstantial evidence appear from the headnote:

> Where the court is required to draw inferences from circumstantial evidence, it may only do so if the 'two cardinal rules of logic' as set out in R v Blom 1939 AD 188, have been satisfied. These rules were formulated in the following terms: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference

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from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct

The law does not require from a court to act only upon absolute certainty, but rather upon just and reasonable convictions. When dealing with circumstantial evidence, as in the present case, the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it. It is the cumulative effect of all the evidence together that has to be considered when deciding whether the accused's guilt has been proved beyond reasonable doubt. In other words, doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation, but those doubts may be set at rest when it is evaluated again together with all the other available evidence.

There is thus no onus on an accused to convince the court of any of the propositions advanced by him and it is for the State to prove the propositions as false beyond reasonable doubt.

Caution must be exercised not to attach too much weight to the untruthful evidence of the accused when drawing conclusions and when determining his guilt"

[31] The State succeeded placing the accused in close proximity to the complainant who cried or screamed shortly before she was found and who had a sperm like substance running down her legs. Having proved this, the State discharged the evidential burden to disprove the accused's alibi that he was not present. The accused, during his evidence in chief testified that he was at his cousin's house and at home whereas he added during cross-examination that he went looking for his father's cattle after he went to his cousin's house. His evidence of an alibi clearly was fabricated to avoid being placed in the vicinity where the complainant was heard to have been screaming. Why would the accused run away or even, as he testified, walk away in the face of a child's cry or scream. This conduct is inconsistent with his proclaimed innocence.

[32] The medical evidence and the evidence that sperm like substance was observed on the legs of the complainant is consistent with an inference that the complainant was raped by the insertion of a penis into her anus. The fact that the complainant was violated was essentially undisputed. Ms Mainga however argued that it is not the only reasonable inference which can be drawn from the

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circumstantial evidence given the fact that the complainant was taken for a medical examination two days after the event. She argued it was possible that something else could have caused the injuries. That may be so but the question is whether that is probable under the circumstances of this case. This court is not enjoined to consider remote possibilities where no evidence has been adduced to support the existence of such a possibility.

[33] The totality of the evidence, inclusive of the mendacious evidence of the accused, is consistent with an inference that the accused was the perpetrator. The only reasonable inference supported by the evidence is that it was the accused who left the complainant in pain with sperm running down her leg.

[34] Having said this, I am satisfied that the State has proven beyond reasonable doubt that the accused contravened section 2(1)(a) read with section 2(2), 3, 5, 6 and 18 of the Combating of Rape Act, 8 of 2000. It was not disputed that the accused was related to the complainant and therefore a family member related by consanguinity. The accused was thus in a domestic relationship with the complainant as defined by section 3(1)(*e*)*(i)* the Combating of Domestic Violence Act 4 of 2003..

[35] In the result the accused is convicted of having contravened section 2(1)(a) read with sections 2(2), 3, 5, 6 and 18 of the Combating of Rape Act, 8 of 2000 and section 1, 3 and 21 of the Combating of Domestic Violence Act, 4 of 2003 i.e.Rape

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MA Tommasi

Judge

APPEARANCES

STATE : Mr. Wamambo
Of the Office of the Prosecutor-General, Oshakati.

ACCUSED: Ms. Mainga
Of Inonge Mainga Attorneys, Ongwediva, Oshakati