

HIGH COURT OF
LOCAL DIVISION,

JUDGMENT



NAMIBIA NORTHERN
OSHAKATI

Case no: CC 25/2012

THE STATE

and

SIMON HIPANDWA SHOW

ACCUSED

Neutral citation: *S v Show* (CC 25 /2012) [2017] NAHCNLD 34 (19 April 2017)

Coram: TOMMASI J

Heard: 18- 19 August 2016

Delivered: 19 April 2017

Flynote: Evidence – Alibi – State bear onus to prove that it is false beyond reasonable doubt – Mutually destructive versions - Proper approach stated in *S v Singh* 1975 (1) SA 227 (N) – Single witness – Need for caution re-stated – Discrepancies, bias adverse to the accused and unsatisfactory aspects of complainant’s testimony creates doubt in the mind of the court.

Summary: The accused was charged with four counts of having 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) [Rape]. He pleaded not guilty and raised an alibi in respect of the first three counts. He also indicated that the complainant, although she was not an incompetent witness, suffered from a mental ailment which may account for her falsely implicating him of rape. The court held that at the time of the incident, the complainant was not suffering from any mental ailment, but concluded that the complainant denial omission to take the court into her, impacted adversely on her credibility. The court, applying caution to the

testimony of the testimony of the complainant, held that there were material discrepancies in the testimony of the complainant; and that despite the fact that the medical evidence is consistent with rape, that the version of the accused was reasonably possibly true. He was given the given the benefit of the doubt and found not guilty and discharged on all four counts of rape.

ORDER

1. The accused is found not guilty of all four counts of having contravened section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) and is discharged.

JUDGMENT

TOMMASI J: [1] The accused was charged with four counts of rape in contravention of the Combating of Rape Act, 2000 (Act 8 of 2000). The accused pleaded not guilty.

[2] A brief summary of the State's case is the following: The complainant, a 13 years old girl was living with her mother and her stepfather, the accused, was 46 years old at the material time. The complainant's mother was due to give birth. She left the complainant and her two younger siblings in the care of the accused. She went to Tsandi to be close to the hospital for the delivery.

[3] During her absence and on 7 September 2010 the accused requested the complainant to bring a tin of fish to his bedroom. When she entered his bedroom, the accused forcibly grabbed her and had sexual intercourse with her. (count 1)

[4] On 8 September 2010 the accused requested the complainant to bring a radio to his bedroom. Once she entered his room he again grabbed her and forcibly had sexual intercourse with her. (count 2)

[5] On 9 September 2010 the accused entered her sleeping room where she was sleeping with her two siblings. He offered her N\$30 to have sexual intercourse with her and she refused. He then forcibly had sexual intercourse with her in her sleeping room and also threatened her. (count 3)

[6] On 10 September 2010 the accused once again entered the complainant's room, grabbed her and forcibly had sexual intercourse with her in her sleeping room. (count 4)

[7] During the early hours of 11 September 2010 the complainant left the house and walked approximately 5 km to her paternal grandmother's house where she related to her father's brother that the accused had raped her. She repeated it to her grandmother. The accused and his wife (the complainant's mother) arrived later and the accused was confronted with the allegations. He denied it and left the grandmother's house. The complainant was taken to the doctor where it was confirmed that she had injuries consistent with penetration.

[8] The accused denied that he had sexual intercourse with the complainant. He raised an alibi that he had left the house on 7 September 2010 and went to a cattle post approximately 35 km away where he stayed until 10 September 2010. He denied that he, on 10 September 2010 when he returned to the house, had sexual intercourse with the complainant. He admitted seeing the complainant at home upon his return. He further explained that he, during the morning of 11 September 2010, noticed that the complainant was not there and, knowing that she was suffering from some mental disorder, went to his wife, who was in hospital but had not given birth at the time. He learnt that the complainant was not at the hospital. He went searching for her with his wife and they found her with her paternal grandmother. In a nutshell the accused raises the defence of an alibi in respect of count 1 – 3 and suggests that the complainant fabricated the allegation of rape as a result of a mental disorder.

[9] Mr Lisulu, counsel for the State, submitted that the complainant places the accused at the scene at the material time. He submitted that, the court, in the evaluation of the evidence where there are two mutually destructive versions, ought to have regard to the following citation from *S v Singh* 1975 (1) SA 227 (N) at 228F – (cited with approved by Mtambenengwe J, as he then was, in *S v Engelbrecht* 2001 NR 224 (HC) at 226E – G):

'Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the abovementioned examples is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.'

[10] The law cited is applicable as the version of the complainant and that of the accused is mutually destructive.

[11] The complainant is a single witness in respect of the rape incident and the court therefore has to warn itself of the inherent dangers of relying on the single uncorroborated evidence of the complainant.

[12] Mr Greyling submitted that the complainant was not a credible witness and the court, having regard to the fact that she is a single witness, cannot rely on her evidence. He referred this court to the oft cited case of *R v Mokoena* 1932 OPD 79 at 80 where De Villiers JP held that:

'the uncorroborated evidence of a single, competent and credible witness is sufficient for a conviction but only in those instances where the evidence of such single witness is clear and satisfactory in every material respect; and that this section (s208) ought not to be invoked where for instance a witness has an interest or bias adverse towards the accused and has made a previous inconsistent statement, where he contradicts himself in the witness box,'

[13] The medical evidence suggests that the injuries are consistent with penetration. There was no active discharge and the doctor ventured an educated guess that the injury was perpetrated within a week as it did not healed completely. This is consistent with the complainant's version that she was raped.

[14] The complainant's grandmother and her uncle confirmed that she arrived at their household in the early hours of the morning and that she reported to them that the accused raped her on four occasions.

Mental condition of the complainant

[15] Mr Lisulu submitted that the mental condition of the complainant should not be believed as the grandmother and the father had no knowledge thereof. He furthermore submitted that the complainant, at the time they found her at the grandmother's house, was normal and there was no sign of mental illness. He submitted that the accused collected his own passport and not that of the complainant which shows that he was not concerned with her mental position at the time. Mr Greyling submitted that the accused, as a lay person, held the view that the conduct of the complainant which appeared to him to be that of a person who is mentally disturbed, may explain why the complainant would fabricate rape charges against him. The evidence however does not support a conclusion that the complainant was suffering from any mental illness at the time she made a report to her grandmother and uncle. This court is satisfied that the complainant was in her sound mind when she reported the incident to her grandmother.

[16] The complainant, when she was confronted with having suffered from mental illness, responded that all the illnesses she had did not affect her brain or mind set. She recalled that she suffered from malaria but denied that she had seen traditional doctors during 2007 and 2008. She denied that she was taken to pastors in 2008 so that they could pray for her. She denied that she threatened to walk into a dam in 2008 or that she was hearing voices who told her to lie in the road so that the cars could drive over her. When she was confronted with an incidence during 2009 when she threatened to stab herself in the chest with a knife she retorted that she took poison for cockroaches because there was a problem between her father and her aunt where she was staying. She could not remember that she went to the doctor after the rape incident occurred when she experienced problems breathing and she refused to talk. She stated that if it affected her, she was not aware of it.

[17] I have reservations about the value of the testimony of the complainant's mother and I shall return to this issue later. However, despite my reservations I nevertheless formed the opinion that her concern for the mental ailments of the

complainant was sincere. The defence furthermore adduced objective evidence that the complainant received medical treatment for “acute psychosis” albeit only after the event.

[18] The terms of reference for the medical examination and observation which the complainant was subjected to, resulted in a report which did not assist the court. The psychologist was clearly not given all the material information in order to be of real assistance to the court. I am satisfied that it is reasonably possibly true that the complainant was taken to medical and traditional doctors for treatment. The significance of this is not that the complainant was mentally disturbed at the time she made the report, but the fact that the complainant denied knowledge of this and only admitted to being emotionally distressed to the extent that she wanted to commit suicide during cross-examination. This denial and the omission to take the court fully into her confidence impacts negatively on the credibility of the complainant.

[19] Mr Greyling made reference to the complainant’s demeanour in that she was smiling when testifying about the rape incident and he submitted that she selectively changed her demeanour to that of a victim. The complainant explained that she usually smiles a lot. I have taken note of the complainant’s demeanour as it was pointed out by counsel but I am not persuaded that I should attach a lot of weight to her demeanour. I have however to note that the complainant expressed herself strongly when she testified that the accused did not want her to live with them and she had an issue with the fact that he had assaulted her mother. This is an indication of bias adverse to the accused.

[20] Mr Greyling further pointed out some inconsistencies and contradictions and I shall, for the sake of brevity deal with only the material discrepancies. He submitted that the complainant was unable to give details of the various occasions she was raped under cross-examination.

[21] During cross-examination in respect of the first incident the complainant testified that the accused, at the time he held her against the bed, told her that she must cover him while her mother was not present and she must not inform anyone. She however forgot to mention the issue of “covering him” in her evidence in chief. She also did not tell the police about it but testified that she told them about the warning not to tell anyone. It appears that she informed the investigating officer that

the accused asked her to cover her with a blanket as he wanted to sleep. There furthermore appears to be a difference in the time he uttered the words. She testified that he uttered the words when he pressed her on the bed and to the investigating officer she related that he uttered these words before he grabbed her.

[22] Mr Greyling cross-examined the complainant extensively on the various positions i.e what his position was when he removed her panty, whether it was possible for the accused to have sexual intercourse with her whilst wearing her skirt; whether she resisted or screamed etc. The complainant became angry at times and even aggressive. The response of the complainant is to be understood. The questions expected of her to remember the finest details of what happened to her which she was unable to do. Her frustration she voiced thus: 'I do not know how to explain but the truth is, all the positions that I have spoken already, they happened but I just cannot explain again the positions because those ones already happened. I do not know how again I can explain the other ones again because I already explained the positions.' Having said this, I have to state that there is merit in Mr Greyling's submissions that that the complainant provided very little detail in respect of the actual rape incidents.

[23] She pointed out that she sustained bruises on her left arm and on her private parts. She did not report to the teachers partly because she did not know how to start and partly because she was instructed not to tell anyone.

[24] During cross-examination of the second incident she testified that the accused grabbed her on her hands. She corrected herself and said on the arms. He asked her again to do what they did yesterday. This however does not appear from her statement. She stated that she did not mention everything because she did not know it would be important but since she is now questioned in detail she recalled details she had left out of her statement. This is a reasonable explanation but the complainant had forgotten that she testified in her evidence-in-chief that he again warned her. It was pointed out to her that it was also not written down in her statement. She testified that she remembered that the accused slept with her but not all the small details.

[25] The complainant testified that on the third occasion she was offered a N\$30 by the accused in exchange for sexual intercourse. She refused the offer but kept the money which the accused dropped, for safekeeping. She testified that she did

not use the money. This is an important issue as the accused indicted that he gave it to her when he left for the cattle post in order for her to buy oil and fatcakes. She showed Abisai the money. Abisai in his statement stated that he saw a N\$10 and coins although he did not count the money. She testified that she put the money together with coins of her own. When she showed Abisai she showed him the notes together with the coins. Her grandmother testified that it was N\$30 but the notes differ from that of the complainant and of Abisai. Both the complainant and the accused confirm that the accused gave the complainant \$30. The inconsistencies lead this court to question the veracity of the complainant's version and lend credibility to the accused's version that he gave it to her to buy oil and fat cakes.

[26] The most unsatisfactory aspect of the State's case in respect of the credibility of the complainant's version is her report to the Psychologist that she was raped only once. The Psychologist indicated that the complainant was reluctant to talk about the rape incident but this does not explain why the complainant omitted to tell her that she was raped on four occasions.

[27] Mr Lisulu submitted that the accused already knew that he was accused of having had sexual intercourse on 4 occasions with the complainant when he came to the house of the complainant's grandmother looking for the complainant. He submitted that if the alibi were to be the truth, he ought to have mentioned it at the time that conversation took place. At this point I take cognisance of the fact that the witness did not testify that the complainant had given the dates of the four occasions she was raped at the time. The charge sheet in the district court however states from 7 – 9 September 2010 and it must be assumed that that was the first time the accused could reasonably have been expected to have known the dates on which it was alleged he had committed the offences. Mr Lisulu submitted that if the accused had disclosed his alibi at an early stage, it could have been investigated. It is indeed so that the accused raised his alibi for the first time during his plea explanation on 5 November 2013. The complainant testified that the accused came from the cuca shop and one would have thought that, given the fact that the complainant was a single witness that the State would obtain corroboration that the accused was in the vicinity of the village.

[28] In *S v Kandowa* 2013 (3) NR 729 (HC) on appeal the court applied the following dicta in *S v Malefo en Andere* 1998 (1) SACR 127 (W) at 157i – 158d: (1) there is no burden of proof on the accused person to prove his alibi; (2) if there is a reasonable possibility that the alibi of an accused person could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt; (3) an alibi must be assessed, having regard to the totality of the evidence and the impression of the witnesses on the court; (4) if there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable; and (5) the ultimate test is whether the prosecution has proved beyond reasonable doubt that the accused has committed the relevant offence and for this purpose a court may take into account the failure of an accused to testify or that the accused had raised a false alibi.

[29] The crux of Mr Lisulu's submission is that the accused alibi is fabricated and furthermore improbable in view of the fact that the accused left the young children unattended.

[30] The accused testified that he left a message for his wife with his brother that he had left for the cattle post. He testified that he chopped wood poles and he had a quarrel with a cattle herder by the name of Haufiku who left the post after he had given him his money. He testified that he informed a neighbour when he left that there was no one to look after the cattle. His brother, according to the accused was in constant contact with his wife and he informed him that he was going to the cattle post. He testified that he entrusted a lady who was employed by his relative in a house 200 meters from where he stayed, with the task of looking after his children. He testified that he visited his wife on his return. She confirmed this and indicated that she saw the sticks on the truck. She recalled that the husband told her when he was in prison that there was no one at the post.

[31] The mother of the complainant (wife of the accused) blatantly lied to the court. She denied having had a consultation with counsel for the defence and he, as a court officer, was duty bound to inform the court that he indeed consulted with her. This does not mean that her entire evidence is a lie but I would apply caution to the testimony of this witness as it appears she fashions her evidence to assist the accused.

[32] The version of the accused is not without unsatisfactory aspects. His description of the person who was the cattle herder appears vague and there are some contradictions between his testimony and his wife's testimony. However the complainant's unsatisfactory, uncorroborated testimony in respect of the N\$30 she received from the accused, lends credibility to the version of the accused. It is thus reasonably possibly true that the accused indeed left for the cattle post as he testified.

[33] It is the duty of the State to disprove the defence of an alibi. Mr Lisulu reminded the court that it was in a position to invoke the provisions of s 167 of the Criminal Procedure Act, 51 of 1977 and to call witnesses. This is indeed so but the court should also guard against descending into the arena.

[34] Having considered all the evidence I cannot conclude that the unsatisfactory and contradictory parts in the complainant's evidence is peripheral. They are central to the allegation that the complainant was raped on four occasions. The fact that she only spoke about one incident of rape to the Psychologist and narrated 4 very sketchy accounts of rape and the other aspects mentioned above creates serious doubt in the mind of the court. The evidence adduced by the State herein simply did not muster the standard applicable for proving that the accused had raped the complainant, beyond reasonable doubt.

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

1. The accused is found not guilty of all four counts of having contravened section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) and is discharged.

MA TOMMASI

Judge

APPEARANCES

For The State :

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