

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
APPEAL JUDGMENT

Case No.: CA 03/2015

In the matter between:

THE STATE

APPELLANT

and

UAKANDERERA TJIZEMBISA

RESPONDENT

Neutral citation: *S v Tjizembisa* (CA 03/2015) [2017] NAHCNLD 51 (20 June 2017)

Coram: JANUARY, J and TOMMASI, J

Heard: 30 March 2017

Delivered: 20 June 2017

Flynote: Criminal Procedure – Appeal – Leave to appeal granted – Acquittal – Contravening section 2(1)(a) Combating of Rape Act 8 of 2000 – Misdirections – Set aside – Convicted – Matter remitted for sentence.

Summary: The respondent was acquitted on a charge of contravening section 2(1)(a) of the Combating of Rape Act, Act 8 of 2000 - Rape. The learned magistrate

misdirected himself. The acquittal is set aside and substituted with a conviction. The matter is remitted to the trial court for sentence.

ORDER

1. The appeal is allowed.
 2. The acquittal is set aside.
 3. The acquittal is substituted with a verdict of guilty of a contravention of section 2(1)(a) of the Combating of Rape Act, Act 8 of 2000-Rape.
 4. The case is remitted to the trial court for sentence to be imposed.
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APPEAL JUDGMENT

JANUARY, J (TOMMASI, J CONCURRING)

[1] This is an appeal by the State against the acquittal of the respondent in the Regional Court Oshakati, sitting at Opuwo on a charge of contravening section 2(1)(a) of the Combating of Rape Act, Act 8 of 2000 - Rape. The accused pleaded not guilty in accordance with section 119 of the Criminal Procedure Act 51 of 1977 and gave a plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977 revealing the basis of his defence. The accused stated; 'I am pleading not guilty as although Uatataiza reported me I did nothing to her. I did not rape her'

[2] The State applied for leave to appeal against the acquittal in terms of section 310(1)(a) of the Criminal Procedure Act, Act 51 of 1977. Leave was granted on 22nd July 2016.

[3] Mr Matota is representing the appellant and Mr Greyling for the respondent. The grounds of appeal are as follows;

'3.1 The learned magistrate erred/misdirected himself on facts by finding that it was highly unlikely that the victim was raped and traumatised just because she has (sic) intercourse with her boyfriend after the rape incident.

3.2 The learned magistrate erred in law and on facts by focusing on an irrelevant issue namely, whether it is an act of love or not by the complainant by having sexual intercourse with her boyfriend after being raped.

3.3 The learned magistrate misdirected himself in law and/or on facts by ignoring the evidence of the complainant to the effect that the respondent had sexual intercourse with her without her consent, despite having earlier found that all factors points towards the commission of rape.

3.4 The learned magistrate erred in law and or on facts by finding that evidence should have been laid (sic) regarding the reaction of the complainant's boyfriend after he was informed about the rape incident, to prove that the complainant was raped.

3.5 The learned magistrate erred in law and or on facts by finding that the evidence of the boyfriend of the complainant should have been laid (sic) regarding the complainant's conditions while at the same time he ignored or attached little weight to evidence on record from Gerson Uavendura to the effect that the complainant was dusty and unhappy when she arrived at home that night of the incident.

3.6 The learned magistrate erred in law by failing to find that the evidence of the complainant was clear and satisfactory in al material aspects regarding the rape incident.

3.7 The learned magistrate erred in law and or on facts after finding that the evidence of the respondent to be of no value, also rejected the state's evidence regarding the rape incident.'

[4] The accused pleaded not guilty in the Regional court and was represented by Mr Tjiteere who did not make any disclosure at the stage of pleading.

[5] The complainant testified that on the night of the incident she was with the respondent. They were together during the day. They went to her home. At bed time the respondent wanted to go to shops to drink. She accompanied the respondent to the shops. When it was dark the complainant told the respondent that they must go back but the respondent still wanted to buy a drink. He put an empty bottle in his trousers. On the way home the respondent grabbed the complainant from behind and said that he was going to rape her. He grabbed her on the neck and threw her on the ground. He then strangled her. The respondent told the complainant to turn on her back. She turned on her back and he raped her. He had sexual intercourse with her by putting his penis into her vagina without her consent. He used force.

[6] The rape lasted for about 20-25 minutes. The respondent afterwards asked the complainant if she is going to report him. He told her that he will kill her if she is going to report. He had a knife with him. The complainant pushed the respondent onto a stick and he was injured on his lower leg. The complainant left the respondent there after telling him that she is not going to report him. She went to the respondent's younger brother who was her boyfriend. She informed her boyfriend that the respondent wanted to rape her and that she slept with him. This she did because she was afraid that the boyfriend will tell her that she just had consensual sex with the respondent. She then had consensual sex with her boyfriend. The next day she told her mother that she was raped. She thereafter went to report the incident to the police. She was examined at Opuwo hospital and blood samples were also taken.

[7] The State called a medical doctor. He was however not the doctor who examined the complainant. The medical examination was done by another doctor who was no longer in Namibia. The doctor who testified just read the J 88 medical report into the record. The doctor who examined the complainant could not determine if anyone had sexual intercourse with the complainant. The complainant only had superficial scratches on the shoulder. There were no fractures, dislocations or open wounds. The labia majora and labia minora were normal, fourchette normal, vestibule normal, no hymen, no bleeding and no discharge. The complainant admitted to unprotected sexual intercourse with her boyfriend.

[8] Another witness who knows the respondent was also called by the State. This witness is a relative of the respondent. The respondent is the son of the uncle of this witness. The witness one day was in a motor vehicle travelling with the respondent and the complainant to shops at about sunset. The witness later on talked to the complainant. The complainant asked for a match. Later the complainant went into a room to sleep. When she came out of the room the next day she talked to this witness and apologised that when she came there she was dusty and angry because the respondent tried to rape her. The witness saw a wound on the lower part of respondent's leg with blood on the trouser. This witness asked the respondent what he did to his brother's girlfriend because the complainant was crying.

[9] The respondent testified in his defence. He stated that on that day he came from his house at Okatumba and went to a shop in Otjizoko. He found a person with the name Jaumba who is his in-law and a lady by the name Umendi. There were a lot of youngsters also at the shop. He spent the whole afternoon there and about 21h00 went to another shop also in Otjitope belonging to one Mbanja where he found a cousin and his brother Katau. They greeted each other and thereafter went to Okatumba, his house. They spent the evening by telling stories. The complainant found them there after she came with a vehicle. The respondent denies that he had raped the complainant. According to him he and his brother just went and slept. He admitted that he was with the third State witness and his brother.

[10] In section 1(a) of the Combating of Rape Act, Act 8 of 2000 'a sexual act is defined as the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person; or...'

(b)...,

(c)....

[11] The learned magistrate made a finding that; '*all factors point that the rape incident occurred*'. Despite this finding he however acquitted the respondent. I have evaluated the evidence of the State witnesses and am of the view that there are no

material contradictions in their evidence. The complainant is a single witness as far as the sexual act is concerned.

[12] The third State witness, however corroborates the complainant in so far that he observed an injury on the leg of the respondent in that she testified that she pushed the respondent onto a stick and that he was injured after the rape. This witness also observed blood on the trousers of the respondent a day after the alleged rape occurred. Further, in my view, the complainant testified that she travelled with a motor vehicle to the shops together with the respondent. She could not remember who else travelled in the motor vehicle. The third State witness testified that he was also in the motor vehicle. This witness is a relative to the respondent. He further testified that the complainant mentioned the rape to him and apologized because she was angry. The respondent in his evidence confirmed that at some point in time on the date of the incident he was in the company of the complainant and the third State witness. He even allegedly bought liquor (Clubman) for the complainant.

[13] The learned magistrate further in his reasons posed the question; 'Is it normal that after being raped, being traumatized, to have sexual intercourse with another person as an act of love? This court is of the opinion that such an act of love is highly unlikely, highly unlikely if the victim is raped'.

[14] This I find contrary to the finding that; '*all factors point that rape has occurred*'. The respondent stated about the allegation of rape firstly that he does not remember that he raped the complainant and thereafter, being led by his legal representative, that he did not rape her. I do not find the evidence of the respondent satisfactory and credible. He was vague in his testimony and to an extent that one gets the impression that he wanted to deny having been with the complainant on the date in question.

[15] In his evidence he testified firstly, only that he went alone to a shop at Otjizoko. He met with his in-law and a lady who was selling (not the complainant). He spent the whole afternoon at the shop until 21h00 when he went to another shop where he found a cousin and his brother. No mention was made about the complainant up to this stage. He then went home in Okatumba with the third State witness and his brother. When he

was asked if there was anything he left out about the incident, he emphatically answered 'no'. It was only when prompted by his legal representative that he eventually admitted having been with the complainant. Only in cross-examination did it emerge that at some stage did he buy Clubman for the complainant. He also stated in cross-examination that he and the complainant grew up in the same village. In cross-examination by his legal representative many facts that he denied were also not put to State witnesses. It was for instance not denied that the third State witness was already in his tent when the respondent and the complainant arrived and when the complainant asked for matches.

[16] The learned magistrate drew an adverse inference that the boyfriend of the complainant was not called to testify on her reaction with him after the alleged rape. I fail to see the relevance of the boyfriend's evidence. The complainant reported the incident to the third State witness and to her mother and reported the incident to the police. The ex-boyfriend is the brother to the respondent and I have my doubts if he would have testified against the respondent.

[17] I agree with what was held in *S v Unengo* by Liebenberg J in the headnote that;

'Held, that the evidence of the single witness need not be satisfactory in every respect. The evidence could safely be relied upon even where it had some imperfections, provided the court could find even though there were some shortcomings in the evidence of the single witness, the court was satisfied that the truth had been told. * (Paragraph [5] at 779F.)

Held, further, that the discrediting of a witness who deviated from a previous statement should be limited to instances where there was a material deviation from a previous statement made by the witness after acknowledgment of the content as being correct. Deviations shown to exist must not be evaluated in isolation. To enable the court to decide whether or not the truth had been told, despite some contradictions, regard must also be had to the rest of the witness's evidence, considered against the totality of evidence presented. (Paragraph [10] at 781E–F.)

Held, further, that where a court was presented with two mutually destructive versions the court must have good reason for accepting one version over the other and should not only consider the merits and demerits of the state and defence witnesses but also the probabilities. The evidence presented by the state and the defence must not be considered in isolation when assessing the credibility of the witnesses and the reliability of their evidence. The approach the court must follow was to take into account the state case and determine whether the defence case did not establish a reasonable hypothesis. (Paragraph [11] at 781F–H.)

Held, further, that failure by the state to call a witness did not per se justify any adverse inference against the state case. Justification to do so would depend on the circumstances of the case. On the present facts there was no basis for drawing any adverse inference from the state's failure to call a witness. It remained open to the defence to call the witness once the state decided not to do so. (Paragraph [63] at 794E–G.)¹

[18] I find merit in the grounds of appeal by the appellant and conclude that there were indeed misdirections by the learned magistrate. The learned magistrate should have convicted the respondent.

[[19] I find it instructive to refer to the approach of our Supreme Court where Hannah AJA stated;

'Both counsel are agreed, correctly in my view, that this Court should apply the same principles in an appeal by the State against an acquittal as those to be applied in an appeal by a convicted accused against his conviction. For the reasons I have given I am convinced that the learned trial Judge was wrong in the conclusion he reached on the first count and accordingly I would allow the appeal, set aside the acquittal and substitute a conviction for murder.

The alteration to the verdict necessarily entails consideration of an appropriate sentence. That in my view is, in all the circumstances, an exercise best left to the trial Court.'²

¹ 2015 (3) NR 777 (HC).

² *S v Shikunga & another* 1997 NR 156 (SC) at 180.

[20] In the result;

1. The appeal is allowed.
2. The acquittal is set aside.
3. The acquittal is substituted with a verdict of guilty of a contravention of section 2(1)(a) of the Combating of Rape Act, Act 8 of 2000-Rape.
4. The case is remitted to the trial court for sentence to be imposed.

H C JANUARY

JUDGE

I Agree,

M A TOMMASI

JUDGE

Appearances:

For the Appellant:

Adv Matota

Of Office of the Prosecutor-General

For the Respondent:

Mr Jan Greyling Jnr.

Of Greyling & Associates