

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI**

**JUDGMENT**

Case no: CC 14/2012

**THE STATE**

**v**

**SHIHEPO ONESMUS  
SEBASITAN ANGULA**

**1<sup>ST</sup> ACCUSED  
2<sup>ND</sup> ACCUSED**

**Neutral citation:** *S v Onesmus* (CC 14/2012) [2019] NAHCNLD 56 (31 May 2019)

**Coram:** TOMMASI J

**Heard:** 7 October 2015; 18 – 20 July 2016; 25 - 29 July 2016; 16, 18 January 2017; 17, 20 February 2017; 14 March 2017; 8, 22 May 2018; 23 October 2018; 15 – 16 November 2018; 22, 31 November 2018; 31 January 2019; 14, 20 February 2019; 1 March 2019; 21, 23, 29 & 31 May 2019

**Delivered:** 31 May 2019

**Flynote:** Criminal law - Contravention of section 16 of the Combatting of Immoral Practices Act, 1980 (Act 21 of 1980) – Failure to adduce evidence of intention to stupefy or overpower the complainant by giving her the alcohol to drink.

Evidence – mutually destructive versions of complainant and accused - Mutually destructive versions of the accused – Having weighed the evidence the complainant's version found credible;

Evidence – Negligence of Crime of the Scene Office prejudicial to the administration of justice. – Failure to collect evidence from the scene of the crime – Failure to ensure the proper handling of important exhibits – rendering the evidence adduced valueless – His testimony disregarded;

Evidence – Cautionary rule applied to the testimony of a single witness and the testimony of a co-accused.

**Summary:** Both accused were indicted on 2 counts of housebreaking with intent to rob and robbery with aggravating circumstances. Accused 2 faced two additional counts of contravening s 12 of the Combatting of Immoral Practices Act, 1980 (Act 21 of 1980 and contravention of section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000). The State's case was that they broke into and robbed the complainant and the shop where she was employed using a panga and a knife, threatening to kill her and assaulting her with a flat hand to force her into submission. They forced her to drink beer and brandy, accused 2 raped the complainant whilst accused 1 was packing the goods. Accused 1 admitted to being on the scene and implicated his co-accused as being there with him. He however denied participating in the robbery or having witnessed the rape by accused 2. Accused 2 denied having been on the scene and having committed any of the offences and put the State to prove all the elements of the offences.

*Held;* that the complainant's evidence was credible and that the State had proven its case beyond reasonable doubt in respect of count 1 and 2 in respect of accused 1 and count 1, 2 and 4 in respect of accused 2. The court rejected the version of accused 1 that he had left the scene and that he did not participate in the housebreaking and robbery as being not reasonably possibly true. The court further

concluded that, given the credible evidence by the complainant and the incriminating evidence of his co-accused, his inculpatory admissions during s 119 proceedings in the district court, that his denial is false beyond reasonable doubt false.

*Held further;* that the intention to stupefy or overpower the complainant by giving her the alcohol to drink was not proven and accused 2 was accordingly found not guilty on count 3.

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### ORDER

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Count 1 – Housebreaking with intent to rob and robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977) -

Accused 1 – Guilty

Accused 2 – Guilty

Count 2 - Housebreaking with intent to rob and robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977) -

Accused 1 – Guilty

Accused 2 – Guilty

Count 3 – Contravention of section 16 of the Combatting of Immoral Practices Act, 1980 (Act 21 of 1980)

Accused 2 – Not Guilty

Count 4 - Contravening section 2(1)(a) of the Combating of Rape Act 2000 (Act 8 of 2000) Rape

Accused 2 - Guilty

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### JUDGMENT

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TOMMASI J:

[1] The two accused were indicted on 2 counts of housebreaking with intent to rob and robbery with aggravating circumstances (count 1 and 2). Accused 2 was charged with having contravened section 16 of the Combatting of Immoral Practices Act, 1980 (Act 21 of 1980) (count 3) and contravening section 2(1)(a) of the Combating of Rape Act 2000 (Act 8 of 2000) (count 4). Accused 1 pleaded guilty to count 1 but a plea of not guilty was recorded. He pleaded not guilty to count 2. Accused 2 pleaded not guilty to all four counts. Accused 1 was legally represented and accused 2 was unrepresented.

[2] The State's case may be briefly summarized as follows: Both accused came to Oshapwa village during the evening hours between 21 and 22 August 2011. They broke into the room of the complainant by cutting the padlock of the burglar bar door and breaking the door to her room. They took her money and her cellphone. They thereafter forcibly grabbed the complainant by her arms, assaulted her using the flat part of a panga, and threatened to kill her. She was instructed to open the door of the shop where she was employed which she did and they then stole goods from the shop. They forced her to drink beer and brandy and accused 2 raped the complainant whilst accused 2 was packing the goods. They took off with the spoils. She ran to the security guard and reported the break-in and the rape.

[3] The version of accused 1 is as follows: He was indeed present at Oshapwa village that evening with accused 2. Accused 2 invited him to go and visit his girlfriend. When they arrived at the place, he was standing at a distance whilst accused 2 went inside the room of the complainant. Accused 2 came out of the room with the complainant and they all walked to the shop. He thought accused 2 wanted to buy something and he followed. When they entered the shop accused 2 took out a knife and demanded money from the complainant. Accused 2's tone was not friendly and he realised that the complainant was not the girlfriend of accused 2. He decided to leave and went to sleep at the house of his friend. The next morning he returned to his house where he found accused 2. Shortly thereafter the police arrived and they were arrested. The police beat him and did not accept his version of the events. The police took him to the police station and returned to the house where they located the stolen items. He admitted to the offence when he was taken to court because the police told him that he would be used as a witness.

[4] Accused 2 flatly denied that: he knew accused 1. He denied that he was at the house of the first accused the next morning and testified that he was arrested at his house. He disputed the testimony of the complainant and insisted that State prove that there is medical evidence that he had raped the complainant. He denied his presence at Oshapwa village during the evening of 21 and 22 August 2011. He thus place his identity and presence at the crime scene in dispute. He denied having pleaded guilty in the district court to 1 count of housebreaking with intent to rob and robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977) and to a charge of having contravened section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) during the section 119 pleading or that he had made certain admissions during the section 119 proceedings in the district court.

[5] It is the duty of the State to prove beyond reasonable doubt that Accused 1 and 2 broke into the room of the complainant and the shop where she was employed i.e. their identities and presence at the scene. The State further has to prove beyond reasonable doubt that they robbed the complainant of her money and cellphone and the owner of the shop of goods which belonged to him; and that they did so with aggravating circumstances as defined in s 1 of the Criminal Procedure Act. In terms of s 1(1)(b) of the Criminal Procedure Act, aggravation in relation to robbery, means-

- '(i) the wielding of a fire-arm or any other dangerous weapon;
- (ii) the infliction of grievous bodily harm; or
- (iii) a threat to inflict grievous bodily harm,'

[6] In respect of accused 2 the State bears the onus to prove beyond reasonable doubt that the unlawful act of causing the complainant to take the alcohol was done with the intention to stupefy or overpower her so as to enable him to have unlawful carnal intercourse with her. The State finally has to prove that accused 2 unlawfully and under coercive circumstances committed a sexual act with the complainant. The coercive circumstances relied on by the State is the use of physical force and the use of threats of physical force to the complainant and furthermore that she was unlawfully detained.

[7] The State called the doctor who examined the complainant to testify. She was examined on 22 August 2011, i.e. the same day and not long after the incident occurred. He found no injuries, bruises or swelling. The Doctor recorded that the vulva, cervix and behind the vaginal fornix were wet and he concluded that penetration was effected. It is my considered view that his conclusion is speculative and therefore of no evidential value. He testified that it is not always the case that bruises would be visible after an assault particularly in dark skinned persons.

[8] The investigation into this offence was poorly handled particularly by the scene of crime officer. The police officers were alerted early in the morning of the break-in. The officers tracked two sets of shoeprints from the scene to the house of accused 1. No photographs were taken of these two sets of shoeprints, no casting was done and no comparison was done between the shoeprints and the shoes which were worn by the accused at the time. The only fact established by the testimony of the police officers is that two sets of shoeprints left the scene and ended at the house of accused 1.

[9] Whilst tracking the shoeprints the officers came upon some beef tins. Some fingerprints were lifted from one of the beef tins and was matched to the fingerprints of accused 2. The scene of crime officer found this tin on the counter at the shop which was broken into. The State failed to adduce any evidence to indicate how this tin made its way from where it was dropped to the counter. The failure by the State witnesses to establish the chain of custody of this tin renders the fingerprint evidence unreliable.

[10] The first question is whether the State proved the identity of the accused. The complainant did not know any of the accused. She overheard one of the persons mentioning the name of the other person. The name happened to be that of accused 1. This ties in with the fact that the two sets of shoeprints ended up at the house of accused 1. Accused 1 furthermore admitted that he was present at Oshapwa village whilst the offences in count 1 and 2 were committed. The identity of accused 1 and his presence at the scene of crime is thus satisfactorily proven.

[11] The complainant testified that she identified accused 2 by the clothes. According to her testimony he was wearing the same clothes he had on when he committed the offences at the time she identified him. The circumstances however

under which the complainant identified accused 2 was yet another example of poor investigation. The accused was alone in the identification parade room. This does not qualify as a proper identification parade. Accused 1 however incriminates accused 2 in that he testified that he went to Oshapwa village with accused 2 to visit his girlfriend.

[12] The complainant is a single witness and the court has to caution itself as to the inherent dangers of relying on the uncorroborated evidence of a single witness. In terms of the presence of accused 2 on the scene she is corroborated by the testimony of accused 1. Accused 1 is a co-accused and the court similarly has to adopt a cautious approach to his testimony. The presence of accused 2 is likely in light of the fact that there were 2 sets of shoeprints and given his presence at the house of the first accused early the next morning. He denied that he was present at the house of accused 1 the next morning but he never disputed the testimony of the police officers and accused 1 that he was found at the house of accused 1. His testimony in this regard may safely be disregarded as an afterthought. I am satisfied that accused 2 was indeed at Oshapwa village at the material time.

[13] This brings to me to the proceedings in the lower court. Both accused appeared in the district court where they were required to plea in terms of section 119. Accused 2 objected to the handing in of the district court proceedings. His objection related to the veracity of the contents thereof and not the admissibility. The court accepted the record into evidence as it is *prima facie* proof that any matter purporting to be recorded thereon was correctly recorded.<sup>1</sup> The State further called the learned Magistrate who recorded the plea and he confirmed that he correctly recorded what both accused stated during the proceedings. Accused 1 did not object to handing in of the proceedings but testified that the police officers promised him that if he pleaded guilty, he would be made a witness and it would make things easier for him.

[14] According to the complainant she was sleeping when she was woken by a noise. She testified that her door was opened and both accused entered her room. They both threatened to kill her and demanded money. She relented and she showed them her bag. They took N\$570 out of her bag. This was not enough and

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<sup>1</sup> See s 76 and 235 of the Criminal Procedure Act, 1977 (Act 51 of 1977)

they forced her to open the bar. They beat her with open hands and the flat side of the panga all over her body although she could not remember who had the panga. They forced her to open the safe. There was not much money in the safe and accused 2 pointed a knife at her throat threatening to kill her if she does not hand over the money. Accused 1 went to the bar and she remained with accused 2 in the storeroom. Accused 1 returned with beer and brandy. They forced her to drink the beer and the brandy. She finished the beer but not the brandy. Accused 1 returned to the bar and it was at this stage when accused 2 raped her. Her testimony was not shaken during cross-examination and neither was it shown that there were material inconsistencies or discrepancies in her testimony

[15] It was the testimony of the complainant, the police officers who arrived at the scene and the owner of the shop that the padlock of the burglar bar door was broken and the door to her room was damaged. The scene of the crime officer however denies that the doors were damaged. The court may safely reject this officer's testimony. He failed dismally to collect evidence from the scene of crime and failed to determine the chain of custody of the tin of beef which was vital for the State to present credible fingerprint evidence. He differed from all the other witnesses including the accused, in that he recorded that he took the photographs of the scene of crime and the recovery of the items at approximately 09h36 in the morning. Both the police officer who followed the shoeprints and the accused testified that they arrived at the house of accused 1 early in the morning, left the house and returned later. His lack of attention to detail and focus is apparent. This kind of negligence is prejudicial to the administration of justice.

[16] Accused 1 handed his warning statement into evidence by agreement. Herein he admitted that he broke into the premises of Mr Likieus where they found the complainant sleeping. He also indicated that they had used an iron and that he saw accused 2 having sexual intercourse with the complainant. He later explained that he was beaten and that is why he gave this statement. During the s 119 proceedings he pleaded not guilty to rape and informed the Magistrate that he was the one who stopped them (meaning the complainant and accused 2) from having sexual intercourse. He also stated that the complainant opened the door by unlocking the door and he admitted that he took goods from the shop. Although the former counsel for the first accused agreed to the handing in of these documents, she appeared



uncertain at times whether she ought to dispute the admissibility of the extra curial warning statement and his plea and admissions given during the s 119 proceedings and it would be prudent not to rely on this evidence exclusively.

[17] The following appears from the headnote of *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC), a case often cited with approval in this jurisdiction:

'(T)he institution of cross-examination not only constituted a right, it also imposes certain obligations. As a general rule it was essential, when it was intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation was intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending her or his character. If a point in dispute was left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony was accepted as correct.... '. This was so because the witness had to be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance was to be placed. The rule was, of course, not an inflexible one.

[18] The complainant's testimony is that accused 1 was present in the shop and was participating in the robbery. This was not disputed. The version which was put to the complainant in fact was consistent with his presence in the shop. The questions of his erstwhile legal practitioner were very specific and it placed first accused inside the shop with his hand in the till (trying to open the till) and it clearly indicates that he witnessed the sexual act of his co-accused. It is furthermore evident from his own testimony that the legal practitioner made use of an interpreter. It is unlikely that language was a barrier for his communication with his legal practitioner. At the time there was no indication from the accused that he was dissatisfied with the conduct of his legal representative. His criticism of his legal practitioner is unmeritorious and simply devised to present a different version of the events during his testimony in court. His version that he left the scene is simply an afterthought and in the circumstances of this case, not reasonably possibly true.

[19] Accused 2 during the s 119 proceedings in the district court admitted that he found the door open and he entered the room of the complainant, that he took properties from the shop and that he placed his finger in the vagina of the complainant. During the trial he denied having been there and he denied having told the Magistrate that which the Magistrate recorded. The Magistrate testified that the record reflects what transpired in court and he informed the court that he had the added advantage of understanding Oshiwambo, the language spoken by accused 2. I am satisfied that accused 2 indeed pleaded guilty and made the admissions. Accused 1 incriminated accused 2 in respect of his presence at Oshapwa village. His extra-curial statement that he witnessed the rape by accused 2 was not confirmed under oath and is thus not admissible against his co-accused.

[20] The evidence adduced by the State in respect of the damage to the door is overwhelming. The version of the complainant is to some extent corroborated by the physical evidence of broken doors and by the testimony of accused 1. The fact that a dangerous weapon was used was supported by the testimony of Accused 1 who testified that accused 2 was in possession of a knife and that he threatened the complainant with it to induce her to give him money.

[21] Having weighed the evidence in its totality I conclude that it is safe to rely on the testimony of the complainant as I find her evidence credible. I am satisfied that the truth has been told. Both accused on the other hand were not credible witnesses.

[22] The evidence adduced by the State proves beyond reasonable doubt that both accused broke into the room of the complainant and robbed her of her money and cellphone. I am satisfied that the State proved beyond reasonable doubt that both accused robbed the owner of the shop of the items as per the testimony of the complainant and further that property belonging to the owner was later returned by the police. The State further adduced evidence which proved beyond reasonable doubt the existence of aggravating circumstances as defined in section 1(1)(b) of the Criminal Procedure Act.

[23] According to the complainant, both accused forced her to consume the alcohol. It is not clear from the evidence adduced what the intention of the accused was when the alcohol was given to the complainant. It is my considered view that the

State failed to prove that accused 2 had the requisite intent to stupefy or overpower the complainant by giving her the alcohol to drink.

[24] Accused two's bare denial of the rape is false beyond reasonable doubt. He was present at the scene and he participated in the robbery. Accused 1 however did not confirm that he witnessed the rape under oath and as such this evidence is not admissible as against accused 2. I already found the complainant to have been a credible witness and I find that it is safe to rely on her testimony that she was raped by accused 2. He did not merely insert his finger but actually perpetrated a sexual act by inserting his penis into the vagina of the complainant as she testified and this he did with the treat of physical force.

[25] In the result I make the following order:

Count 1 – Housebreaking with intent to rob and robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977)

Accused 1 – Guilty

Accused 2 – Guilty

Count 2 - Housebreaking with intent to rob and robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977) -

Accused 1 – Guilty

Accused 2 – Guilty

Count 3 – Contravention of section 16 of the Combatting of Immoral Practices Act, 1980 (Act 21 of 1980)

Accused 2 – Not Guilty

Count 4 - Contravening section 2(1)(a) of the Combating of Rape Act 2000 (Act 8 of 2000) Rape

Accused 2 - Guilty

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M A TOMMASI  
JUDGE

## Appearances:

For the State:

Mr Gaweseb

Office of the Prosecutor General, Oshakati

For the 1<sup>st</sup> Accused:

Ms Hango

Of Dr. Weder, Kauta &amp; Hoveka Inc., Ongwediva

For the 2<sup>nd</sup> Accused:

Mr Sebastian Angula, in person

Eemwandi