

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

JUDGMENT

Case No.: CC 3/2019

In the matter between:

THE STATE

v

STEPHANUS PAULUS

ACCUSED

Neutral citation: *S v Paulus* (CC 3/2019) [2020] NAHCNLD 108 (17 August 2020)

Coram: SALIONGA J

Heard: 15-17 July 2020

Delivered: 17 August 2020

Flynote: Criminal Procedure: Evidence – Charged with murder and Contravening section 2(1) (a) as read with with sections 1, 2(1), 2(2), 2(3) 3, 4, 5, and 7 of the Combating of Rape Act, 2000 (Act 8 of 2000).—Accused pleaded guilty to both counts — Convicted of murder --A plea of not guilty entered on count two —Single witness evidence clear and satisfactory—Supported by medical evidence of

bruise or inflammation —Accused version improbable and not possibly true—Court satisfied that the State proved its cases beyond reasonable doubt – Accused guilty of rape.

Summary: Accused was charged with murder and Contravening section 2(1) (a) as read with with sections 1, 2(1), 2(2), 2(3) 3, 4, 5, and 7 of the Combating of Rape Act, 2000 (Act 8 of 2000). It is alleged that the accused during March 2015 proceeded to the deceased's home where he demanded his money that the deceased owed him. The deceased did not have the money and accused picked up a kitchen knife which was in the homestead of the deceased and stabbed the deceased multiple times on the chest. The deceased succumbed to injuries. Accused fled the scene but was arrested after several days. Two years later the accused kicked the door of the homestead where the victim LS was staying. He used physical force to subdue the victim and proceeded in raping the victim by putting his penis into the vagina of the victim without consent. He pleaded guilty to both counts. He was convicted on his own plea of guilty on both charges. However in mitigation accused denied having raped the victim and a plea of not guilty was entered on a rape charge. After evidence was led, accused was found guilty and convicted accordingly.

ORDER

Count two; Contravening section 2(1) (a) as read with with sections 1, 2(1), 2(2), 2(3) 3, 4, 5, and 7 of the Combating of Rape Act, 2000 (Act 8 of 2000) – Guilty.

JUDGEMENT

SALIONGA, J:

[1] The accused person is arraigned before this Court on one count of murder and a count of rape in contravention of section 2(1) (a) as read with sections 1, 2(1), 2(2), 2(3) 3, 4, 5, and 7 of the Combating of Rape Act, 2000 (Act 8 of 2000).

[2] On the murder count the state alleges that upon or about the unknown date during March 2015 and at or near Uukwalumbe “B” village Okahao in the district of Okahao, the accused did unlawfully and intentionally kill Eveline Shiimi a female adult.

[3] On the rape count the State alleges that on or about the 12 July 2017 and at or near Uukwawanayanga village in the district of Outapi the accused (hereinafter called the perpetrator) did wrongfully and unlawfully and under coercive circumstances commit or continue to commit a sexual act with one LS (the complainant and name withheld to protect her identity) by inserting his penis into the vagina of the complainant and that the coercive circumstances are that he applied physical force to the complainant and /or that he threatened verbally and /or through conduct to apply physical force to the complainant and/or that the complainant was unlawfully detained.

[4] The accused pleaded guilty to both counts and tendered the written statements in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977 (the CPA). The plea was accepted by the State and the court having been satisfied that accused admitted all the elements of the offences on both counts found him guilty and convicted him accordingly.

[5] In mitigation accused denied having raped the complainant. A plea of not guilty was entered in terms of section 113 of the CPA on count two. At that stage his erstwhile counsel Mr Grusshaber withdrew from the case and the matter was remanded for the accused to get a lawyer. Mr Mukasa on the instruction of legal aid appears for the accused and Mr Gaweseb represented the State.

[6] The trial proceeded in respect of count two and accused gave a plea explanation in terms of section 115 of the CPA. He stated that he was not guilty of committing the aforesaid offence as he did not commit the sexual act. He however

admitted that on 12 July 2017 he was at the complainant LS's residence situated at Uukwawanayanga village in the district of Outapi; that while at the abovementioned residence he had grabbed the complainant by force and dragged her to a bed in her room. He proceeded to forcefully remove her clothes while pinning her down with one hand. He removed his trousers and remained in his trunkies or boxer shorts. He then proceeded to put a condom on his penis, while doing so the complainant tried to run away and he grabbed her again and dragged her back to the bed. He proceeded to try and insert his penis into her vagina but before he could insert his penis then Ms Lucia Bonifatius interrupted by banging hard on the door. Then the complainant managed to run away, open the door and left. He further admitted that he intended to have sexual intercourse with the said complainant and that his actions above were wrong and unlawful and that he could be tried and convicted and sentenced by a court of law. These admissions were recorded in terms of section 220 of the Criminal Procedure Act 51 of 1977.

[7] The State in proving its case led the evidence of three witnesses which I will briefly summarise hereunder.

[8] The first witness called by the State was Wambui Njuguna a medical doctor at Outapi State hospital. She testified that she was the author of J88 documents marked exhibit N1 and N2. These documents contained examinations she conducted on 12 July 2017 in respect of the victim, LS and the accused person. She further testified that during the examination of the victim she observed the slight bruising and inflammation on the opening of the vagina around the vulva and concluded 'probable rape with some penetration'. She however did not observe any injuries on the accused. The witness stated that she accidentally switched the names of the accused and the victim on the J88 forms, however she was certain of the correctness of the report she compiled. She further confirmed the age of complainant to be about seven to eight years old. In cross examination she stated that she arrived at that conclusion because there were some injuries at the entrance or around the opening of the victim's vagina and concluded that there was "a bit of penetration not full penetration."

[9] The second witness was Lucia Bonifatius. She knew the accused as a person who used to stay in her house at Outapi. At the time of the incident accused had a sleeping tent behind her house. Her testimony collaborated the evidence of the victim in that when she returned home from the stand she found the accused and the victim in the room and it was locked. Accused was naked and was trying to put on a trouser which was on the bed. He had a trunky down below the knees. At that stage the victim was lying on the floor on a mattress naked as her trouser was on her chest and her panty was on one leg. She called her husband who arrived with the police. She however had no knowledge with regard to the circumstances under which the sexual act took place.

[10] The last witness is LS the victim in this case. She stated that she was seven or eight years at the time of the incident. She testified that she came back from school and went into her room. Whilst in her room busy changing her clothes the accused kicked the door, demanding the victim to open before he kicks the door open. She went and opened the door and saw that it was the accused person when he entered the room. When the accused entered he locked the door then he let her down. He undressed himself and remained in a trunky and also undressed the victim's trouser which he put on her chest. He further removed her panty until the legs. Thereafter a struggle began between the victim and the accused person resulting in the victim biting the accused. The accused retaliated by biting her back.

[11] It was the witness' further evidence that in the course of the struggle, accused took out his 'kapipi' and put it on her 'namesake'. When asked to explain what she meant by her namesake the victim demonstrated that her name sake she referred to was her private genitals by pointing her vagina. In cross-examination when asked where the accused inserted his 'kapipi' on her name sake, she replied that it was outside and she was still able to walk. She was only assisted to get up from the mattress she was laying when the police arrived.

[12] The state closed its case and the accused exercised his democratic right to remain silent. The court is required to determine whether the State had proved beyond reasonable doubt that the accused raped the complainant under the coercive circumstances. I am mindful of the fact that the burden of proof rests upon the State

to prove the guilt of the accused beyond a reasonable doubt. That there is no burden of proof on the accused to prove his innocence and if the accused's version may reasonably possibly be true, he is entitled to his acquittal. (See *R v Difford* 1937 AD 370).

[13] Mr Gaweseb recounting the evidence of the doctor and the victim submitted that on the second count of rape with coercive circumstances the state has proven its case. He further submitted that when faced with mutually destructive versions, the court must decide which evidence to accept and which one to reject in arriving at the correct factual finding. He further submitted that he is alive to the fact that the court is faced with a single witness's evidence that of the complainant in as far as whether penetration had taken place. However counsel argued that in achieving the correct factual finding the court must consider the evidence in its totality and weigh up merits and demerits of the state and defense's case as well as probabilities and it is a process that requires common sense. With regard to the evidence of a single witness counsel submitted that the evidence of the victim is clear and satisfactory in all material respects. He therefore argued that the totality of the evidence shows beyond reasonable doubt that the accused wrongfully and intentionally committed a sexual act with the complainant and in the circumstances prays that this honorable court should find the accused guilty as charged.

[14] On the other hand Mr Mukasa submitted that the state had not adduced sufficient evidence to prove a case of rape against the accused, most importantly the element of penetration. He further submitted that the principle with regard to penetration in our law is very clear as stated in *S v Vries* (SA 6/2001) [2001] NASC 6 (07 December 2001) and if these principle are applied to the current case it would become apparent that penetration into the organ of the female victim was not proven. Mukasa argued that from the plea explanation the accused merely disputes penetrating the vagina of the said complainant as he admitted attempted rape. On the doctor's evidence counsel submits that when she conducted the examination on the victim she observed that the victim had bruise or inflammation on the entry of the vagina on the outside and did not observe any other injury.

[15] However in cross examination the doctor confirmed that the injuries observed were on the outside of the vagina and that penetration was not complete. It was only in re-examination she clarified that from the observation of the injury she could say there was an attempt to penetrate or to rape the victim. Counsel further submitted that the second witness did not observe the rape taking place and her evidence adds no significant weight to the state's case. He further argued that the complainant herself testified that even after the accused put his kapipi at her name sake, referring to her private parts, she was able to walk properly on her own. The victim did not testify that she was crying as testified by the second witness. Counsel rightly argued that clarity was not given on what was meant when the complainant referred to 'kapipi' in her evidence however since the accused had admitted to have tried to insert his penis in the victim's vagina before he was interrupted I find that omission not material. It was counsel further submission that the State failed to prove its case beyond reasonable doubt and the only inference to be drawn from the evidence is that the accused person merely attempted to have sexual intercourse with the victim and he be found guilty of attempted rape.

[16] In the instant matter, the court is faced with a single witness's evidence in as far as the circumstances under which the sexual act took place. That is to say the witnesses called to testify none witnessed the actual rape. The court has to approach such evidence with caution although such caution should not be allowed to displace the exercise of common sense. In analysing the evidence the court should not also lose sight that the only dispute to be determined is whether the sexual act between the accused person and the victim had taken place. In this regard the court is confronted with the words of the victim against that of the accused and it is a matter of which version the court will find more probable and believable.

[17] I align myself to what Maritz J stated in *S v Noble* 2002 NR 67 (HC) at 71 G-I that:

'Whether a judicial officer considers the evidence of a single witness with reference to that salutary guide or not, he or she must approach such evidence with caution. He or she should not merely pay lip-service to the existence of a cautionary rule in such cases, but it should be apparent from his or her reasoning that he or she, mindful of the inherent dangers of such evidence, treated it with circumspection.' (emphasis provided)

[18] It is common cause that the victim is ten years old and was seven to eight years old at the time of the incident. She possesses the necessary intelligence and she gave her evidence in a clear and straight forward manner. It is further common cause that three years have passed since the incidence occurred but when she testified she made a good impression in court. Her evidence was corroborated by the medical evidence and was not displaced in cross examination.

[19] The accused during plea explanation made the following admissions in terms of section 220 of the Act. That the accused was in the room with the complainant on the date in question. He grabbed the victim by force and dragged her to a bed in her room. He forcefully removed her clothes and while pinning her down with one hand and removed his trouser and remained in his trunk. That complainant tried to run away but he grabbed her again and dragged her back to the bed. He admitted that he intended to have sexual intercourse with the said complainant but was interrupted. Dispute the admissions made, accused elected not to testify in his defence.

[20] In *S v Auala* 2010 (1) NR 175 (SC) the court referred to the following citation in *S v Boesak* 2001 (1) SA 912 (CC) (2001) (1) SACR 1; 2001 (1) BCLR 36) stated that:

‘The fact that an accused person is under no obligation to testify does not mean that there are no consequences attached to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.’ In this matter the accused’s admissions coupled with the complainant’s injuries call for an explanation.

[21] Both counsel rightly submitted that the principle of law in determining whether there was penetration or not in a rape case was properly laid down in *S v Vries* (SA 6/01) [2001] NASC 6 (07 December 2001). Whilst I agree with the defence that the State in a case such as this must ensure that all relevant evidence is placed before court, the above quoted case could be distinguished in its finding in that the

appellant's evidence was not supported by the medical evidence. The aforesaid principle has to be considered in conjunction with what the learned authors, Burchell and Milton in *Principle of Criminal law* 3rd edition on page 706 in footnote 447 explained 'slightest penetration' to mean "entry into the labia the outermost part of the female genital organ is sufficient entry". The principle should further be considered with what Smythe Pithey in Sexual Offence Commentary Act 32 of 2007 at page 2-2 discussed on the degree of penetration required under the definition in section 1 of the Act as "to any extent whatsoever". Further consideration is on section 1 of the Act which defines "vagina" to include 'any part' of the female genital organ. When regard is had to the aforesaid definitions and principles laid, coupled with the doctor's testimony in the instant case it is safe to conclude that indeed, the opening of the vagina is part of the female genital organ and further safe to concluded that the detection of the bruise or inflammation on the opening of the vagina though outside corroborated the victim's evidence that penetration did occur.

[22] Counsel also argued that the complainant was able to walk after the alleged rape had taken place, but that does not mean if she was able to walk after the ordeal she was not raped. In casu aaccused's actions could not have been a mere attempted rape if the redness of the skin was still visible on the complainant's genital organs at the time of the examination. (See *Monomono v S* (CA 108-2016) [2017] NAHCMD 111 (7 April 2017)). Accused admitted guilt of attempted rape and in my view this could hardly be so where a mere attempt resulted in a bruising of the opening of the vagina leaving the uncertainty as to how or what caused the injuries to the complainant's vagina.

[23] Having carefully considered all the evidence by State witnesses, including the accused's admissions, I am satisfied that a case of rape has been proven sufficiently beyond reasonable doubt against the accused. I reject accused's defence as improbable and not possibly true.

[24] Accordingly;

Count two: The accused is found guilty of Contravening section 2(1) (a) as read with sections 1, 2(1), 2(2), 2(3), 3, 4, 5 and 7 of the Combating of Rape Act, 2000 (Act 8 of 2000) and is convicted as charged.

J T SALIONGA

JUDGE

APPEARANCES

For the State:

Mr M Gaweseb
Office of the Prosecutor-General,
Oshakati

For the Accused:

Mr G M Mukasa
Directorate of Legal Aid,
Oshakati