

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case No: CC 10/2019

In the matter between:

THE STATE

and

MUAAMBELAU NDOVAI

ACCUSED

Neutral citation: *S v Ndovai* (CC 10/2019) [2020] NAHCNLD 134 (15 September 2020)

Coram: DIERGAARDT AJ

Heard: 27-31 July 2020, 3-6, 10, 14 August 2020

Delivered: 15 September 2020

Flynote: Criminal law and Procedure – Rape –single witness evidence to be treated with caution but common sense must prevail - two mutually conflicting versions – the most probable version to be accepted - medical evidence corroborates rape having occurred – duplication - accused guilty on counts one, two and three.

Summary: The accused is charged with one count of Rape, two counts of assault by threatening, alternatively Intimidation in terms of the Intimidation proclamation AG 24 of 1989 all read with the provisions of Combating Domestic Violence Act and further two counts of defeating or attempting to defeat the course of justice. He pleaded not guilty and the matter went on trial. The complaint was a nine year old and the biological daughter of the accused at the time of the incident. She testified that she was left at home with the accused after he had instructed the other children to go and fetch water. Her father called her and took her inside the room where he took a condom wore it and proceeded to have sexual intercourse with her. He also secured her silence by threatening to kill her. Her mother testified that the complaint informed her about the rape incident after she had inquired what had happened.

The mother observed that the complaint might have slept with an adult and thereafter confronted the accused who in turn threatened to kill her and kill himself. There was also evidence from the other children that they found complaint crying upon returning from fetching water. There was sufficient medical evidence that suggested penetration. After the closure of the state case the accused testified and did not call witnesses. The court was faced with two mutually destructive versions being that of the state and defence. The accused denied the rape allegation and indicated that the complainant's mother opened a case out of jealousy.

Held, all state witnesses including three child witnesses had a very good recollection of the events and corroborated each other. *Held further*, that no reason to reject the evidence of a reliable minor who is a single witness. *Held further*, that the evidence has proven counts one, two and three and the accused is found guilty as charged.

ORDER

The accused is guilty of;

1. Count 1: Contravening Section 2(1) (a) read with sections 1, 2, 3, 4, 5, 6 and 7 of the combating of rape Act, 8 of 2000; (Rape under coercive circumstance) Rape read with the, provisions of the combating of domestic violence Act, 4 of 2003;

2. Count 2: Assault by threat read with the provisions of the combating of domestic violence Act, 4 of 2003 (I.R.O. Brenda Ndovai);
3. Count 3: Assault by threat read with the provisions of the combating of domestic violence Act, 4 of 2003 (I.R.O. Ndapandula Tjithunga);
4. Not guilty and acquitted on counts 4 and 5.

JUDGEMENT

DIERGAARDT AJ

Introduction

[1] The accused is charged with the following offences:

‘Count 1: Contravening Section 2(1) (a) read with sections 1, 2, 3, 4, 5, 6 and 7 of the Combating of Rape Act, 8 of 2000;(Rape under coercive circumstances) Rape read with the, provisions of the Combating of Domestic Violence Act, 4 of 2003;

Count 2: Assault by threat read with the provisions of the Combating of Domestic violence Act, 4 of 2003 (I.R.O. Brenda Ndovai);

Alternative to Count 2: Contravening section 1(1) (a) (ii) of the Intimidation Proclamation, AG 24 of 1989 Read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 (I.R.O. Brenda Ndovai);

Count 3: Assault by threat read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 (I.R.O. Ndapandula Tjithunga);

Alternative to Count 3: Contravening section 1(1) (a) (ii) of the Intimidation Proclamation, AG 24 of 1989 read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 (I.R.O. Ndapandula Tjithunga);

Count 4: Defeating or obstructing or attempting to defeat or obstruct the course of Justice;

Count 5: Defeating or obstructing or attempting to defeat or obstruct the course of Justice.’

[2] The accused was represented by Mr Tjirera and the State was represented by Ms Petrus. When charges were put to him, accused tendered a plea of not guilty on

all charges and gave no plea explanation. The summary of substantial facts, the Pre-trial memorandum and the reply thereto were all admitted into evidence as Exhibits "A", "B" and "C" respectively.

[3] The state called seven witnesses in support their case and the accused was the only witness for the defence.

Summary of the evidence

[4] The State commenced their case by calling Paheerenu Uarije who is a nurse by profession and in possession of a certificate in nursing. She was stationed at Opuwo state hospital at the time of the alleged incident and she has been a nurse for nine years. She explained her duties in short which entailed receiving patients and treating patients by giving them medicine and if unable to do so to refer the patient to a doctor

[5] She narrated that on 10 February 2017 she was on duty at Opuwo clinic. A child came to the clinic with her father. She was identified as Brenda Ndovai, nine years old. They came into her office and she gave the child a chair to sit. The father was just standing there and she asked what the child was suffering from. The father replied that she was sick in her legs.

[6] She asked the child what caused her legs to be sick and whether she fell and the father responded that the child was jumping at school. She asked the child again what caused her injury and she said they were jumping at school. She observed that the child awaited a response from the father, looking at the father first and then to her and she concluded that the child was not comfortable speaking in the presence of her father.

[7] She then instructed the father to leave the room where she was treating the child. She asked the child to tell the truth as to what happened to her and the child told her that she was raped .She asked her when and she replied three days ago. She asked her who it was and she said she didn't see as the room was dark. The witness told her that she will examine her and asked her to lay down and removed the panty.

[8] The child complied and she proceeded to examine her on the abdomen and told her she will not examine the vagina. She asked her to open the legs and she looked at the child's vagina. She wanted to check whether there was blood. When she observed the vagina and she noticed that on her gloves there was some brownish discharge and she instructed her to dress. She called the child's father and he came and she informed the father that the child claim that she was raped but she did not see the person. She advised the father to take the child to the doctor as he was the right person to confirm whether the child was raped or not .The state asked the witness why she was concerned about the discharge and she replied that in her professional opinion and experience a child of that age is not supposed to have a discharge.

[9] She then pointed the father to be the accused before court. She directed the child and the accused to the doctor's surgery with the words that 'you should not fail to take her today' and this was the last time she saw both.

[10] She could not confirm whether the accused indeed took the child to the doctor and she denies telling the accused to go to the police station to fetch a paper. When asked about her observation of the child she said that the child she said that the child appeared to be in fear.

[11] She confirmed that she made entries in the victim's health passport and decided to investigate (health passport marked as exhibit.)

[12] The accused does not deny taking the child to the hospital but he denies being referred to the doctor by the witness. His version is that the nurse referred him to the police station to take a paper.

[13] Ndapandula Tjuhunga the biological mother of the victim testified that she was not at home on the fateful day. She only arrived later-on during the day I believe in a state of intoxication. The accused person was her boyfriend at the time of the alleged incident. They cohabitated in Opuwo with their five children including the victim.

[14] She testified that during February 2017 she went to collect bottles for money and then the next day her first born, Tunave told her that the accused had chased them out of the house and send them to collect water. When they returned home

they found Brenda sitting next to the house crying. This witness, Npandula then asked the child what happened and the child narrated to her that her father came and pulled her into the house but she ran outside. He then came and grabbed her and carried her into the house. He put a condom on his penis and applied saliva on her private parts and then started "sleeping" with the child.

[15] When she was asked what she meant by the father was sleeping with the child she replied that the father raped the child after putting on a condom on his private parts. The child also informed her that the accused removed her underwear before he started sleeping with her. She also mentioned that the child informed her that after the sexual act the accused warned her not say anything.

[16] She examined the child and found no blood coming from the child's private part, but in her assessment she could see the victim slept with an adult. When she was asked by the state what gave her that impression that she slept with an adult she replied that the child's vagina was enlarged. After her observation she went to the accused and confronted him but he denied and said he never did something like that and he will kill her and himself if the matter reaches the police. She then called her brother in Ruacana and reported the incident. She further testified that she noticed that a condom was missing from the box.

[17] After some days passed she told the accused to take the child to the hospital but he was quiet. She then observed that the child started paining in the hips. After insisting, the accused took the child to the hospital and he informed her on his return that he was referred to the police. Her brother subsequently arrived from Ruacana and took the child to the hospital but he was told that the mother of the child must also come. As a result they ended up at the Woman and Child Protection Unit and they were referred back to the hospital.

[18] What is of significance is that the version that was put to the witness by the defence was that she missed a condom and confronted the accused out of jealousy whereby the accused admitted that he slept with a Himba girl but the witness denied the allegation of sexual assault.

[19] Nakale Henock the brother of Npandula Thihunga who stays in Ruacana testified that he received a call during February 2017 from Katrina his sibling. She reported to him that his niece Brenda was allegedly raped by her father in Opuwo.

[20] He informed his mother that his sister's child was raped and she directed him to go and see if the child is alright. After some time lapsed he went to Opuwo to investigate the situation

[21] When he arrived in Opuwo he found Brenda and her mother at home at between 11h00am to 12h00pm. He found them in a room and called them outside. He asked Ndapandula what happened but she referred him to the child to inquire.

[22] He asked the child what happened and she narrated the story to him. The child told him that she was with her father while her mother went to look for firewood. The child told him that her father instructed her to clean the room. Thereafter her father took her into the room, took his penis from his pants and inserted it into her vagina. She furthermore told her uncle that her father sworn her to secrecy by saying 'what we have done here cannot be told to anyone otherwise I will kill you' He asked the child if they took her to the hospital and the child said she went with her father but she was not treated but they were sent to the police.

[23] Subsequently he took the child to the hospital but they were referred back to the police.

[24] On 28 February 2017 he was told by the police to go to the inspector and on 1 March 2017 he returned to the police station with Ndapandula Tjihunga and the victim. He was informed to go to the hospital with a paper. He then left the mother with the child to go to the hospital and returned to Ruakana.

[25] When he was asked by the state about his observations on the child he stated that the child was walking in an abnormal manner that is bending forward and that she was complaining of pain and pointed towards the child's pelvic area. He was also asked whether he asked his sister why she did not take the child to the hospital and he responded that she said that it was as a result of the accused threat to kill her and himself that she was afraid to take the child to the hospital.

[26] He further commented that what prompted him to take the child to the hospital was that he was of the opinion that for them to keep the child in the house was like killing the child .and thus he decided to take the child for treatment.

[27] Rebecca Thomas a Sergeant Officer attached to Opuwo Woman and child Protection Unit for the past 9 years testified that she is the complainant in this matter.

She explained that whenever a minor is involved the police officer opens a case on behalf of the state.

[28] She further clarified the procedure in that complainants can come directly to their office or sometimes they go the charge office first. She testified as to how it came for the accused to be arrested in the matter.

[29] On 1 March 2017 whilst busy performing her duties in Opuwo she was approached by three people, two elders and one child who said they wanted to discuss something with her. It was Nakale Henock, Ndapandula and the child, Brenda Ndovai. Ndapandula proceeded to tell her that between 6 and 7 February 2017 she was approached by her children informing her that the previous day their father instructed the children to go and fetch water and instructed Brenda to go and make up the bed. That when the children came back they found Brenda with eyes full of tears. She then called Brenda and asked her what happened. Brenda informed her that the accused inserted his private part into her private parts. .

[30] According to Ndapandula the accused said that it was not true and she must stop asking him about the allegations otherwise he will kill her and himself. From there Ndapandula kept quiet as she was scared. She was further informed that on 10 February 2017 Ndapandula informed the accused to take the child to hospital and he indeed took the child. The witness testified that she checked the health passport and saw that they were indeed referred to the police. Ndapandula also told this witness that she decided to call her brother and informed him about what had happened. This witness then gave the J-88(medical examination form) to Ndapandula to take the child for examination and further treatment at the hospital.

[31] The witness then asked Brenda where and what happened and she said in her father raped her in her parents room. Brenda informed her that the accused sent the other children to go and fetch water and when they left he took her and raped her.

[32] She (Brenda) further Informed Sergeant Thomas that the accused threatened to kill her if she should tell somebody.

[33] Brenda Ndovai the victim in this matter testified that she was eight years old during the time of the incident. She narrated the ordeal to the court .She testified that

they were at home when others were directed to go and fetch water and she was instructed by the accused to clean the house. She cleaned and left the house and went to sit next to the house. Her father, the accused called her and subsequently came to get her outside and took her inside again. She explained that he laid her down on a bag, took a condom and put it on his private parts, pulled up her dress and removed her underwear and in her own word she said ' he did what he had done'. She told her mother the next day that her father slept with her when Kandara went to fetch water.

[34] She further testified that some days passed and her mother told her father to take her to the hospital whereby he took her to the hospital. On the way he asked her who had told her mother that he raped her, she said that she was the one who told her mother. The accused instructed her not to tell who raped her and that she should just say that an unknown man raped her.

When they arrived at the clinic the accused told the nurse that her legs are paining. The nurse told her father to leave and after he left she told the nurse that she was raped by an unknown man in the dark. The nurse told her father to go and get a certain paper from the police. She testified that they did not go to the police station. She also informed the court that her whole body was paining and she realised that she must say something as she would not recover. She confirmed that she was not taken to the hospital again until her uncle arrived from Ruacana and he took her to the hospital where she was then examined and treated.

[35] Tunaveli Tjimbo is a 13 year old, the sister of the child testified that they were sent by the accused to go and fetch water and when they came back they found Brenda sitting next to the house crying. Brenda stayed behind at home with their father when they were sent to get water.

[36] She asked Brenda what happened but she did not respond. They then left her and went to sleep. When her mother came in the evening to get Brenda she ran to the neighbouring house of a relative. They also started running and slept at the neighbour's house. The next morning Brenda started telling their mother what their father did to her. She testified that she could hear what Brenda was saying. She told the court that Brenda informed their mother that the father took a condom and raped her.

[37] Kandari Ndovai 11 year's old, the brother of the child testified that their father, the accused sent them to fetch water and they left Brenda behind. When they came back they found Brenda next to the house crying. They asked her what was wrong but she didn't say anything. Their father was at home and the mother went to sell bottles.

[38] Valeria Kheis a police officer stationed at Woman and Child Protection Unit for 14 years now testified that she is the investigating officer in this matter. She came to know the accused as a suspect in this case. During her investigations she learned that the incident took place between 6 and 7 February 2017.

[39] On 02 March 2017 she was at the Woman and Child Protection Unit where she was stationed. She met a child named Brenda Ndovai accompanied by the mother Ndapandula and the uncle Henock. These people had already been seen by one of her colleagues the previous day regarding a rape complaint. She was briefed by Sergeant Thomas about the incident and was informed that on the previous day they did not get assistance as the doctor was not available. She then issued them with a J-88(medical examination form) to be filled in by the doctor and accompanied them to Opuwo state hospital.

[40] On arrival at the hospital she informed the nurse about the alleged rape. The doctor subsequently examined the victim and confirmed sexual penetration. The doctor proceeded and completed the document known as a J-88 and handed the form to her. She then interviewed the mother and the child and took a statement from the child.

[41] During the interview the child told her that the incident happened in her village where she was staying with her mother, father and siblings. She narrated that on that day she was home with three of her siblings and the accused .The accused sent the other children to fetch water whilst the victim remained home with the accused person. He instructed her to sweep the floor of the main bedroom. She subsequently went outside and whilst outside the accused person grabbed her and took her inside the room. He laid her on a bag on the floor , removed her panty , layed on top of her and inserted his penis inside her and made up and down movements .When he was done he stood up and got dressed. Before she left the room the accused threatened

her that if she reveal the sexual act he will kill her, the child went outside where she was found by her siblings on their return in a sobbing condition.

[42] She told the police officer that initially she did not inform anybody as to the reason why she was crying, but the next day she reported the incident to her mother. This was after one of her siblings told their mother that she was crying the previous day. The child told her that on an unknown date her father took her to the hospital. On their way to the hospital he instructed the child not to disclose that he was the person who had sexual intercourse with her but instead to say that the deed was done by an unknown person.

[43] She was informed that the mother of the child was informed on 8 February 2017 where after she confronted the accused person and he denied the allegations. That the mother further informed accused to take her to the hospital but that the accused threatened to kill the mother and kill himself if she continued to talk about the incident. He conclusion was that all evidence pointed to the father and she arrested the accused. She took a warning statement from the accused whereby he exercised his right to remain silent

[44] The defence called upon the testimony of the accused Muambelau Ndovai, the accused before court. He testified that on 7 February 2017 he slept at his house and went to Epupa early in the morning. It is at this location where Ndapandula, the child's mother found him. She had a used condom in her hand. She confronted him and accused him of sexually assaulting their child.

[45] He confirmed that the previous day when he came home he send the children to get water and asked his child, Brenda to sweep the floor. When Brenda was done he entered inside the room and saw that the child did not properly sweep. He then laid in the room until it was late in the afternoon. He did not find the wife referring to Ndapandula when he woke up and went to look for her at Epupa but she was not there. He saw Brenda crying and asked her why she was crying, she said she had fallen and that her mother ran away from home.

[46] He then saw the mother and child going to the neighbour; he ran after them and asked them where they were going. He was informed that she was on the way to Nangula's house. At Nangula's house her father asked Ndapandula what happened and she said she was assaulted by unknown people. However Brenda

said that her mother fell on the floor. Brenda also told her father that their mother was drunk at Okalunga, The accused took his child Kandara and they went home. The next morning Ndapandula told him that she picked up a piece of a used condom that she found in their room. His response was to ask the children and not him as they liked to play with condoms. He confirmed that Brenda indeed asked him if he slept with the child and he said Brenda must speak up or respond.

[47] He asked Ndapandula whether she examined Brenda to see if she had been raped. In response she informed him that she could not conclude whether she had been raped. She informed him their other children told her that Brenda was raped. His response was that she was telling a lie and he left to a pub. When he came back he found that they had taken all the blankets and went to Nangula's place and only came back the next morning.

[48] A few days passed; when they came up with the suggestion that neighbours must be called to assist .He then volunteered to take the child to the hospital. He subsequently took the child to the hospital. At the clinic the nurse inquired from the child but the child did not respond and the nurse asked him to go outside .When he came back the nurse informed him that the child claims she was raped. He asked the child who raped her; she said it was an unknown person.His version is that he then asked the nurse if she checked the child and if she concluded that the child was indeed raped. The nurse couldn't confirm and advised them to go to the police station and obtained a certain paper. He went home and called Ndapandula and told her that they didn't get assistance and he told her to go to the police station but she refused

[49] On 3 March 2017 he learned that Brenda had been taken to the hospital by her mother and he followed them to the hospital. At the hospital he found the victim, her mother and a police officer. He was then arrested and informed about a rape case that had been opened against him.

Legal and factual Issues

[50] The court was called on to adjudicate on the following issues of law:

- (a) Whether there was a sexual act performed on the victim,
- (b) Whether the sexual act was performed by the accused,

- (c) Whether there were coercive circumstances present,
- (d) Whether the conduct of the accused can be construed as threatening towards the complainant and Ndapandula,
- (e) Whether the conduct of the accused satisfied the elements of defeating the cause of justice.
- (f) Whether an issue duplication of conviction arise

The Law

Mutually destructive versions

[51] *In casu* the court is alive of the fact that we are dealing with two mutually destructive versions. Where a court is presented with two mutually destructive versions, it is a rule of practice that 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 cases respectively, but also the probabilities (see *S v Engelbrecht* 2001 NR 224 (HC) at 226E – G). Furthermore that the evidence presented by the State and the defence must neither be considered in isolation as an independent entity when assessing the credibility of the witnesses and the veracity of their versions. The approach the court must follow is to take into account the State's case and determine whether the defence's case does not establish a reasonable hypothesis. In *S v Radebe* 1991 (2) SACR 166 (T) at 168D-E the court said: 'The correct approach is that the criminal court must not be blinded by where the various components come from but rather attempt to arrange the facts, properly evaluated, particularly with regard to the burden of proof, in a mosaic in order to determine whether the alleged proof indeed goes beyond reasonable doubt or whether it falls short and thus falls within the area of a reasonable alternative hypothesis.'

[52] It is common cause that the victim was a single witness on the alleged sexual act. Section 208 of the Criminal Procedure Act as amended makes provision for that an accused may be convicted of an offence on the evidence of a competent single witness.

[53] I am mindful of the fact that such evidence must be approached with caution but that the exercise of caution should not be allowed to displace common sense. I share the same view that was applied in *S v Sauls and others* 1981 (3) SA 172 (A)

where it was held that such evidence need not be satisfactory in every respect provided that the court at the end is satisfied that the truth has been told. Despite this evidence having some imperfections or shortcomings the court may convict on the evidence of a single witness.

Burden of proof

[54] The fundamental principle of our law is that in criminal trials, the prosecution has a duty to prove the guilt of an accused beyond reasonable doubt¹. The onus has to be discharged upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true.

Assessment of evidence

[55] I have evaluated the evidence as a whole including the evidence of the accused. What is common cause is that the victim and the accused were alone on the date and time of the alleged incident. It is also common cause that the victim was crying when the other children returned from their water expedition. The victim reported to her mother Ndapandula a day after the alleged incident, that the accused raped her in their room whilst being alone with her. The mother of the child, Ndapandula confronted the accused about the incident and he denied the allegation

[56] The issue in dispute is what transpired when the accused and the victim were alone. It was already mentioned that the complainant in this case was a single witness as far as the commission of the offence is concerned.

[57] The court acknowledges that the victim and two of the seven state witnesses that was called by the state were child witnesses. In this regard I refer to the position as set set out in *Hoffmann and Zeffert* 1988 (4th ed) at 375-377 and the following passage at the foot of 376 is of particular relevance:

'In each case the judge or magistrate must satisfy himself that the child understands what it means to speak the truth. If the child does not have the intelligence to distinguish

¹ see *S v Van Den Berg* [1996] (1) SACR 19 (NM).

between what is true and false, and to recognize the danger and wickedness of lying, he cannot be admonished to tell the truth – he is an incompetent witness.’

Additionally, regarding the correct approach to be followed when assessing their evidence, I cautioned myself not to approach the evidence in a fragmented fashion but, following the established legal principles, to approach the evidence of the state witnesses holistically.²

[58] I acknowledge the correct position regarding child witnesses as provided for in s 164 of the Act (CPA) as was amended by the Criminal Procedure Amendment Act, 2003 (Act 24 of 2003) by the insertion of subsection (4) which reads: ‘A court shall not regard the evidence of a child as inherently unreliable and shall therefore not treat such evidence with special caution only because that witness is a child.’

[59] I am of the view that all three child witnesses demonstrated a good recollection of the events that occurred. All three corroborated each other on the material evidence as to the emotional condition in which Brenda was found when they returned from the water hole and that she narrated to her mother how she was raped by her father. All three of the child witnesses understood the difference between speaking the truth and telling a lie. Two of the witnesses understood what it meant to take an oath. They were sworn in. The witness, Tunaveli was admonished but the court was satisfied that she understood what the difference between speaking the truth and telling a lie.

[60] Brenda was a material witness for the state .As a single witness she made a very good impression on the court. Though the child was emotional during most of the trial, with the assistance of anatomical designed dolls she remained steadfast in her version that the accused had sexual intercourse with her whilst they were alone with her at home. She answered all questions put to her by the state and defence without deviating from her version.

[61] There is no reason to reject the evidence of the child. I am therefore of the view that Brenda Ndovai was a competent and reliable witness. The court accepts her evidence as being the truth. The other child witnesses were reliable and had a good recollection of the events that occurred.

² see *S v Kapika & others* (2) 1997 NR 290 (HC) and *S v Gqozo & another* 1994 (1) BCLR 10 (Ck).

[62] The victim's version that she reported the matter to her mother Ndapandula the day after the incident was corroborated by the other child witnesses. The same children who found her crying on the day of the alleged incident. The child's version was corroborated by her mother, Ndapandula who testified that the victim told her that she was raped by her father the previous day. A vital witness who gave material evidence was the nurse who testified that she examined the child and concluded that there was tampering with the child as she observed a discharge in the child's vagina. The court took into consideration that the victim was honest to the court when she informed the court that she lied on two occasions being to the nurse and to her father but she justified these lies by giving her reasons being that she was compelled.

[63] The accused's version on the other hand was that the whole incident is a fabrication as a result of Ndapandula's jealousy. I am of the view that his version was tainted with material contradictions. I highlight some of these contradictions. He testified in evidence in chief that he was the person insisting to take the victim to the hospital whereas it was never put to the witness Ndapandula or any other witness. He also testified that at the clinic he was not afforded the opportunity to speak but this was not put to the nurse whereas the nurse testified that she told the accused that the child was raped and he did not say anything.

[64] I have given due consideration to the discrepancies and improbabilities as pointed out by defence counsel in the evidence of the state witnesses specifically the reasons why the victim only reported the alleged sexual assault on her to her mother a day after the alleged incident. Also the fact that she had lied on two occasions of which but she had given an explanation for it.

[65] In my final analysis the court gave due consideration to the fact that the victim had told her uncle as well as the officials from Woman and Child Protection Unit that she was raped by the accused. There was undisputed evidence led that she had pain in her abdomen and legs coupled with a foul discharge. Though the medical examination for an alleged rape was conducted a month after that alleged incident the undisputed doctor's findings confirmed penetration.

[66] Having consideration to the accused version the court finds that the accused's version of the incident is a bare denial with an accusation of jealousy.

I am of the view that the cumulative effect of the State's evidence is overwhelming against that of the accused. The fact that the accused was alone with the victim at the time the alleged offence was committed suggests that the accused had created an opportunity for himself to commit the alleged offence by sending away the other children. This coupled with the emotional state of the victim when the children returned from fetching water is part of the evidence that is conclusive to prove that the child endured a traumatic event.

I am convinced that the probabilities weigh heavily in favour of the state. The accused's bare denial coupled with his untruthful version during evidence in chief convinced the court that he was trying to mislead the court. I conclude that his version is not only improbable but false beyond reasonable doubt. The only reasonable inference the court can draw in the circumstance and in applying the holistic view approach with regard to count one is that it was indeed the accused person that performed a sexual act on the child, Brenda Ndovai and therefore the court is satisfied that the accused committed the offence of rape.

[67] I am satisfied that the sexual act was done under coercive circumstances in that the victim is a minor under the age of 14 years and the perpetrator being 35 years old, being more than three years older than the complainant. She could therefore not concede to the sexual act. The court takes into consideration that the accused applied physical force by grabbing the child and taking her into the room where he performed the sexual act.

Counts two to five

[68] In addition the accused was charged with two counts of assault by threatening, alternatively contravening the Intimidation in terms of the proclamation as contained in the indictment in respect of both the victim Brenda Ndovai and her mother Ndapandula, being counts two and three.

Counts four and five both comprised of defeating or attempting to defeat the course of justice.

In respect of counts two and three I refer to the evidence of Ndapandula who testified that after she had confronted the accused about the alleged rape incident the accused threatened her by saying that he will kill her and then kill himself. She

further stated that it was as a result of these threats that she did not take the child to the hospital and rather called upon the assistance of her family. This version of Ndapandula was also confirmed by her brother who came from Ruakana assist his sister. This act of searching for help is something she could not have done had the accused not threatened her. I am convinced that she indeed believed that the accused will carry out his treat.

I now refer to the victim's testimony that the accused threatened to kill her after he had sex with her. When she was found by her siblings she was in a bad emotional state. Though she did not tell her mother the same day the child's version of the threat was corroborated by her mother. I am convinced that the child only told her mother what had happened to her as she realised that she needed assistance and she was in pain. I am satisfied and I believe that the child did not tell the nurse that it was her father who raped her as she was in fear of her father. I am thus convinced that the child believed that her father will carry out his threat.

[69] The charges on counts four and five includes the words that were uttered by the accused person towards both the child and her mother construed as being threats. The charges further include the accused failure to inform the nurse of the truth and his failure to report the incident to the police or get a J-88 from the police. The charges also relates to the threats that the accused person extended to Brenda that she should not inform anyone about the incident or mention that it was the accused who sexually assaulted her. In my final analysis I found these acts to be intimidation rather than defeating or attempting to defeat the course of justice.

[70] In respect of counts four and five the issue of duplication of conviction arise.

The test that is used in this regard when considering whether duplication is likely to occur requires a well calculated assessment of the evidence presented. There are two tests to be applied in deciding whether there is a duplication of convictions, namely the single intent test or the same evidence test and in each case the court ought to use common sense and fair play to determine whether there would be a duplication of convictions³.

[71] The evidence that the prosecution presented in this aspect is in my view is the same evidence that was tendered in support of the charges of assault by threatening

³ see *Kafunga v S* (HC-NLD-CRI-APP-CAL-2018/00019) [2019] NAHCNLD 7 (29 January 2019).

(count two and three).Assessing the evidence I am of the opinion that where the state allege amongst other allegations that the accused threatened the victim and her mother it was done for the purpose of inducing the child into silence. That in my opinion amounts to intimidation as stated above which was alternative counts to the main count two and counts three

[72] In conclude that in counts 4 and 5, it was the same threats which formed the basis for counts two and three. It is the same factual averments. Although the state lead evidence on count four and five allowing this will result in the duplication of convictions. Therefore I cannot convict on count four and count five

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

The accused is guilty of;

5. Count 1: Contravening Section 2(1) (a) read with sections 1, 2, 3, 4, 5, 6 and 7 of the combating of rape Act, 8 of 2000; (Rape under coercive circumstance)Rape read with the, provisions of the combating of domestic violence Act, 4 of 2003;
6. Count 2: Assault by threat read with the provisions of the combating of domestic violence Act, 4 of 2003 (I.R.O. Brenda Ndovai);
7. Count 3: Assault by threat read with the provisions of the combating of domestic violence Act, 4 of 2003 (I.R.O. Ndapandula Tjithunga);
8. Not guilty and acquitted on counts 4 and 5.

A DIERGAARDT
Acting Judge

APPEARANCES:

For the State:

Ms. S Petrus

Of the Prosecutor General Office, Oshakati

For the Accused:

Mr. N Tjirera

Of the Directorate of Legal Aid, Opuwo