

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case No: CC 5/2022

In the matter between:

THE STATE

v

RSS

ACCUSED

Neutral citation: *S v RSS* (CC 5/2022) [2024] NAHCNLD 34 (5 April 2024)

Coram: KESSLAU J

Heard: 5-7 July 2023; 2-3 August 2023; 4 October 2023;
2-3 November 2023; 8 March 2024

Delivered: 5 April 2024

Flynote: Criminal law – Rape (c/s 2(1)(a) of Act 8 of 2000) – Three charges of rape (read with the provisions of Act 4 of 2003) – Contradictions between written statements and oral evidence – Medical evidence not supporting the version of the victim – Offences of rape not proved.

Summary: The accused pleaded not guilty on three charges of rape in contravention of s 2 (1) of the Combating of Rape Act 8 of 2000. It is undisputed that the victim was 11 years old at the time with the accused her adult biological father. The victim's

evidence unsatisfactory in that she gave two written statements which materially differ from each other. In oral evidence she was vague whenever detail was required and alternate between the two versions. The medical report did not support the version of charges put to the accused, whilst supporting evidence from her mother and uncle were unsatisfactory and possibly bias.

ORDER

1. Count 1: Contravening section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) – Not Guilty.
2. Count 2: Contravening section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) – Not Guilty.
3. Count 3: Contravening section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) – Not Guilty.

JUDGMENT

KESSLAU J:

Introduction

[1] The accused is arraigned before this Court on three charges of rape in the contravention of section 2(1)(a) of the Combating of Rape Act 8 of 2000 (CORA) (read with the provisions of the Combating of Domestic Violence Act 4 of 2003). In this judgment family members of the victim will be referred to by their initials to protect the victim's identity whose age was determined at 11 years.¹

¹ Exhibit "H".

[2] The indictment² alleged that on three consecutive dates being 13, 14, and 15 June 2020, and at Ombaalume village in the district of Outapi, the accused did unlawfully and intentionally committed sexual acts with KNS by inserting his penis into her vagina and that coercive circumstances were present in that the victim was 11 years old at the time (being under the age of 14) and the perpetrator more than three years older than the victim.

[3] The summary of substantial facts³ alleged that the accused and the victim is in a domestic relationship with the accused being the biological father of the victim. Furthermore that the accused and the biological mother of the victim were in a relationship. Both were employed as domestic workers by a certain Mr MV whilst also living in the said house. All three the sexual acts described in the indictment were allegedly committed during the early morning hours and in the shared bedroom of the accused and his girlfriend.

[4] The accused, represented by counsel, pleaded not guilty to all three charges and a statement⁴ in terms of section 115 of the Criminal Procedure Act 51 of 1977, as amended (CPA), stated that the accused is denying all the charges and putting the State to prove same. A formal admission in terms of s 220 of the CPA was made with the accused admitting that the victim is his biological daughter.

Summary of evidence

[5] ES confirmed that she is the biological mother of the victim. She and the accused were in a domestic relationship for an extended period. They have three children together with the victim being the eldest. She testified that on 15 June 2020 she woke up and left their shared bedroom to make tea. On her way she woke the victim KNS to assist with the small child. She then proceeded to the kitchen. She made a fire and while putting on the pot, noticed that the light of one of the rooms was on. With the purpose to get the key for that room, she returned to their bedroom.

² Exhibit "A".

³ Exhibit "C".

⁴ Exhibit "B".

[6] She entered their bedroom, switched the light on and saw the accused positioned on top of KNS whilst covered with a blanket. She asked KNS why she 'is laying like that' and pulled the blanket off of them. She then saw that the trouser of the accused was on his knees and his penis was penetrated into the vagina of their daughter. She asked the accused 'what are you doing to the child'. He then got off and got dressed. The accused thereafter apologized by saying he will not do it again. She testified that she was crying, in shock and cannot remember much detail. She reported immediately to her father, Mr MV, that she caught the accused having sexual intercourse with the victim. Thereafter the accused was called and questioned. He then admitted that 'my wife found me when I was undressing the victim'. Mr MV told them to proceed with their daily task. Later that day Officer Moongo arrived who took her and the victim to Outapi hospital. At the hospital the victim was examined by a nurse. She further said that, when questioned by Mr MV, the victim said the sexual intercourse happened on three separate occasions.

[7] During the cross-examination of this witness it was put to her that the accused was intoxicated that morning and furthermore that he only had his legs over the body of the child at the time when she removed the blanket. Furthermore that she had reason to falsely implicate the accused, as there was tension in their relationship caused by her infidelity. It was put to her that she returned late on the Friday accompanied by another man and that the accused confirmed their footprints as well. The tension was so much that Mr MV was asked to intervene. The witness however denied these allegations of having an affair. She also denied that the accused was drunk that morning. It was put to her that the accused was sleeping in a tight hot pants which she denied, insisting he was dressed in trousers which were half removed. She testified first that the accused was not present in the room when she left, however, changed that version to him being present. There were contradictions in her evidence on the sleeping arrangements of the two younger children sharing their room and the position of the bed. She however said that when entering the room the light switch is next to the door and the bed immediately in once sight.

[8] A multitude of questions were asked by counsel to ES on contradictions and omissions from her written statement⁵ to the police e.g. she stated she left the accused sleeping in the room, did not mention that she switched on the light when returning to the room to fetch the key, the sequence of how she confronted the victim and the accused were different and, her written statement omitted that, when questioned by the medical staff, the victim told them it happened three times. She however could not remember if the police statement was read back to her before she signed it. She confirmed that she heard no screaming from the victim prior the incident. She remained steadfast in her evidence that she saw the penis of the accused penetrated into the vagina of the victim, however, could not explain how she could see that if the accused was on top of the victim. Her family ties with Mr MV was questioned, on which she answered that he is the father to her brother. The witness struggled with remembering details, however, had said at the outset that she was in shock of what she witnessed. She testified that the victim reported three incidents to Mr MV. Finally it was disputed that this witness and the accused were present when the victim was questioned by Mr MV.

[9] The reliability of ES as witness is questionable as in many instances she was vague on details. Additionally her observation skills might have been influenced as she was in a state of shock. Her evidence needs to be approached with caution as she contradicted herself and changed her evidence from time to time.

[10] Mr MV testified that the accused and ES were both employed by him as domestic workers. He denied that he is an uncle to ES. He testified that he arrived at his house on the Friday. On the Monday morning at 06h00, ES woke him whilst crying. She narrated to him that she saw the accused and victim sharing their bed and witnessed them suspiciously moving under the blanket. When she removed the blanket she saw that they were having sex. When Mr MV confronted the accused he responded that she is crying because she found him undressing the victim and that he undressed the victim because ES is having another boyfriend. He testified that he then questioned the victim in the presence of her parents.

⁵ Exhibit "K".

[11] Mr MV testified that the victim reported to him that she was woken by her mother and sent to tend to the small child in their bedroom. She furthermore told him upon entering the bedroom, she laid down on the bed after which her father undressed her and started having sexual intercourse with her. Her mother then re-entered the room and found them busy in the act. When asking the victim if this was the first time, her response was that it happened every day. When he asked the parent the way forward, ES said she wanted compensation from the accused whilst the accused responded that they will forgive each other. He then called the police.

[12] In cross-examination the witness denied that he was asked to mediate the relationship problems between the accused and ES. The witness also denied the version from the accused that he told Mr MV that ES is crying because he was found with his leg on the victim. It was denied by the accused that he said he was found undressing the victim. It was also put to the witness that the victim was quiet when questioned in the presence of her parents and that they were then sent away. The witness insisted that these instructions from the accused are untrue.

[13] In general Mr MV appeared to be a reliable witness, however, the fact that he denied being related to ES and the victim might be an indication of him being bias. Additionally there are contradictions between his evidence and the other witnesses regarding the details of the victim's report.

[14] The victim, KNS, testified via CCTV in the presence of a support person as vulnerable witness in terms of section 158A of the CPA. She confirmed that the accused is her biological father. She testified that on three consecutive dates being 13, 14 and 15 June 2020, early in the mornings, her mother would go to the kitchen to brew tea. Each time she was woken up by her mother to tend to a younger sibling who was sharing a bedroom with her parents. She said that each time the accused undressed her and inserted his penis into her vagina whilst being on top of her.

[15] On the morning of 15 June 2020 her mother returned unexpectedly to the bedroom, switched the light on and removed the blanket whilst the accused was still on top of her. His penis was no longer in her vagina. Her mother then left the room. She testified that on all three occasions she experienced pain in her vaginal area.

She furthermore confirmed the involvement of Mr MV to whom she reported these incidents. She testified that Mr MV then took her to the hospital for examination.

[16] During cross-examination, KNS agreed that the accused was sleeping in black 'hot-pants'. She demonstrated with anatomically correct dolls how the accused was laying on top of her, indicating that he was covering her whole body. When confronted with her mother's version, that only the lower part of the body of the accused was found on top of the victim, she changed her evidence accordingly. She insisted that the penis of the accused was no longer inserted at the time when her mother discovered them.

[17] Two written statements of the victim were received into evidence on request of the defence.⁶ The most glaring differences between the two statements are that, initially she declared that the accused on the previous occasions came to her room to conduct the sexual acts and, secondly that the first two incidents were during March and May. When confronted with the differences, she testified that the second statement is the correct one as at first she could not remember well. When pressed on this issue, she contradicted her earlier oral evidence by answering that the first statement of incidents that happened in March and May was the correct version. She testified that no injuries were sustained, however, said that she observed swelling on her private parts. When confronted with the medical report which noted no fresh injuries, she chose not to answer. Unfortunately in many instances during cross-examination KNS chose not to answer.

[18] Warrant Officer Moongo attached to the Gender Based Violence Unit of the Namibian Police testified. She confirmed that on 15 June 2020 she attended to a report of rape at the Ombaalume Village. She testified that she arrested the accused and explained his rights to him. Her evidence regarding the rights explained, did not include the right to remain silent. The accused replied that he is asking for forgiveness. Thereafter he was transported to Outapi and formally charged. Thereafter the accused elected to remain silent. She testified that the age of the accused was estimated as above 21 years as determined by a dentist examination.⁷

⁶ Exhibits "L" and "M".

⁷ Exhibit "J".

[19] Officer Moongo further testified that an additional statement had to be obtained from the victim as the first one was unclear on certain aspects. The second statement was obtained from the victim two years after the initial statement was made. In the second statement the victim narrated that the rape occurred on the three consecutive dates of 13, 14 and 15 June 2020. She testified that no rape kits were available in their area and the country was in lock down due to the COVID epidemic.

[20] During cross-examination, officer Moongo added that a photo plan was compiled and filed in the docket, however, could not explain why it was not disclosed. On an instruction put to the witness, that the accused denies asking for forgiveness when he was arrested, she replied that maybe he misunderstood. She testified that she assumed that the victim suffered trauma, as in her first statement she mentioned that the sexual acts were committed in March, May and June without giving specific dates. When the second statement mentioned that the sexual acts were committed on 13, 14 and 15 June 2020, the first statement was abandoned.

[21] The medical doctor who examined the victim on 15 June 2020 and compiled a report⁸, has since returned to his country of origin. Doctor Chiwara was called to explain the medical findings. He testified that according to the report the hymen was absent while no fresh injuries was observed on the genitalia of the victim. The conclusion was that of frequent sexual intercourse. It was the doctor's opinion that the absence of injuries indicated that either the intercourse happened with a willing partner or that some time has passed since the act, giving the body time to heal.

[22] During cross-examination, the doctor conceded that if the rape occurred consecutively on 13, 14 and 15 June 2020, the likelihood of vaginal injuries was high. He did however add that such will depend on the level of development of the girl and the size of the male organ. Both of these factors were not examined as the report is silent on whether the vagina allowed 1, 2 or 3 fingers during the examination. No medical examination was done on the accused. The reason was that at the time the required rape kits were unavailable in the region.

⁸ Exhibit "G".

[23] The accused testified under oath. He denied having any sexual intercourse with the victim. He confirmed that he suspected his wife, ES, to have an affair which she admitted in the presence of Mr MV. He testified that the Sunday night he spent time with his friends at a bar drinking a substantial quantity of Tassenberg wine after which he then went to bed. In the morning he was unaware that his wife left the bedroom. He was woken up by the girlfriend saying 'tsk!' at the door and removing the blankets from them. He then realised that the victim was next to him and that he had his right leg over her body whilst sleeping on his side. He denied making admissions of having sexual intercourse with the victim or that he apologised to any of the parties involved. He denied that the victim in his presence reported any incidents of rape to Mr MV stating that the parents were asked to leave as the victim did not want to speak. He insisted that Mr MV is related to his wife as her biological uncle. He confirmed that he was not examined by any doctor. In conclusion the accused said that the allegations of rape could not be true considering that the medical report indicated no injuries to the private parts of the minor victim.

[24] During cross-examination, it was pointed out to the accused that when his wife testified it was not put to her that she admitted having an affair in the presence of Mr MV. He insisted that the Sunday prior to the last alleged crime he was drinking Tassenberg and when it was earlier said to have been beer that was an error by the interpreter. He confirmed that he arrived at 15h00 on the Sunday and slept without taking any additional alcohol. He said that the next morning he was suffering from a hangover. The accused contradicted earlier instructions put to his wife that it was dark in the bedroom, now confirming there was no need to switch on a light as it was early morning with clear visibility. The accused testified that he thought it was his wife next to him and that's why he had the leg over her in contrast to his earlier evidence that he was aware that she had left the room. Then changing his version to not being aware of the fact that he was placing his leg on someone. When confronted with these contradicting versions, the accused avoided answering it. The accused denied the medical conclusion in the J88 of repeat sexual intercourse by saying he is not the only male person in the area. He confirmed that his biological daughter, the victim was 11 years old at the time while he was 35 years old. Finally he denied having asked for forgiveness from the parties.

The law applicable

[25] The accused was charged with three counts under section 2 of CORA of which the relevant parts read that:

‘2 (1) Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances - (a) commits or continues to commit a sexual act with another person . . . , shall be guilty of the offence of rape. (2) For the purposes of subsection (1) “coercive circumstances” includes, but is not limited to - . . . (d) circumstances where the complainant is under the age of fourteen years and the perpetrator is more than three years older than the complainant . . .’

[26] In terms of section 1 of CORA the definition of a sexual act is given as:

‘the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person . . .’

[27] The victim is a single witness regarding two of the allegations of rape. In terms of section 208 of the CPA it is possible for a conviction to follow on the evidence of a single competent witness. The following, stated in *S v HN*,⁹ finds application:

‘It is a well-established rule of practice that, where a witness gives evidence as a single witness, that such evidence must be corroborated or approached with caution, although, such caution should not be allowed to displace the exercise of common sense (*S v Snyman* 1968 (2) SA 582 (A); *S v Sauls and Others* 1981 (3) SA 172 (A)) and must be clear and satisfactory in every material respect (*R v Mokoena* 1932 OPD 79; *S v Artman and Others* 1968 (3) SA 339 (A)). Evidence of the single witness need not be satisfactory in every respect as it may safely be relied upon even where it has some imperfections, provided that the court can find at the end of the day that, even though there are some shortcomings in the evidence of the single witness, the court is satisfied that the truth has been told.’

⁹ *S v HN* 2010 (2) NR 429 (HC) p 443 par 56.

[28] On the point of the young age of the victim who testified, Defence counsel referred this court to the matter of *Minister of Basic Education, Sport and Culture v Vivier No and Another*¹⁰ where the following was said:

‘The approach of the courts in assessing the credibility of child witnesses and the reliability of their evidence is informed by the evidential risks associated with their, as yet, inchoate social, emotional and intellectual abilities: their suggestibility and imaginativeness; their capacity to accurately observe, remember, recollect and relate events and experiences; their appreciation of the duty and importance of being truthful when testifying and their, sometimes, incomplete comprehension of the — often complex — matters which they are required to testify about. These evidential concerns must always be individualised when courts assess the evidence of child witnesses . . .’

[29] Regarding evidence received from a child, this court shall also be mindful of the provisions of section 164 (4) of the CPA which states:

‘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.’

[30] Defence counsel pointed out various differences between oral evidence and written statements from both the victim and her mother. To determine the effect of these differences on the reliability of the evidence, the approach is twofold. Firstly, if these deviation or omissions from the statements are material and secondly, if there is a logical reasonable explanation provided for such differences. It is important to be mindful that a witness statement only remains the skeleton or starting point on which a decision to prosecute is made and not necessarily needed to be a detailed account of the incident.¹¹ Furthermore it would be unreasonable to expect a witness to repeat word for word in open court the statement written in English by another person.¹² More often than not English would not be the mother tongue of either of the parties involved and additionally, limited time is spend on the taking down of a statement.

¹⁰ *Minister of Basic Education, Sport and Culture v Vivier NO and Another* 2012 (2) NR 613 (SC) p 623 par 16-17.

¹¹ *S v Thomas and another* 2022 (2) NR 404 (HC) p 414 par 52; *S v Nicodemus* [2019] NAHCMD 271 (CC 15/2017) (6 August 2019).

¹² *S v Bruiners en 'n Ander* 1998 (2) SACR 432 (SEC); *S v Lichtenstrasser* (CC 9/2020) [2023]. NAHCMD 696 (2 November 2023).

[31] Regarding the credibility and reliability of witnesses in the light of contradictions in their oral evidence, it was said in *Absalom v S*¹³ and *S v Auala*¹⁴ that from experience witnesses rarely give identical evidence. Furthermore, that contradictions *per se* do not render such evidence unreliable. Differences in evidence presented should be considered against the totality of evidence while taking into account the nature of contradictions, their number, importance and bearing on other part of witness' evidence.

[32] It is well established that there is no onus on an accused to convince the court of any of the propositions presented by him and that it is for the State to prove the propositions as false beyond reasonable doubt. The onus thus rest on the shoulders of the State and as stated in *S v HN*¹⁵ by Liebenberg J:

'The State thus carries the burden of proving the allegations contained in each charge against the accused beyond a reasonable doubt and in *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373 Denning J (as he then was) stated it in the following terms:

"It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt."

The law does not require from a court to act only upon absolute certainty, but rather upon just and reasonable convictions.'

Discussion

[33] The accused was not an impressive witness. The versions put to the witnesses and his later oral evidence did not always corroborate. The first instructions put to witnesses hinted that the accused at the time was intoxicated. This later changed to him being hangover. The only consistent part of his evidence was that he only had his leg over the victim and that he was not undressed. The

¹³ *Absalom v S* (CA 112/2016) [2017] NAHCMD 251 (04 September 2017).

¹⁴ *S v Auala* (no 1) 2008 (1) NR 223 (HC).

¹⁵ *S v HN* (Supra) at par 59.

apologies made by the accused at the time could be for a number of reasons and in isolation does not amount to an admission. Be that as it may, it is for the State to prove beyond reasonable doubt that the accused committed these offences.

[34] The evidence of the victim regarding the first two incidents of rape varied in respect of when and where it happened as per her two written statements. I find these to be material differences. Furthermore her oral evidence did little to explain the differences in that she said at first she could not remember the specifics. That explanation is highly unlikely considering that the second statement was taken two years after the incident.

[35] The victim furthermore in her oral testimony contradicted herself and changed her versions alternating between the details noted in the written statements. Even under the favourable condition of testifying from the victim friendly facility, she chose to not answer many of the questions. Her evidence will thus have to be approached with caution. Regarding counts 1 and 2, there is only her evidence before court implicating the accused. I cannot find that the victim's evidence was satisfactory and reliable enough to prove these counts beyond reasonable doubt.

[36] Turning to count 3, the evidence of Mr MV stood the test of cross-examination. However, the fact that he is denying his close family ties with ES and the victim could be an indication of him being bias and is a reason for concern. His evidence regarding when the incidents happened, was also in contradiction to what the victim and ES testified.

[37] Furthermore regarding count 3, I cannot ignore the obvious contradiction between the evidence of the victim and the medical report which, lacking as it is, does not indicate any injuries sustained. The third count is supported by the evidence of the victim's mother ES. For the most part the differences between the oral evidence of ES and her written statement were immaterial. However, there was the material omission from the statement regarding the report allegedly made by the victim to the medical personnel. Further to that there were material contradictions between the version of the victim and ES regarding the detail of this incident e.g. the position the accused was found and the oral interaction between parties shortly after

ES made the discovery. When considering the totality of their evidence, it falls short of proving the allegations beyond reasonable doubt.

[38] In conclusion this court finds as follows:

Count 1: Contravening section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) – Not Guilty.

Count 2: Contravening section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) – Not Guilty.

Count 3: Contravening section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) – Not Guilty.

E E KESSLAU

Judge

APPEARANCES

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