



REPORTABLE

CASE NO: SA 36/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE

Appellant

and

STEPHANUS HENDRICK RUBA GARISEB

Respondent

Coram: MAINGA JA, SMUTS JA and CHOMBA AJA

Heard: 13 March 2019

Delivered: 1 April 2019

Summary: The respondent was convicted in the High Court, Windhoek of indecent assault as a competent verdict to a contravention of s 2(1)(a) read with ss 1, 2(2), 3, 5, 6 and 18 of the Combating of Rape Act 8 of 2000 ("The Act"). It was alleged that respondent on or about 1 April 2011 at House No 2893 Orwetoveni Mondesa in the district of Swakopmund, wrongfully and intentionally committed a sexual act, under coercive circumstances with complainant, a minor by inserting his penis into her vagina and/or anus.

The respondent had pleaded not guilty but after an intermittent trial he was acquitted of rape but convicted of indecent assault. The State appeals with leave

of the court below against the acquittal on rape and the verdict of indecent assault as a competent verdict on a charge of rape in contravention of the Act as the trial court found.

The State argued that there was evidence of respondent opening complainant's buttocks and inserting his penis and doing up and down movements which was sufficient proof that the respondent inserted his penis even to the slightest degree into the anus of the complainant. The alternative argument was that, if there was no evidence to prove penetration into the vagina or anus, there is sufficient evidence proving rape in the form of cunnilingus or genital stimulation. Counsel argued that genital stimulation is not confined to the stimulation of the female organs but of male organs as well as s 1(1) defines "sexual act" to include, 'cunnilingus or any other form of genital stimulation' (the underlining is mine).

On appeal the court *held* that the trial court did not err on the facts or law when it found that penetration was not proved on the evidence before that court and therefore rape could not have been committed in terms of s 2(1)(a) of the Act. Counsel for the state's argument was seeking the court to postulate that there was penetration of the slightest degree.

Held further that no rape was proved in the form of cunnilingus given the dictionary meaning of cunnilingus, which is the act of touching a woman's sex organs with the mouth and tongue in order to give sexual pleasure. There was no such evidence on record. Therefore the argument that a "sex act" means cunnilingus or any form of genital stimulation and encompasses an erectile male organ is without merit and results in absurdity. The words 'any form of genital stimulation' should be read with s 1 (1)(b). The definition of cunnilingus is confined to touching a woman's sex organs with the mouth and tongue but s 1 (1)(b) includes insertion of any part of the body of a person or of any part of the body of an animal or of any object into the vagina or anus of another person.

Held further that the Act does not make indecent assault as a competent verdict but that the offence of attempted rape is a competent verdict on a charge of rape

under the Act by virtue of s 18 of the Riotous Assemblies Act, No 17 of 1956 *infra*. Consequently the verdict of indecent assault is set aside and substituted with attempted rape and the matter is remitted to the High Court for sentencing.

APPEAL JUDGMENT

MAINGA JA (SMUTS JA and CHOMBA AJA concurring):

Introduction

[1] On 19 May 2015 respondent was convicted in the High Court (Main Division) of indecent assault as a competent verdict to a contravention of Section 2(1)(a) read with ss 1, 2(2), 3, 5, 6 and 18 of the Combating of Rape Act 8 of 2000 (“the Act”) and he was acquitted on the second similar count of rape except that, that count was read with s 94 of the Criminal Procedure Act 51 of 1997. The State appeals to this court with leave of the Court *a quo* against that conviction. Leave to appeal against the second count was refused by the trial Judge.

Background

[2] The allegations on the count which is the subject matter of this appeal are that on or about 1 April 2011 at House No 2893 Orwetoveni Mondesa in the district of Swakopmund, the accused (respondent) wrongfully and intentionally committed a sexual act, under coercive circumstances with complainant, a minor by inserting his penis into her vagina and/or anus. The coercive circumstances are that the respondent who was 42 years, was older than the victim (complainant) who was 9 years old at the time by more than three years old.

[3] The respondent had pleaded not guilty to both the count the subject matter of this appeal and the second count but after an intermittent trial, he was acquitted of rape on both counts but convicted of indecent assault on the count before us.

[4] The appellant's case is premised on three grounds, which grounds are in this form:

(A) The learned judge erred in law and/or on the facts when she acquitted the respondent on the main charge of rape before us, when;

- i) There was evidence from the complainant that the respondent opened her buttocks and inserted his penis.
- ii) There was evidence from the complainant that the respondent was doing up and down movements which was sufficient proof that the respondent inserted his penis even to the slightest degree into the anus of the complainant.
- iii) There was evidence from the witness Anna Garises that when she examined the complainant's panty soon after the rape report, she noticed blood spots on it.
- iv) There was evidence from Dr Shoopala that there was redness in the perineum, which could have been caused by pressure to that area, which evidence is consistent with the evidence of rape.

- (B) By failing to find that even if the evidence presented was not sufficient to prove penetration into the vagina or anus of the complainant, there is sufficient evidence proving rape in the form of genital stimulation.
- (C) By finding that the charge of indecent assault is a competent verdict on a charge of rape in contravention of the Combating of Rape Act, 8 of 2000.

[5] The evidence led at the trial on the pertinent allegations of the offence against the respondent, which the latter denied, show quite clearly that the respondent was caught in *flagrante delicto* committing a “sexual act” on complainant at complainant’s parents’ house as alleged in the charge-sheet. Respondent’s denials were in my opinion correctly rejected and therefore the question before us is whether the sexual act respondent committed on complainant amounted to rape as contemplated in s 1(1) of the Act and secondly whether the verdict of indecent assault is a competent verdict on a charge of rape in contravention of the Act.

[6] In terms of 1 (1) of the Act “Sexual Act” means:

- ‘(a) the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person; or
- (b) the insertion of any other part of the body of a person or of any part of the body of an animal or of any object into the vagina or anus of another person, except where such insertion of any part of the body (other than the penis) of a person or of any object into the vagina or

anus of another person is, consistent with sound medical practices, carried out for proper medical purposes; or

- (c) cunnilingus or any other form of genital stimulation;

“vagina” includes any part of the female genital organ.’

[7] Complainant among other things testified that on 1 April 2011 respondent took her to school. At school he informed the class teacher that complainant was ill. The teacher gave respondent permission to take back complainant home. From school they went to respondent’s work place and then home. At home she wanted to go into her parents’ bedroom to change the school uniform, but respondent told her to change in the room she and respondent shared. She changed clothes and wanted to leave the room but respondent grabbed her by the arm and pulled her back in the room. He instructed her to lay down on the bed on her stomach. She did not lie down as instructed but she instead laid on her back and she put a pillow on top of herself. Respondent flipped her over and pulled off her under pants. He opened the zip of his trouser and took out his ‘thing’ which ‘thing’ she qualified as also used to urinate with, in context reference to penis. Respondent put his thing between her buttocks and started to do the up and down movements. Whilst respondent was busy with her, her stepfather or mother’s boyfriend entered the room. Respondent jumped off her and stood at where the washing machine is. She pulled up her underpants. It was at that point she testified about the 2nd count which is irrelevant for the purposes of this appeal.

[8] Pertinently at the end of the defence’s cross-examination, the court had the following exchange with complainant:

'So, can you just explain you said uncle Ruba put his thing between your buttocks? How did he put it? --- My Lady he was opening my buttocks and then he was inserting his thing.

Did it go inside or it was just between the buttocks? --- He did not penetrate my anus it was just between the buttocks.

And you also said that sometimes he would ask you to sleep on your stomach, to lie on your stomach? --- That is correct My Lady.

Now when you lied on your stomach did he put his thing into your vagina or where was the thing? Where was his penis? ---

INTERPRETER: Can that be rephrased My Lady there is some problem with the sound system?

COURT: You said uncle, there are times when uncle Ruba would tell you to sleep on your stomach. Is that correct? --- That is correct My Lady.

Yes, and when he told you to lie on your stomach you said he raped you. That is the word which you used.

--- That is correct My Lady.

How did he rape you? --- My Lady he was putting his thing between my buttocks.

Has he ever put his thing in your vagina, into your vagina? --- Yes, My Lady he did.

How did he put it? Has it gone inside or where was it? --- He was not penetrating he did not put in it was on top.

On top of what? --- Of vagina.

How was it on top? Where exactly was it? Sharon. --- My Lady can that be explained to me?

Yes, please explain. --- My Lady it was a bit to the inside but not deep inside.'

[9] In the questions by the court, complainant was asked whether respondent's 'thing' was put into her female organ and the answer recorded is 'yes, my lady he did.' In the next question that followed she replied that he did not penetrate her, the thing was just on top of the vagina. The last two questions the court posed, namely, how was it on top? Where exactly was it? The answer recorded is, 'my lady it was a bit to the inside but not deep inside.' The replies are irreconcilable but the evidence on this score strikes me overwhelmingly that the respondent had put his penis between complainant's buttocks only and no more.

[10] This observation finds support in the evidence of Dr Helvi Mekondjo Shoopala who examined complainant on the same day at 20h21. She testified that complainant was not sexually active as her hymen was still intact and no bleeding was noticed. She noted a white discharge on the labia majora which is basically excretion that comes from the vagina itself or the urethra or the area around it which is caused by a number of conditions, namely urinal infection, poor hygienic condition or sexual transmitted disease. She also testified that she observed redness of the skin around the perineum (the area between the anus and the scrotum or vulva), which could have been caused by infection, pressure applied to the skin, which would include forceful pressure of an erected penis. On the anal examination the general hygienic was neat, no fissures, cracks, abrasions,

swelling and no skin tags. The conclusion of the doctor's examination was that, 'there was no signs of penetration but there were whitish discharge on the vulva.'

[11] In the discussion of the evidence above, the court *a quo* came to this conclusion: 'It is therefore my conclusion that the accused exhibited some conduct of an indecent nature towards the complainant by placing his penis between her buttocks or anus'. The question that arises is whether such conduct amounts to a sexual act? That court referred to s 1 of the Act verbatim and continued to say:

[30] Although the hymen was not broken according to the medical report, it is not an element for the hymen to get broken in order for a sexual act to be committed. However, the doctor specifically concluded that there were no signs of penetration despite the fact that there was some redness of the skin around the perineum and a white discharge on the vulva. This is the only medical evidence available. I therefore find that the State did not prove penetration or insertion of the penis into the vagina or anus of the complainant. The evidence is however that the accused placed his penis between the complainant's buttocks and made up and down movements. Whilst such conduct may amount to stimulation, the definition of a "sexual act" under sec 1(c) of the Combating of Rape Act requires that such stimulation be genital stimulation. The word 'genital' is not defined in that Act. It should therefore be given its grammatical meaning. The Concise Oxford Dictionary defines 'genital' as 'of or relating to the reproductive organs' and '(in pl.) the external organ or organs of reproduction'. To my understanding, buttocks are not organs of reproduction so that the stimulation thereof may amount to 'genital stimulation'. In my opinion, the accused's conduct amounts to indecent assault and he should therefore be convicted of indecent assault as a competent verdict to rape.'

[12] The State refers to the exchange between the court and complainant in para [8] above, particularly the evidence I said is irreconcilable and submits that it

is clear from the evidence of the complainant that the respondent did not just place his penis on top of the buttocks of the complainant, he actually opened them and put his penis in between the buttocks which is where the anus is and that the fact that there was no evidence of full penetration of the anus of the complainant does not justify a finding that the complainant was not raped, as the Act, s 1 thereof defines a sexual act to be committed where there is insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person. Counsel for the State further submits that there is also evidence that the respondent was doing up and down movements and that it is inconceivable that the respondent would open the buttocks of the complainant and move up and down with his erected penis without penetrating to the slightest degree the anus of the complainant.

[13] With greatest respect to counsel she is not contending that there is any specific evidence, in this case, insertion of respondent's penis even to the slightest degree in complainant's anus or vagina which the trial court failed to consider, which this court should consider. What counsel is suggesting is that because complainant testified that respondent opened her buttocks where the anus is located and inserted his penis between and made up and down movements the trial court and now this court should postulate that there was penetration of the slightest degree. That is idle speculation. The interests of justice do not require the postulation by the court of speculative possibilities of unsatisfactory features in the evidence of the State witnesses – and then regard that as a basis for interference¹. The grounds of appeal allege that the trial court erred in law and/or on the facts.

¹ S v *Leslie* 2000 (1) SACR 347 WLD at 355H

There are no facts on which the court erred. The suggestion by counsel for the State that there was slight penetration, is not borne out by the evidence. Complainant contradicted herself when the court put a direct question to her, whether the respondent ever put his “thing” into her vagina and her reply was, ‘Yes . . . he did.’ I understand the question to refer also to other previous occasions the subject matter of the second count. When the court followed up, she altered her version, to say, ‘he was not penetrating he did not put in it was on top’, of the vagina. Generally her evidence is that he did not penetrate her, which evidence is corroborated by Dr Shoopala. That being the evidence or the facts, the question whether the trial court erred in law does not arise. There was no penetration, therefore rape could not have been committed in terms of s 2(1)(a) of the Act and the trial court could not have erred in law either. In my opinion the first ground of appeal borders on vagueness. It is not about that the trial court erred in rejecting the State witnesses’ evidence and in accepting the respondent’s evidence on the point in discussion, but it is about the trial court should have postulated that there was penetration of the slightest degree despite the record being silent of the same. The court correctly rejected that invitation which we condone and subscribe thereto.

[14] It is submitted that even if the trial court found that there was no penetration of the penis even to the slightest degree into the vagina or anus of complainant, the respondent should still have been found guilty of rape of the complainant because the actions of the respondent may have amounted to genital stimulation as the Act includes genital stimulation in the definition of sexual act. Counsel further contends that the trial court in concluding that there was no

stimulation of the genital organ, that court overlooked the fact that the respondent inserted his penis between the complainant's buttocks and submitted that the respondent was clearly stimulating his penis.

[15] The court's observation in this regard reads as follows:

'The evidence is however that the accused placed his penis between the complainant's buttocks and made up and down movements. Whilst such conduct may amount to stimulation, the definition of a "sexual act" under sec 1(c) of the Combating of Rape Act requires that such stimulation be genital stimulation. The word "genital" is not defined in that Act. It should therefore be given its grammatical meaning. The Concise Oxford Dictionary defines "genital" as "of or relating to the reproductive organs" and "(in pl.) the external organ or organs of reproduction". To my understanding, buttocks are not organs of reproduction so that the stimulation thereof may amount to "genital stimulation".'

[16] Section 1(1)(c) in the definition of sexual act includes 'cunnilingus or any other form of genital stimulation' and particularly it provides that 'vagina includes any part of the female genital organ'. It follows necessarily in my opinion or it is common sense rather, that to qualify as rape in terms of s 2(1)(a) it is the female genital organ that must be stimulated. Cunnilingus comes from the Latin *cunnus* for vulva women's external genitalia and *lingere* to lick². This finds support in the meaning of cunnilingus. The Oxford Advanced Learner's Dictionary: International Students Edition 8th Ed, defines cunnilingus the act of touching a woman's sex organs with the mouth and tongue in order to give sexual pleasure³. There is no

² *Concise Oxford English Dictionary*, 8 ed, revised. See also the shorter *Oxford English Dictionary*, 6 ed, Vol I.

³ See also google.com, Wikipedia: en.m.wikipedia.org which refers to cunnilingus as Eat Pussy; google.com: Urban Dictionary: <http://www.urbandictionary.com>, which defines cunnilingus as oral stimulation to the clitoris or any other vaginal area, the act of using the mouth to stimulate the female genitalia, the fine art of making love to a vagina/vulva with . . . mouth and tongue.

evidence on record that respondent stimulated the complainant's genital organ. The fact that respondent inserted his penis between the complainant's buttocks and his penis was erectile, falls short of the meaning of cunnilingus. The words 'any form of genital stimulation' on which counsel for the State relied to extend the meaning of genital stimulation for the purposes of the Act, should be read with s 1(1)(b) and the whole purpose of the Act, which is to remove all legal impediments related to rape complaints. The dictionary meaning of cunnilingus is confined to or it is an act of touching a woman's sex organs with the mouth and tongue but s 1(1)(b) other than the insertion of the penis includes insertion of any part of the body of a person (e.g. finger(s)) or of any part of the body of an animal or of any object into the vagina or anus of another person. The words in my opinion should be understood in that context. Therefore the argument that the respondent stimulated his penis as per the definition of "sex act" in s 1(1)(c) when he inserted his penis between the complainant's buttocks, or that, that act should be covered by the words 'or any other form of stimulation' results in absurdity. The Legislature could never have intended the definition of genital stimulation to apply in such circumstances. The trial court was correct when it held as it did on the point and the argument fails.

[17] The last ground of appeal is the verdict of indecent assault which the trial court returned as a competent verdict to a contravention of s 2(1)(a) of the Act. It is submitted that the Act does not make provision for the offence of indecent assault or the attempt thereof. It is further argued that s 18 of the Riotous Assemblies Act 17 of 1956 makes it possible for the crime of attempted rape to be a competent verdict of the crime of rape in contravention of s 2(1)(a) of the Act but that the Riotous Assemblies Act also does not make provision for indecent assault as a

competent verdict of rape under the Act. Counsel makes reference to *S v Hengari* 2010 (2) NR 412 (HC) wherein it was held that the Act does not specifically provide for attempted rape but that s 18(1) of Riotous Assemblies Act becomes relevant in convictions of attempted rape.

[18] Section 18 of the Riotous Assemblies Act provides:

(1) Any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

(2) Any person who –

(a) Conspires with any other person to aid or procure the commission of or to commit; or

(b) Incites, instigates, commands, or procures any other person to commit,

any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.'

[19] There can be no doubt that by virtue of s 18 of the Riotous Assemblies Act, an offence of attempted rape under the Act is a competent verdict on a charge of rape. The only concern at this stage is whether substituting the verdict to attempted rape would be prejudicial to the respondent. That consideration would

vary from one case to another. In this case the prejudice does not arise, for two reasons; namely (1) he was defended in the court below and (2) it is unlikely that he would have mounted a different defence to the one he raised to the main offence even where he would have been informed at the start of the trial that he could be convicted under the Riotous Assemblies Act, s 18 thereof. That is so in this case for the reason that respondent pleaded not guilty and declined to disclose the basis of his defence. As the trial proceeded it turned out that his defence was bare denials. He denied presenting himself at the school where he collected complainant as the father of the child, he denied that he was referred to the school principal by the class-teacher to seek permission to remove complainant from school on 1 April 2011, he denied the evidence of complainant and that of his stepfather that he caught him red-handed on top of complainant. His evidence was that he met complainant's stepfather at the gate. In the result he cannot be prejudiced if the crime of attempted rape is substituted in the stead of indecent assault which the Act does not make provision for as an alternative offence.

Order

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

1. The appeal partially succeeds.
2. The conviction of indecent assault is set aside and substituted therefor in terms of s 18 of the Riotous Assemblies Act, an offence of attempted rape.

3. The sentence is set aside.
4. The matter is remitted to the trial court to sentence the respondent afresh on the offence of attempted rape.

MAINGA JA

SMUTS JA

CHOMBA AJA

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