**16 October 1996**

**THE STATE versus DAWID DOESEB**

**MTAMBANENGWE,J.**

**EVIDENCE**

**Rape - evidence- immediate report of no corroboration of rape or independent evidence of the allegation but admissible to show consistency of complainants evidence. Accused failure to testify after plea of guilty in Sec 119 proceedings before magistrate and statement that 6 year old complainant gave her consent but no sexual intercourse took place. Factors to be take with other evidence in determining whether accused is guilty as charged, the same as regards allegation unsubstantiated by cross-examination of complainant or reputation of same by accused under oath.**

**Rape - penetration - slightest penetration even if the hymen not injured suffices.**

**CASE NO. CC 123/96**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between

**THE STATE**

versus

**DAWID DOESEB**

**CORAM: MTAMBANENGWE, J.**

Heard on: 1996.10.15

Delivered on: 1996.10.16

**JUDGMENT**

**MTAMBANENGWE, J.**: The accused pleaded not guilty to the charge that on 3rd December, 1995 he raped the complainant, a female child then aged 6 years. His plea explanation put in as Exhibit **A** puts into issue:

"... all the elements of the charge."

Mariane Niuses, complainant's mother's sister, lived with the complainant then. She was accused's girlfriend for seven months to that date. She said she was cleaning inside the house and when she finished went outside to look for the complainant. She called for the complainant and later saw her coming from the veld. The complainant immediately made a report to her that accused had raped her. She confronted the accused who denied the allegation. She reported the accused to accused's elder brother, one Gerson, who also questioned the accused. The accused also denied the accusation to his brother. She said that the complainant later showed her two places where she alleged accused had assaulted her and there she saw some marks of a knee and a toe on the ground which was mainly dusty with little grass on it. The complainant had said that the accused had spread his shirt on the ground. She went on to say that the complainant's dress was clean but her panty was wet in the front area and there was some white stuff on it.

A certain white man by the name of Diedericks had also questioned the accused who again denied the allegation. After the child was examined by a doctor the following day she noticed a drop of blood on the complainant's panty. She said on Mr Diedericks's instruction she had not washed the complainant when she took the latter to hospital the following day.

The complainant was examined by Dr Riegter the following day, the 4th of December and the doctor's evidence was that she had compiled

the medical report produced as Exhibit B. She dealt with so many cases of a similar nature, and could not remember this independently of her remarks on the report which she acknowledged to have compiled. In giving evidence she said that she found a yellow-whitish discharge from complainant's vagina which she assumed was an infection caused by the accused. The hymen was torn at .06 degrees and there was partial penetration. She could not say that there was any attempt to penetrate complainant more deeply, otherwise there would have been more injury, she said. The

genital organs of the complainant were bleeding easily which meant that the assault must have happened in the last twenty four hours. Her report records the following findings:

> "Rabia minora - mildly reddened. Vestibule
> - erythematous Hymen - torn at 06:00
> bleeding Discharge - offensive yellow/white
> Haemorrhage - Contact bleeding
> Examination - (easy - painful) under anaesthesia
>
> Remarks: Clear evidence of acute sexual molestation with probable attempted penile penetration (torn hymen, erythematous vestibule and labia minora, vaginal infection). Unlikely that adult penis entered vaginal canal.
>
> Opinion: Possible digital penetration of anus with e.g. little finger. Penile penetration of anus unlikely. No tears. Episode likely to have occurred recently e.g. last 3 days."

Under cross-examination the doctor said that the labia minora, that is the wall around the vagina, was reddened because of the trauma, that is bruising of the tissue. She conceded that that fact did not point or indicate a penis as the only cause or as the only object likely to have caused the injury and that any other object like a finger would have caused such an injury. I have already said she explained what she meant by .06 degrees or hours, she said like a

clock at the position of half past six and that is what is indicated in the drawing that I have just referred to, and repeated that this could be caused by partial penetration. She said she had taken vaginal smears and sent them for analysis. On the results of the analysis she said (her evidence on this point was later confirmed by Mr Nambakoe, the senior forensic analyst who analyzed the smears and who was called to produce the report showing the result.) Her notice was that no spermatozoa or semen was observed on the vaginal smear when analysed, the reason being that smears were bloody and both the doctor and the analyst said the blood would mask the presence of sperms or semen and Mr Nambakoe put the chances that that would happen to be nine out of ten cases, that is in 90% of the cases, this masking would happen. The report in the form of an affidavit in terms of section 212(4)(a) and (8)(a) of the Criminal Procedure Act no. 51 of 1977 (the Act) was produced as Exhibit D.

The doctor and the analyst of course would not rule out the possibility that no sperms of semen were found in the smears because neither was there.

The complainant was a very timid girl who appeared to have been so traumatized that she was unwilling to talk about her experience. I and counsel had to reassure her in chambers that she had nothing to fear. When she testified she said that accused had invited her and other kids to go with him to collect wood. As they followed him he told the other kids to go back and said to the complainant let us go and collect some tree gum. In the veld he took off his shirt and said "give me." She said accused injured her and indicated her private parts as the area where she was injured. She said that he

had opened his trousers before he touched her body. Asked where he had touched her body she pointed at her private parts. She had also indicated the accused as the man who had injured her by looking at him when she said the man was present in Court.

Defence counsel did not cross-examine her. Her reluctance to talk about her experience was painfully demonstrated by the way she answered or did not answer the prosecutor's questions.

The accused chose to remain silent and closed his case soon after the State called its last witness who was the complainant.

The section 119 (of the Act) proceedings before a magistrate which were held on 6th December, 1995 were produced by consent as Exhibit C. There the accused pleaded guilty to the charge of rape and was questioned in terms of section 112(1)(b) of the Act. Asked why he pleaded guilty to the charge he replied:

> "The complainant gave me consent to have sexual intercourse with her but we did not have sexual intercourse."

In choosing to remain silent this answer to the magistrate and the plea of guilty remain begging for an explanation. These are factors to be taken into account as part of the totality of the evidence in this case, and in this connection see S v Snyman, 1968(2) SA 582 (AD) at 588 G - H and the cases there referred to.

In addressing the Court Mr Murorua tried to persuade the Court not to convict the accused as charged. He criticised the evidence of the doctor as not being conclusive that the injuries she found on

complainant's genitals were caused by a penis. He stressed the fact that the doctor in her report

said that it was "unlikely that adult penis entered the vaginal canal." The short answer to this criticism is as stated by Snyman: Criminal Law, 2nd edition at p. 446:

> "The act (that is the act of rape) consists in the penetration of the female's organ by that of the male. The slightest penetration is sufficient."

The learned author relies for this proposition on the case S v Molefe, 1969(2) PH H 213 (Bot) where Young, C.J. then said:

> "The Court-a-quo had erred in acquitting the accused of rape since any penetration, even the slightest, and even if the hymen is uninjured suffices (Archbold, 36 ed. para. 2879 referred.)"

In this connection Mr Murorua referred to two authorities namely S v Theron, 1924 SA 2 04 (EDLD) and R v V, 1960(1) 117 (TPD) at 117 H. The relevant passage in the first case is at 205. The facts in these two cases clearly distinguish them from the present case. They appear sufficiently summarised in the two passages viz p. 2 05 in the Theron case:

> "The Court found that, notwithstanding that the complainant had conceived as a consequence of the assault, as there was no satisfactory evidence of any degree of penetration whatever, the accused was guilty only of assault with intent to commit rape and not rape."

and that at p. 117 H in R v V:

> "It was found that there were scratch marks between the labia minora and the labia majora:
>
> the hymen was not torn at all but there obviously had been interference with the child's vagina. The doctor has said there was no sign of penetration and such marks as he found could have been caused by something like a finger nail.
>
> It is on this evidence that the Court says the Crown was right in abandoning the charge of rape. There was no penetration and it is not clear that there was even an attempt to penetrate."

Next Mr Murorua argued that an inference that rape had taken place could not be drawn from the totality of the evidence as the only reasonable inference. He added that even if it was found that partial penetration took place one could not say it was penile.

This argument ignores the evidence of the complainant, the accused's plea and statement to the magistrate which, by remaining silent, the accused failed to explain. He also failed to gainsay complainant's evidence that accused opened his trousers, he injured her on her private parts. Mr Murorua's comment on complainant's evidence was that he could not say much about it and that she was justifiably traumatised and did her best to narrate the horrible experience she suffered. I agree with him on that comment.

The complainant immediately reported to her aunt that she had been raped and that report and the contents thereof are, though not a corroboration of her story or independent evidence of the alleged rape, admissible to show the consistency of her evidence. In this connection see Hoffmann & Zeffert: The South African Law of Evidence, 4th ed. at pp. 118 - 121. The accused's plea and answer to the magistrate are sufficient corroboration of

complainant's evidence at least as far as there having been a sexual association between accused and her. Despite her
understandable timidity, which, according to the Court's observation of her as a witness, arose from the continuing trauma she still suffers, I have no reason to doubt the veracity of the rest of her evidence despite its shortcomings.

Mr Murorua also criticised the doctor's evidence because, as he said, it was not conclusive about penetration or attempted penetration and it was further weakened because there was no corroboration of it of a discharge of sperms or semen in the vaginal smears that she took and sent for analysis. Snyman in the passage that I have quoted above makes the further statement that "it is immaterial whether semen is emitted . . . . " and of course it is a well-known fact that a man can have sexual intercourse with a woman without discharging at all.

It must be remarked that in cross-examining the doctor Mr Murorua, admittedly on the accused's instructions, alleged that he had information that complainant had had previous sexual experience. This was a gratuitous attack on complainant's character which was not substantiated either by cross-examining the complainant on it or by accused taking the witness stand to repeat it under oath. In the circumstances it must be taken as a base lie in an attempt, it would seem, for accused to raise a defence that he was not responsible for complainant's torn hymen.

In cases like the instant caution must be exercised in approaching the evidence of the complainant. MacDonald, A.J.P., as he then was,

said the following at p. 90 D - T in R v J, 1966(1) SA 88 (SRAD):

> "The surrounding circumstances when they do not afford evidence of the commission of the offences or of the identity of the perpetrator, frequently afford valuable evidence in regard to the merits of the evidence of the respective witnesses.
>
> The third point is that while there is always the need for special caution in scrutinizing and weighing the evidence of young children, complainants in sexual cases, accomplices and, generally, the evidence of a single witness, the exercise of caution should not be allowed to displace the exercise of common sense."

See also Snyman' s case, supra, at p. 585 G. I find these statements to be very apposite in the circumstances of this case.

On the totality of the evidence that I have considered above I find that the State has proved the guilt of the accused beyond reasonable doubt. The accused is accordingly found guilty as charged.

MTAMBANENGWE, JUDGE

ON BEHALF OF THE STATE: ADV S F SCHULTZ

ON BEHALF OF THE ACCUSED: MR MURORUA

Instructed by: