"SPECIAL INTEREST"

CASE NO.: CC 08/2006

SUMMARY

THE STATE versus NGHIDIPOHAMBA SHAANYENENGE

DAMASEB, JP

31/07/2006

INFERENCES

20 Year old Accused charged with rape of a minor girl of 7 years. There being evidence that she was previously sexually abused but not known by whom. State failing to prove that such previous abuse not cause of injuries to complainant seen by the doctors on day after alleged rape by the accused. Court not entitled to draw inference that injuries seen by doctors result of alleged assault by accused, when facts also consistent with inference his version he did not rape reasonably possible true. State failing to discharge onus and accused found not guilty.

CHILD TESTIMONY

Two minor witnesses' testimony not trustworthy. Two untrustworthy accounts not capable of corroborating each other.

“SPECIAL INTEREST”

CASE NO.: CC 08/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

and

NGHIDIPOHAMBA SHAANYENENGE **Accused**

CORAM: Damaseb, JP

Heard on: 20/04/2006; 31/05/2006; 02/06/2006; 28/07 – 31/07/2006

Delivered on: 31/07/2006

JUDGMENT

DAMASEB. JP: [1] The accused is charged with the rape of a 7 year old girl when he was 20 years old. Since he was more than 3 years older than the alleged victim, the indictment alleges the existence of coercive circumstances. The accused denies the charge and has put every element of the offence in dispute.

[2] The indictment alleges that on or about 13th November 2004 and at or near Onamindi village in the district of Outapi, the accused did wrongfully

and intentionally commit a sexual act with the minor girl (L.S) by inserting his penis in her vagina. The gravamen of the accusation is that the accused, during the night of 13th November 2004, entered the hut where the complainant and other children were sleeping, and asked to have sexual intercourse with the complainant in return for 50 cents. It is alleged that the complainant refused but the accused proceeded to have intercourse with her anyway.

[3] The accused was arrested on 14th November 2004 and made a warning statement to the Police. He said:

> "On Saturday 13 November 2004 at 21h00, I went to the room of the kids where they sleep to check my blanket. When entered I found my blanket, I took it and go back to my hut. From there I sleep until tomorrow morning. Morning my mother asked me, what I was looking in the room of the kids. I replied her that I was looking my blanket. From there she went and report me to the police. I didn't had sexual intercourse with the victim." (sic)

[4] In addition to the two medical doctors who examined the complainant, the state called the complainant and another girl who was allegedly in the room with the complainant when the rape is alleged to have taken place. I refer to L.S as the 'complainant'.

[5] The complainant is a nine (9) year old female. She was 7 years old when the alleged rape happened. I conducted an enquiry to establish if she understands the nature of an oath. Being so satisfied, I had the oath administered and she gave evidence under oath. She came across to me as a very intelligent and articulate girl. She testified very clearly and lucidly for a person of her age.

[6] Her evidence is to the effect that she normally sleeps with two other girls in the same room. She knows the accused as they live in the same house. They all live with her grandmother, the mother of the accused. She said the accused is her uncle. She testified that on the 13th November 2004 the accused came to her in the room where she sleeps and said: "Let me eat there and I will give you 50 cents," (or words to that effect). The complainant said that she did not want and thereupon the accused forcefully took off her panty and had sex with her.

[7] She testified that the accused put his penis in her vagina and she felt pain. Two other girls (N and L) were in the room when this happened, according to the complainant. The complainant testified that N went to tell the grandmother who then came to the room. According to the complainant, when the grandmother came inside the room, the accused was leaning against the wall. After the incident, she testified, she was taken to a doctor by the grandmother.

[8] The complainant testified further that she and the other two girls were sleeping on the floor covered in the same blanket when the accused came in. She testified that she was in the middle (between L and N). She woke up at the time the accused asked to have sex with her. She said that the accused woke her by touching her and whispering to her.

[9] The complainant persisted in cross-examination that the accused was in their room when the grandmother came. She testified that when the grandmother came in she said to the accused: "What did you do to the child?" The accused did not respond, according to her. The grandmother then left the room. It was at this point, she testified, the accused ran out and went to his room. It was put to her by Ms Hitula, appearing for the accused, that the accused will testify that he was never in the room. The complainant testified too that there was sufficient visibility in the room for her to identify the accused properly.

[10] The complainant further testified that the other two girls did not see what the accused did to her. She stated that she attempted to wake L but she did not answer. The complainant said she did not scream when this happened to her as she was afraid. The complainant dismissed the suggestion put in cross-examination that it was another boy, not the accused, who did this to her.

[11] The next witness was NN whom I will simply refer to as N. She is 16 years old, much older than the complainant. She must have been 14 years old around the 13th November 2004. She goes to school and is in grade 6. She knows both the complainant and the accused as they live in the same household.

[12] N's evidence is to the effect that the accused, when he came in the room, "seduced" the complainant and wanted to "do it" to the complainant the night of the 13th of November. She said the accused said to the complainant: "Let me eat there so that I give you 50 cents" (or words to that effect), thus confirming what the complainant heard.

[13] Initially, N testified that only she and the complainant were in the room the night of the 13th November. She said she was awake when the accused entered the room and spoke to the complainant. According to N, she heard the complainant say to the accused that she does not want, i.e. to the suggestion to have sex with him for 50 cents. N said too that she then left the room to report to the grandmother. The grandmother then came and found the accused in the room. She said the grandmother said nothing. According to her testimony, the accused also said nothing and then left the room.

[14] In cross-examination N maintained it was only she and the complainant who were in the room when the accused came in. She said too that usually only the two of them sleep in that room. She later changed her story and said L, her younger sister, was also in the room on the fateful night.

[15] N testified that she was in the middle between the complainant and L when the accused entered the room, while the complainant lay towards the door, and L at the back.

[16] N testified that she saw the accused clearly as he entered the room as there was moonlight and therefore sufficient visibility in the room. She insisted that she was awake when the accused came in as sleep had not yet caught up with her. According to N, the accused came in and lay down next to the complainant while she was looking at what he was doing. She saw him ‘seduce’ the complainant. N testified that she did not say a word and went to report the matter to the grandmother. She said she felt bad about what the accused did. N testified that when she went to the grandmother she told her that the accused is in their room.

[17] N’s further evidence is that when the grandmother came, the accused was not in their room. She later said, when confronted with the statement she made to the police, that when the grandmother came the accused was still in the room. N said she did not see the accused do anything to the

complainant apart from seducing her. She maintained that L was asleep at the time.

[18] The accused testified on his own behalf and he called no other witnesses. He denied raping the complainant. His version is that he had some days before the 13th of November 2004, asked his mother for a blanket for his own use. This blanket was in the room where the girls, including the complainant, sleep. Some time early in the day of the date mentioned in the indictment, he testified, he went to fetch that blanket in the girls' room. He testified that the girls were not in the room at the time as they were in the kitchen preparing dinner. He said that he fetched the blanket and took it to his room.

[19] According to the accused, about 20h00 on the night of the 13th of November 2004, they all had dinner and he went to sleep thereafter. Early in the morning of the 14th November 2004, he testified, his mother and N came into his room and his mother accused him of wanting to rape the complainant. He denied the accusation and said he did not even as much as touch the complainant. When the morning broke, he was taken to the police, together with the complainant, and was arrested. The accused denied that another girl, L, said by the complainant and N to have been in the room at the time, was in fact there. He maintained that she was away from home at the time visiting relatives for the weekend. He also maintained that L

attended school at Namedi and stayed with her mother. The accused maintained that the third girl who was in the room with the complainant and N, was a girl named Nd who has a child of her own.

[20] When asked why the complainant would accuse him falsely the accused said that the complainant may have been raped by someone else and told to accuse him. He maintained that he was on good terms with both the complainant and N, except for the normal misunderstandings one would expect amongst children. The accused said that he knew about the girls who were in the room on the fateful night with the complainant as he saw them leave the fire place together (after dinner) to go to bed. The accused said too that when his mother and N came to his room, accusing him of untoward conduct towards the complainant, he initially thought they had come to him about the blanket he removed from the girls' room earlier that day.

[21] The accused then asked the rhetorical question why the older girl in the room at the time (Nd, the one with a child) did not make a report about the alleged rape. I wish to mention that the presence of Nd in the room was never put to the state witnesses to confirm or deny and therefore carries very little weight.

[22] The state also called the two medical doctors who examined the complainant following the complaint of rape. The first was doctor Jasmine

Norde Robert, a Cuban national who testified with the help of a Spanish interpreter. She is said, and admitted, to have great difficulty in writing and speaking English. She is a specialist in general medicine and was at the time under training by Dr Ndoukve Mannie, the principal medical officer, who, together with her, conducted the medical examination on the complainant.

[23] Dr Robert testified that it was the first time she encountered a case like the present and was not quite sure what to do and called for the help of Dr Ndoukve Mannie. She confirmed conducting an examination on the complainant on 14th November 2004. She made the following findings: complainant's mental state was calm; there was 'redness' on the labia minora and the vestibule; the hymen was perforated; the examination of the vagina was 'easy' (1 finger) and she came to the conclusion that this was a rape.

[24] In a further report prepared jointly with Dr Ndoukve Mannie, Dr Robert made the following additional entries: the labia majora and minora, and the vestibule were reddish; and there was a whitish smelly discharge from the vagina. No vaginal smears were taken because a rape kit was not available. The joint conclusion of the two doctors was that this was a case of rape and the complainant was 'psychologically traumatized'.

[25] Dr Robert was unable to say how recent the injury to the complainant's genitalia was. She said though that the vaginal secretion and the reddishness on both labia meant it was not very long ago. She said it was not normal for a 7 year old girl to have a reddish labia and that it must have been due to some sexual 'play or manouvre'.

[26] In cross-examination Dr Robert said she inserted her finger into the vagina of the complainant during the examination. She observed all that was recorded on the medical report, she said. They found no blood on the clothing of the complainant, nor on the genitalia of the complainant. All she saw was reddishness. Dr Robert testified further in re-examination that the absence of blood on the genitalia may be as a result of the fact that the complainant had washed in the meantime, i.e. after the rape and before the examination. She also said that the insertion of the penis into the complainant's vagina may not necessarily have caused blood, and that the hymen is a very thin membrane that does not contain blood.

[27] Dr Ndoukve Mannie, for his part, said Dr Robert was undergoing orientation under his supervision at the time and made mistakes in completing the medical report. He said he prepared the last part of the report with her recording the findings made and to which I have already made reference. Dr Mannie disagreed with Dr Robert's finding that the complainant was calm, saying she was traumatized and was restless as they

had to calm her down during examination; only to concede in cross-examination that the complainant may just have been a shy girl, not necessarily traumatized.

[28] Dr Mannie testified that the injury to the hymen was 'fresh'. He concluded therefrom it was not an old injury. He attributed the whitish smelly discharge from the complainant's vagina to a possible 'opportunistic infection' or a sexually transmitted disease. He said the court need not make anything of the whitish smelly discharge. Further, for his part, Dr Mannie said that he inserted the finger into the complainant's vagina during the examination.

[29] Dr Mannie also testified that it was possible the complainant had been raped many times before. He came to this conclusion because of the ease with which he was able to insert his finger into the 7 year old complainant's vagina. This, he said, showed that this had gone on 'repeatedly'. Dr Mannie persisted that what he saw was consistent with the complainant having been the victim of sexual abuse before the incident that brought her to them.

That is the evidence that was led in this case.

[30] The complainant and N, (more so the complainant) are young witnesses and I must be satisfied that their evidence is trustworthy. *S v Engelbrecht* 1993 NR 154 at 163 E-I.

[31] During argument I tried to focus Mrs Miller's attention to the difficulty the state faces in this case; and it is this: the testimony of the complainant is that she was raped by the accused on the 13th November 2004. The complainant was at the time 7 years old. Any sexual act with her by anyone with legal capacity would amount to rape. She can, in law, not have consensual sexual intercourse. Dr Mannie testified, for the state, that he was surprised by the ease with which he was, during examination of the complainant, able to insert his finger into the vagina of the complainant. Dr Robert's evidence also confirms that the entry of one finger into the complainant's vagina was easy.

[32] That suggested, according to Dr Mannie, that this child had prior sexual experience before the incident for which she was brought to him for examination. What inference must the Court draw from this evidence? First, it shows that this complainant had been the victim of sexual abuse prior to the incident allegedly involving the accused. That raises the further question: when did that happen? Was it long before or shortly before the 13th of November 2004? If it was long before, say when she was so small that she did not know what was happening to her, she could not have been reasonably expected to know the identity of the perpetrator. If it was, however, say a month or just a few weeks or even days before the 13th of November 2004 further issues arise, in my view: (i) why did she not report

it? (ii) who was the perpetrator? (iii) why did the state not deal with it in evidence and exclude the possibility that the injuries observed by the doctors on the 14th November 2004 were not the result of those prior rapes, especially when regard is had to the uncontroverted medical evidence of the state that such prior rape must have taken place.

[33] The crisp issue is this: Is the only reasonable inference that can be drawn the one that the injuries to the genitalia of the complainant occurred on the night of the 13th November 2004 and that it could only have been caused by the accused? If I am unable to draw that inference, the state has failed to discharge its onus. In view of the medical evidence, it is an equally reasonable inference that the complainant was the victim of an illegal sexual act before 13th November 2004 and that act or acts may be to explain for the injuries to her genitalia.

[34] This is compounded by the contradictions in the state's testimony on very crucial aspects of the case. The first point I wish to make is that the mother (or grandmother) has not been called as a witness. She would, if called, no doubt have shed some light if the story about the blanket is true, who actually slept in the girl's room that night, whether L was present in the room or not; and where she found the accused upon receiving the report of the rape.

[35] The complainant testified that no-one-else in the room saw what the accused did to her. When the accused came in she was asleep. She says he woke her up. N, on the other hand, testified not only that she actually saw the accused enter the room, but that she saw and heard the accused 'seduce' the complainant and, what is more, that the accused did not do anything to the complainant apart from seducing her. N was clear in her testimony that she was awake throughout as sleep had not yet caught up with her. If N was awake and saw what was happening, why did she not raise the alarm? N was much older than the complainant. Why for example did the complainant not raise the alarm? She was after all on her version sleeping between tow girls, one of whom was 14 years old. I don't think it is enough to say the complainant was afraid without saying what the reason for it was. In my view the state had a duty to explain why she was afraid of raising the alarm. She was not alone after all on her version.

[36] N also contradicted the complainant in respect of who slept where. The complainant said she was in the middle, while N maintains that it was she who was in the middle. Who should be believed? This is crucial for *where* exactly the complainant was at the time goes to an assessment of the probabilities of whether the act could have been committed in the way said by the complainant. If she was actually raped while in the middle (between L & N), could N have failed to notice it?

[37] Another inexplicable discrepancy in the evidence is where exactly the accused was when the grandmother came after the alleged rape. As I said the grandmother was never called. The state explained from the bar that she could not be called because she was a negative influence in the case. No evidence was led to that effect. She could have resolved the issue of where exactly the accused was found. The complainant said the accused was leaning against the wall when the grandmother came. Initially N said he was not in the room but later retracted and said he was in the room. Which one is the Court to accept? In any event, what are the probabilities that a person who had just committed an act of rape and knows that someone (N) had just left the room, possibly to raise the alarm, would just wait in the room and only run away when the grandmother arrived?

[38] N also said that the grandmother said nothing when she came in, but the complainant said that the grandmother confronted the accused and asked what he had done to the complainant. The accused's version, of course, is that the grandmother came to his room and it was in his room that he was confronted about the incident. Is that version displaced beyond reasonable doubt?

[39] A Court of law is not entitled to reason thus: The witnesses for the state are credible. I believe their evidence. Therefore, since the accused says something which contradicts their testimony, he is telling a lie and

therefore is guilty. Mrs Miller submitted during argument that in order to not find the accused guilty as charged, I must find that the two girls' testimony is a complete fabrication. With great respect, that is a completely wrong approach to the *onus* in a criminal trial.

[40] When the law says that an accused is presumed to be innocent, what is really meant is that the burden of proving his guilt is on the prosecution. This requires a clear conviction of guilt and not merely a suspicion, however strong that suspicion. A mere fanciful doubt where it is not in the least likely to be true, would not prevent conviction. As I understand the law, a court of law is not entitled to draw an inference of guilt from a set of facts, if the same facts are capable of an inference inconsistent with guilt, or are consistent with an inference that the accused's version is reasonably possibly true. In that event the state would have failed to discharge its burden of proof beyond reasonable doubt and the accused would be entitled to his acquittal.

[41] The observation of Silungwe, J (as he then was) in *S v Shaanika* 1999 NR 247 at 252-G, are apt. He said:

> "In any event, it is trite law that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied not only that the explanation is improbable, but also that beyond any reasonable doubt,

> it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

His Lordship also quoted, with approval, the following *dictum* of Van der Spuy AJ in *S v Munyai* 1986 (4) SA 712 (V) at 714 I – 715 A and 715 F – G:

> "Although the accused's version of events is improbable and contradictory, especially when he questioned the witness about the alleged robbery, I am nevertheless of the opinion that the version of the accused could reasonably possibly be true. Even if the state case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false. There is no room for balancing the two versions i.e. the state case as against the accused case and to act on preponderances."

[42] I have already warned myself of the need to be satisfied of the trustworthiness of the evidence of the young witnesses. I have pointed out the discrepancies, contradictions and inconsistencies in the testimony of the evidence of the state. True there is a contradiction between the accused warning statement and his *viva voce* evidence about when exactly he went to fetch the blanket from the girls' room, the warning statement placing him in the room at about the time the girls were in the room. But is that enough

to convict him? The accused stuck to his version that he did not rape the girl from the day of his arrest, and his evidence was not shaken in cross-examination. I do emphasise that there is the unexplained matter of the previous sexual abuse and how proximate it was to the 13th of November 2004.

[43] I have come to the conclusion that I am not satisfied that the evidence of the two girls is trustworthy for the reasons I have given. I am reminded of what Hannah J said in *Tuyenikelao Nande v The State* FA 1/99 (at page 7) of the unreported judgment:

> "Suspect evidence from one quarter can hardly be said to corroborate suspect evidence from another. Common sense dictates that the mixture of one impurity with another further contaminates, not cleanses."

The untrustworthy accounts of the two girls cannot corroborate each other.

[44] I am accordingly satisfied that it is not the only reasonable inference that I can draw on the facts that the injuries to the genitalia of the complainant, seen by the doctors on 14th November 2004, occurred on 13th November 2004 and that they were caused by the accused. I have come to the conclusion that the state has failed to prove the charge of rape against the accused beyond reasonable doubt. I therefore acquit him.

DAMASEB, JP

ON BEHALF OF THE STATE: **Ms S Miller**

Instructed By: **Office of the Prosecutor-General**

ON BEHLAF OF THE ACCUSED: **Ms H Hitula**

Instructed By: **Directorate of Legal Aid**