



**CASE NO.: CC 15/2011**

**IN THE HIGH COURT OF NAMIBIA**

**HELD AT OSHAKATI**

In the matter between:

**THE STATE**

**versus**

**MPASI JOHANNES HAUSIKU**

**FIRST ACCUSED**

**HAINDERE JOHANNES NDOKO**

**SECOND ACCUSED**

**HAUTA KONSTANTIUS**

**THIRD**

**ACCUSED**

**FRANS MUNANGO MBAMBA**

**FORTH**

**ACCUSED**

**ANDREAS KARUPU NZARO**

**FIFTH ACCUSED**

**CORAM: TOMMASI J**

Heard on: 17/05/2011 -

Delivered on: 8 June 2011

**JUDGEMENT: APPLICATION IN TERMS OF SECTION 174**

**TOMMASI J:** [1] The accused herein were indicted with having contravening section 2(1)(a) of the Combating of Rape Act, 8 of 2000 (rape) and 4 additional counts of having contravened section 2 (1)(b) of the same act (rape). The 4 additional counts of rape is based on each one of the accused assisting the other accused to rape the complainant in what is commonly referred to as “gang rape”.

[2] The State closed its case and the Defense applied for the discharge of accused 1, 2, 4 and 5 in terms of section 174 of the Criminal Procedure Act, 51 of 1977. (The trial of accused 3 was separated from the trial of accused 1, 2, 4 and 5).

[3] Defense counsel submitted that the accused should be discharged since there is no evidence upon which a reasonable court, would convict. She argued that although the credibility of the witnesses play a limited role at this stage of the proceedings, that the credibility of State witnesses, in particular the complainant, is so poor so as to justify a discharge. The State submitted that there is evidence upon which a court, acting carefully, may convict; that the credibility of the witnesses play a limited role at this stage;

and that the Court should refuse the application if there is a possibility that the accused may be convicted on a competent verdict.

[4] The legal position in respect of whether or not credibility plays a role at this stage of the proceedings has been spelled out as follow in *S v TEEK 2009 (1) NR 127 (SC)* at page 131, A - C:

*“Somewhat more controversial is the question whether credibility of the State witnesses has any role to play when a discharge is sought under the section. But the generally accepted view, both in Namibia and in South Africa, appears to be that, although credibility is a factor that can be considered at this stage, it plays a very limited role. If there is evidence supporting a charge, an application for discharge can only be sustained if that evidence is of such poor quality that it cannot, in the opinion of the trial court, be accepted by any reasonable court (see eg *S v Mpetha and Others 1983 (4) SA 262 (C)* at 265; *S v Nakale supra* at 458). Put differently, the question remains: is there, having regard to the credibility of the witnesses, evidence upon which a reasonable court may convict?”*

[5] The complainant testified that she and her two friends, Evalista and Cecilia, went to a bar early evening on 7 June 2008. They did not enter the bar but were standing outside under a tree. Although it was already dark by this time, there was some moonlight. They were approached by all the accused herein. She knew all of the accused prior to this incident as they live in the same village where she lived before moving to another village.

[6] Accused 5 pulled her by her arm in an eastern direction from amongst her friends under the pretext that he wanted to tell her something. Whilst they were standing there accused 5 was still holding her but did not say anything. Accused 1 came to where they were standing and whispered something in accused 5's ear. Her friends came looking for her as they grew tired of waiting. They instructed accused 5 to leave her so that they can go home. She followed her friends but accused 5 continued holding her hands behind her back. Accused 5 let go of her and accused 2 got hold of her hands. Her two friends were present but each was being held by accused 1 and 3 respectively. Accused 4 and 5 were also following them at that time. Accused 2 took her from the main road to his homestead. When they came close to house of accused 2, his father, Daniel Mbuto, came out with a torch, having been woken up by the noise made by the complainant. Accused 2 ran away and she remained standing. Daniel Mbuto escorted her and they found Evelista and Cecilia along the road. He left them along the road leading to their home with instructions to go straight home.

[7] All the accused re-appeared in front of them on the main road and blocked them. Accused 1 came towards her and smacked her asking why she told his father. He kicked her 3 times on her legs and she started crying. One of the accused alerted the other accused that the old man, Daniel, was

coming back and they all ran away. The three girls continued walking. Cecilia tried to comfort her. Evalista was somewhere ahead of them.

[8] All the accused once again appeared in front of them and accused 1 told her that *"today you are going to shit."* They continued walking and the accused were walking with them. At some point she lost sight of her two friends and accused 3, 4 and 5 made her stand at the road. She also testified that at some point all the accused surrounded her; and that that accused 1 and 2 came from the direction of the house of accused 3.

[9] Accused 1 pulled her by the arm towards the house of accused 3 and threatened to stab her with a knife if she misbehaved. Accused 1 instructed accused 3 to light the candle and to switch on the radio. The sound of the radio was put on a very high volume. All of the accused were present at the time. Accused 1 pulled her into the hut. She resisted by hanging onto a pole. The other 4 accused pushed her into the hut. All five of the accused then took turns to rape her. Accused 1 was the only one who used a condom and she was sure that accused 5 ejaculated during sexual intercourse. They used force to push her on the bed and she felt pain near her bladder during sexual intercourse. The other accused were outside the hut whilst one would be raping her and she could not escape. She could see their faces because the candle was lit intermittently. She was also crying but nobody came to her

assistance. After the rape all the accused came into the hut and accused 5 gave her clothes back to her. They escorted her halfway to the house of Cecilia and she thereafter walked alone.

[10] When she arrived at home she informed her friends about the rape, Nankali, Cecilia's elder sister, was informed the next morning as well as her mother. The accused were confronted by the complainant, her mother and members of the community under a tree the next day. A police officer intervened and they were advised to take her to the hospital. She was taken to the scene of the crime to point out certain places and was examined by the doctor at 16H00, the same day.

[11] All the accused submitted a written plea explanation in terms of section 115 of the Criminal Procedure Act, 51 of 1977. Accused 1, 2, 4 and 5 denied that they were present at the place of the incident, that they had raped her and that they were detaining her in the hut.

[12] Counsel for the defense submitted that the complainant's evidence was not credible, because there were some shortcomings or defects in her evidence and moreover that the medical evidence does not corroborate her version that she was raped. She highlighted some of the discrepancies.

Without going into detail it would suffice at this point to state that the complainant's evidence is not without shortcomings. The question though is whether it so contradictory or fanciful that no reasonable court could ever convict on it. (See *S v MPETHA AND OTHERS* 1983 (4) SA 262 (c) at 265).

[13] The complainant is a single witness but it does not necessarily flow from this fact that no reliance can be placed on her evidence despite the shortcomings in her evidence. In *S v NOBLE* 2002 NR 67 (HC) the following excerpt was cited from *S v SAULS AND OTHERS* 1981 (3) SA 172 (A) at 180D-E:

*"of no significance; the single witness must still be credible, but there are, as Wigmore points out, "infinite degrees in this character we call credibility". (Wigmore on Evidence vol III para 2034 at 262.) There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpf JA in S v Webber 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded" (per Schreiner JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'*

Maritz J, as he then was, at page 71 G-H, of the same judgment concludes as follow:

*“The weight of authority suggests, correctly so in our view, that it is a common sense guide enumerating some of the considerations applicable when assessing the reliability and credibility of the evidence of a single witness within the totality of the evidence adduced in the trial.”*

[14] The discrepancies and shortcomings pointed out are to be viewed against the evidence that was presented by the State.

[15] The complainant’s friends confirm the presence of all five accused at the bar. There is sufficient proof of the identity of all the accused as they were known to the complainant and her friends prior to this evening; and of the fact that they were at the bar that evening. Defense counsel in cross examination put it to the complainant that accused 3, 4, and 5 were at the bar. There is thus *prima facie* evidence that all the accused had met up with the complainant at the bar that evening.

[16] The evidence of the complainant that she was taken into the direction of the homestead of accused 2 was confirmed by her friend Evalista who was being held by accused 1 and who was also taken to the homestead of accused 2. Both testified that accused 1 and 2 ran away when Daniel Mbuto came out with his torch. Daniel Mbuto confirmed that he found the complainant outside his home. The complainant testified that they were on



their way home. There is no apparent reason for the complainant to be at the homestead of accused 2. There is therefore evidence to support that she was brought there by accused 2. That there was reason to be concerned about her safety is evident from the fact that Daniel Mbuto decided to escort her.

[17] The complainant's testimony that they were confronted by all of the accused after Daniel Mbuto left and that accused 1 assaulted was corroborated by her friend, Cecilia. The evidence of Evalista in respect of this and further encounters are of less value as she testified that she ran ahead when she noticed accused 1 approaching the complainant because she feared a possible attack by accused 1. It cannot therefore with certainty be said that she was close enough to observe what was happening.

[18] Her testimony that all five the accused confronted them for a second time along the main road was confirmed by Cecilia. There is furthermore evidence led by her two friends that accused 1, 2 and 3 were seen at the homestead of accused 3. The complainant's evidence places all of them at the homestead and hut of accused 3.

[19] To summarize; there is evidence that all the accused were following the three girls on their way home, that they were taken off their path; first to the home of accused 2 and then the homestead of accused 3. There is evidence to support that these were not voluntary deviations. This places all the accused in the vicinity of the hut where the complainant testified she was raped.

[20] The complainant immediately reported the rape to her friends. There were some contradictions in respect of the response by the complainant after the rape incident but as indicated before that the shortcomings should be viewed in the totality of the evidence. Her testimony constitutes evidence before the Court. This evidence, indicate that all the accused who was present in the vicinity of the hut raped her. If the Court accepts that there are some shortcomings in the evidence of the complainant, it may look at facts which would corroborate her version of the event.

[21] Such corroboration for the actual rape, in the absence of an eyewitness, is usually found in the evidence of the medical practitioner who examines the victim. What was of some considerable concern to the Court was the fact that the medical practitioner's evidence was not consistent with the complainant's version that she was raped. From his observations he did not observe any signs of "*penetrative sexual intercourse*". Counsel for the

State argued that the absence of injury is not necessarily indicative of the fact that rape did not take place. I am not sure whether there is evidence of an expert nature before this Court to support counsel's argument.

[22] A further part of the evidential material this Court has to consider is the *extra curial* statement of accused 5. In his statement accused 5 admitted to having had sexual intercourse with the complainant with her consent. At this juncture this admission is *prima facie* proof of sexual intercourse between the complainant and accused 5 and it may, if it remains uncontested, become conclusive proof thereof. This evidence is not consistent with the medical practitioner's evidence. If, for some reason or the other, the medical practitioner was unable to detect sexual intercourse with one of the accused, then one of the inferences could be that his evidence, that he found no evidence of "*penetrative intercourse*", was incorrect. Such an inference would leave this Court with only the evidence of the complainant, a single witness implicating all four of the accused. I am of the view that a reasonable court may convict if the medical evidence is found to be unreliable.

[23] A further consideration is the evidence of assault on the complainant which would be a competent verdict on the charge of rape albeit only in respect of some of the accused.

[24] Given the above it would be premature for this Court to discharge the accused at this stage of the proceedings. I am of the opinion that there is evidence before this court, having considered the credibility of the complainant as a single witness and other evidence, that there is evidence upon which a reasonable court may convict.

[25] In the premises the application of accused 1, 2, 4 and 5 for a discharge in terms of section 174 are dismissed.

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**Tommasi J**