



CASE NO. 42/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

GERHARD GEISEB

CORAM: SIMPSON, AJ

Heard on 26 April 2011

Delivered on: 22 August 2011

JUDGMENT

SIMPSON, AJ:

[1] The accused is charged with the offence of rape, C/S 2(1)(a) of Act 8/2000, an incident that occurred on or about 30 August 2008, at Tsaraxa Aibes in the district of Otjiwarongo, whereby a baby girl aged 1 year and 5 months was raped, whereby she sustained serious injuries on her private parts.

[2] The accused is also charged with the offence of committing or attempt to commit a sexual act with a child under the age of 16, C/S 14(a) of Act 21/1980, as amended;

Alternatively:

Commit or attempt to commit an indecent or immoral act with a child under the age of 16, C/S. 14(b) of Act 21/1980, as amended.

Alternatively:

Indecent assault.

An offence whereby the accused indecently assaulted Alletta Muranda, aged 11, by touching the complainant/victim on her breast. This incident occurred on the same date at the same place as that of the incident in count 1.

[3] The accused pleaded not guilty to both counts without any plea explanation.

[4] The facts of the matter is Sylvia Auibes was at a memorial service at the Tsaraxa Aibes location in Otjiwarongo. On the morning of 30 August 2008, she went to her aunt's house to get dressed for the funeral. On her way out, she saw the kitchen door of her brother's house open. As her brother was not in town, a certain Helena Uwe Khaes was responsible for the house. This Sylvia Auibes went into the house and saw utensils scattered all over the floor and a baby was crying in the room. She saw the baby was covered in blood, and there were also faeces on the back of the baby as well as on the bed.

[5] Helena Uwe Khaes then testified as to how she was with a certain Maria and Fifi. Fifi, being the mother of the injured baby. The three of them were in town on a drinking spree. The baby was with them at that stage. They have then decided to take the baby to the house of which Helena Uwe Khaes is responsible for. They then left the baby in the care of Aletta Muranda.

[6] They then went back to town to drink.

[7] Alletta Muranda was called by the state who testified that the accused was in the room on the bed with the baby. She testified that she stood next to the accused and he touched her breasts. When the accused asked Alletta

Muranda to lie next to him, as he wanted to have sexual intercourse with her, she ran out of the room.

[8] The question before court is: who raped the baby girl?

[9] It is common cause that the victim in count 1 is a baby girl aged 1 year and 5 months. It is common cause that the victim was examined by a medical practitioner. It is common cause that the private parts of the victim was severely injured. It is common cause that these injuries were sustained by penetration or an insertion of an object.

[10] The state called several witnesses, but there were no direct evidence as to witnessing the actual commission of the offence.

[11] The state in this case, regarding count 1, relied on circumstantial evidence.

[12] At this stage, it is important to point out that when a party rely on circumstantial evidence, there are two rules which need to be considered:

- 1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
- 2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn, is correct.

[13] These rules were pointed out by Watermeyer JA in ***R v Blom 1939 AD 288*** as well as in ***S v Sesetse 1981 (3) SA 353 (A)***.

[14] In ***R v Mlambo 1957 (4) SA 727 (A)*** Malan JA stated at page 738 A that "the prosecution should produce evidence by means of which such a

high degree of probability is raised that the ordinary reasonable man, comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged.”

[15] The duty of the court is to evaluate the evidence placed before it; that is both the state’s case as well as the defence case.

[16] Coming to the evidence of the state; Helena Uwe Khaes testified that on that specific evening she met with a man at a certain place called Bussiness. He proposed to her, and she told him that she want to fetch a jersey at home, as it was cold. This man, identified as Mafia, was pointed out in court as the accused.

[17] They went together to the house to fetch the jersey as she also testified, the baby was still in a clean state. They then went back to the bar and started drinking. The accused then again proposed her. She then said to the accused, and I quote “if you want me, you should first go to New Start”. This witness then testified that the accused kicked her and she fell down. She ran home, and the accused followed her. She testified that when she got home, she went to sleep.

[18] She testified that early in the morning a certain Maria and her boyfriend came at the house, whereby she went to the room where Maria and her boyfriend was. She testified that she chased the accused away and he went to sit in the sitting room.

[19] It is clear that this witness Helena did not want to be with the accused.

[20] At a later stage this witness, Helena then left with Maria and her boyfriend.

[21] Helena also testified that when she went to the house to fetch a jersey, Alletta Muranda was the one who opened the door.

[22] Helena also testified that when they left, they met with a certain Bernard at 7h30 in the morning.

[23] This Maria, Maria Oebes, also testified, and stated that she was with her boyfriend in the room, whereby the accused came in the room and he was then chased out of the room. She identified him by the name "Mafia".

[24] Maria also testified that she, together with the boyfriend left the house at about 7h30 in the morning.

[25] Alletta Muranda testified that Helena came home to fetch a jersey. She was with a man. She could testify with certainty, as she was the one who opened the door. She also testified that early in the morning, Maria and her boyfriend showed up at the house.

[26] She further testified that after a while, a man also entered. This was the same man who was together with Helena the previous night.

[27] Alletta Muranda also testified that Maria, her boyfriend and Helena left the house together. She also testified that a certain Bernard was there the following morning.

[28] Bernard Au Aibeb also testified to the effect that on the morning of 30 August 2008, he met with Maria and another person, as he stated it, "a baster guy". Bernard stated that he knew the accused since their soccer days, as they were playing soccer together and they are staying in the same neighborhood.

[29] Bernard testified that the accused asked him where Maria and Helena is, as they left him alone with the baby, and they just disappeared.

[30] It is clear from the abovementioned witnesses, that accused was indeed at the house where the baby was. These witnesses corroborate one another to that effect. The accused was also identified properly. There can therefore not be said that it was a mistaken identity.

[31] When Alletta Muranda testified, she stated that accused called her. When she went into the room, she saw the accused lying on the bed with the baby. When he touched her on her breasts and making sexual gestures, she ran out of the room.

[32] This witness testified that the baby at that time was still wearing a vest and a nappy.

[33] The state also called Richard Uwu-Khaeb, who testified that he saw the man on the bed with the baby.

[34] Maquenza Avibes was also called by the state who testified that she saw "uncle Mafia" on the bed with the baby. Whilst there, this uncle Mafia called Maggy. Maggy being Alletta Muranda. Uncle Mafia was pointed out by the accused. This witness also testified that she saw Bernard that morning.

[35] Regarding count 2, the state called the complainant, Alletta Muranda, who testified as to how the accused called her into the room, lying on the bed next to the baby girl. This complainant stood next to the accused whereby he started touching her on her breasts. The accused then asked her to come lie next to him. According to her, she understood it that the accused wanted to have sexual intercourse with her. The complainant then ran out of the room.

[36] Richard Uwu-Khaeb also testified that he saw the man touching the breasts of Maggy; Maggy being Alletta Muranda.

[37] There is therefore corroboration in the events that took place in respect of Alletta Muranda.

[38] The state also called the girlfriend of the accused, Tusnelda Kavanga, who testified that on 29 August 2008, she was together with the accused. After having dinner, the accused left the house, as he said that he is going to give money to his child. The accused never returned home. When she woke up the next morning, she went to the neighbours' house. When she returned back home, the accused showed up.

[39] The accused also testified. He stated that at the night of 29 August 2008, he met with Helena at about 22h00 and proposed to her. They then reached an agreement and remained at the drinking place until 2h00 in the morning.

[40] They then left to the residence of Helena. When they entered the room, the accused then realized that there was a small baby. The accused and Helena together with the baby on the bed. The accused then left the house the following morning at about 6h30.

[41] The accused also testified that he met with Bernard the time that they went to the house of Helena.

[42] The accused also testified that on that Saturday morning he then left for the farm.

[43] The state also had the opportunity to cross-examine the accused. During cross-examination it became clear that the accused was not consistent in his evidence-in-chief viz a viz the evidence under cross-examination.

[44] There was also no corroboration in order to substantiate the version of the accused.

[45] On the other hand, the state witnesses not only corroborated one another, but they were also consistent in their evidence-in-chief viz a viz their evidence under cross-examination.

[46] It is indeed so that the forensic expert which the state called, did not assist the state in establishing whether DNA particles were found on the baby. As the witness testified that none could be found. It was however also testified by the expert as to the possibilities why particles could not be found.

[47] The absence of DNA particles does not make or break a case.

[48] What is of importance are witnesses as to what they saw.

[49] In this instance it is clear that the state called witnesses who saw a man in the room with the baby, being the last person seen with the baby. This man was positively identified to be that of the accused.

[50] The circumstantial evidence is corroborative with the evidence adduced by the state. It is therefore clear that the rules as set out to rely on circumstantial evidence, has been complied with.

[51] The court is therefore convinced that the state indeed proved its case beyond reasonable doubt in respect of count 1 and find accused guilty on count 1.

[52] Regarding count 2, as already stated previously, the complainant, Alletta Muranda testified as to how it came for the accused to touch her breasts. This was also corroborated by Richard Uwu Khaeb.

[53] The court is therefore convinced that the state indeed proved its case beyond reasonable doubt, and therefore find accused guilty of C/S 14(b) of Act 21/1980, as amended, by committing an indecent act with a child under the age of 16.

SIMPSON, AJ

ON BEHALF OF THE STATE

INSTRUCTED BY

General

Ms. Esterhuizen

Office of the Prosecutor-

ON BEHALF OF THE ACCUSED

INSTRUCTED BY

Mr. Kamanja

Legal Aid

