IN THE HIGH COURT OF NAMIBIA

CASE NO: CC 13/2010

In the matter between:

THE STATE

AND

LAIZER KUHLEWIND

***CORAM*: DAMASEB, JP**

Heard on: 1-3 August 2011; 14 September 2011

Delivered on: 11 October 2011

JUDGMENT

DAMASEB, JP.

The charge:

[1] The Accused faces one count of rape in contravention of s 2(1) (a), read with secs. 1, 2 (2), 2(3), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000. It is alleged that upon or about 18 June 2008 , and at or near Hakahana Location in Katutura in the district of Windhoek, the

Accused did wrongfully, unlawfully and intentionally commit or continue to commit a sexual act with the minor complainant (A.G) by inserting his finger into the vagina of the complainant under coercive circumstances in that the complainant was below the age of 14 years , to wit 7 years of age, and the Accused was more than 3 years older than the complainant, to wit 20 years of age.

Summary of substantial facts[1]

[2] The State's summary of substantial facts read as follows:

> 'The perpetrator was renting a room in the house of the mother of the complainant. On 18 June 2008 the perpetrator called the complainant to his room. The perpetrator offered to give the complainant a dollar if she had sex with him. The perpetrator who was watching a blue movie suggested that he and the complainant do what was on the blue movie. The complainant ran away but the perpetrator grabbed her and took her to his room. The perpetrator then chased the other children who were in his room out. After they left he closed the door. The perpetrator then pulled the complainant's dress up and pulled her panty down. The perpetrator pushed his finger into the vagina of the complainant. The complainant screamed and the perpetrator covered her mouth with his hand. The perpetrator pulled complainant close to him and held her tightly. One of the boys who had been in the room of the accused heard the complainant screaming and made a report to the complainant's grandmother. The complainant's grandmother then sent someone to the accused's room to get the complainant'.

[1] Section 144(3) (a) of the Criminal Procedure Act, 51 of 1977 (CPA).

The plea

[3] The Accused pled not guilty to the charge. In the State's pre-trial memorandum, the Accused was asked to disclose the basis of his defense. His answer to that question was: *'Accused did not realize what he was doing as he was under the influence of drugs.'*

[4] After the Accused pled not guilty his counsel stated the 'basis of the defense' as follows:

> '… basis of his defense is that at the time that the offence was committed, he did not realize what he was doing as he was under the influence of drugs'.

[5] The Accused made the following admissions in terms of s 220 of the CPA, thus making the proof by the State unnecessary:

1. The admissibility and evidential value of the J88 report by Dr Muzenda Vengesai on the complainant.
2. That the complainant was born on 28 August 2000. (He added however that he thought that the complainant was 11 years old.)
3. That the Accused was 20 years of age on 18 June 2008.

[6] At the Court's request for an explanation of the nature of the drugs he allegedly used, Mr. Isaacks for the Accused, confirmed, after taking instructions, that the drugs allegedly consumed by the Accused were dagga and crack cocaine; the latter known by its street name of 'rocks'. He used those drugs for the first time in his life starting the morning of the alleged offence and throughout the day. He

did not dispute that he was at the place named in the indictment as the scene of the crime.

[7] It is clear from all of the above that the Accused was ambivalent about whether or not the physical act of inserting the finger into the vagina of the complainant by him in fact took place. It appears to me that, as far as he is concerned, it really mattered not if such an act took place: he has no recollection of such a thing. The importance about this is that no positive evidence is proffered by him gainsaying the occurrence of such the alleged physical act of inserting a finger into the vagina of the minor complainant. Significantly, the Accused does not dispute that he had the opportunity to commit the crime.

What has the State proved as regards the act of insertion of the finger into the vagina?

[8] The first is the admitted contents of the J88. It records the following salient evidence: That the Dr examined the complainant and that her vestibule was ‘inflamed’. The complainant testified that the Accused confronted her inside the house, against her will placed her on his lap, and inserted his finger into her vagina causing her pain and bleeding. That the Accused indeed perpetrated that sexual assault on the complainant is corroborated by one Maradonna Again Davids, the Accused’s brother, who testified that he saw the Accused grab the complainant and insert his finger into her vagina. When Maradona asked him what he was doing the Accused said something to the effect that the former would be answerable to the police for what he (the Accused) was doing to the complainant. The complainant also made reports of the sexual assault to her aunt and the

grandmother after she left the room where she was kept by the Accused against her will. I am satisfied that the evidence establishes beyond reasonable doubt that the Accused perpetrated the physical act of inserting his finger into the vagina of the minor complainant.

[9] That being the case, the only issue that falls for determination in this case is whether the Accused acted with the requisite criminal intent when he inserted his finger into the vagina of the complainant.

The Law

[10] In our law, everyone is presumed to be of sound mind and to will and desire the natural consequences of their actions. But that rule is not absolute. For example, intoxication might, in an appropriate case negative affect required criminal intent.

[11] An accused who as a result of voluntary consumption of alcohol (or drugs) - *S v Chretien* [2]- is so drunk that he is not conscious of what he is doing is not liable, because a muscular movement done in that condition is not a criminal act - *Chretien*: 1104E and 1105F-G; 1106B-C. The ratio of *Chretien is that* where intention in respect of a crime for which intention is required[3] is lacking due to voluntary intoxication, the accused cannot be criminally liable (Chretien at 1103B-C).

[2]1981 (1) SA 1097.
[3] Rape is such an offence.

[12] The prosecution must prove that the accused was not intoxicated at the time of the commission of the offense if the latter claims that he was intoxicated: *R v Pethla* 1956 (4) SA 605(A). Although judicial frustration has been expressed[4] about the potential injustice of a person escaping his otherwise criminal conduct from self-induced intoxication, the ratio in *Chretien* remains the law in Namibia, being a decision of Appellate Division, the constitutional predecessor to the Supreme Court of Namibia.

[13] It was recognized in Chretien that the mere fact that an accused cannot later recall what he did does not render his conduct criminally non-responsible: *Chretien at* 1105 in fine 1106D; 1106G; 1108C-D. As O'Linn J (as he then was) put it *in S v Davids at* p 259,

> 'it should be noted that although it was stated in s v Chretien 1981 (1) SA 1097 at 1106B-H that it is a defence to a charge that a person was so drunk that he did not know what he was doing, a court will not easily accept that an accused was so drunk that he did not know what he was doing.' …

The Accused's mental state at the time of inserting his finger into the vagina of the minor complainant

[4]S v Davids 1991 NR 255, '… Where O' Linn J stated the following at *259F-H*:

> 'it appears to me to be a traversy of justice that a person can voluntarily indulge in intoxicating liquor and/ or drugs with a narcotic effect and then commit what would otherwise have been a serious crime or offence, even an offence in terms of which intoxication is an element, such as driving under the influence of liquor, and then go scot-free because he was so drunk that he lacked the required criminal capacity and/or the ability to perform a voluntary act…'

[14] At the s 119 plea, which was admitted in evidence, the Accused admitted guilt and in answer to a question by the presiding magistrate stated that he was so pleading because he *'forcefully inserted my finger into the child's vagina when we were watching an adult movie'*. When asked what his intention was for doing so he said: *'It was just devil created by the movie I have watched earlier. I did not intent to do anything to her.'* The Accused has before me denied the voluntariness of this admission in the court *a quo* and testified under oath that he made that statement because one Yolande Haack, an aunt of the minor complainant who had laid the charge with the police visited him while detained at the police cells in Wanaheda and told him to plead guilty so that the matter could be quickly finalized and that if he did so she would, as the person who laid the charge, facilitate his being granted bail. He persisted with that version and was hardly shaken in cross-examination as regards that allegation.

[15] At the end of the defence's case the State applied to re-open its case and in rebuttal called Yolande Haack who under oath denied inducing the admission by the Accused at the s119 plea. I found Yolande an unsatisfactory witness who even tried to mislead the Court. She rather implausibly suggested that she could not have induced an admission from the Accused with the promise of bail because she did not know what bail was. She at one time strenuously denied ever being present at the s119 hearing where the Accused made the admission - only to state later that in fact she was present. She on numerous occasions contradicted herself about meeting the Accused while detained at Wanaheda or having a discussion with him about bail but later suggested that it was he who pleaded with her to be let out on bail but that she said that she could not. I reject Yolanda Haack's version of events concerning whether or not she induced the Accused to make the s 119 admissions.

[16] I am satisfied that the Accused's version that he never intended to plead guilty to the alleged rape at his s 119 plea in the court *a quo* is reasonably possibly true and I will consequently place no weight on it as proof of his guilty state of mind at the time he inserted his finger into the vagina of the minor complainant.

The evidence

[17] Except for Maradona, to whose evidence I will revert presently, all prosecution witnesses testified that the Accused was not abnormally intoxicated. None could however deny his assertion that he had consumed cannabis and cocaine on the day the alleged offence took place. In fact, Mr Moyo for the State conceded that the State could offer no evidence that the Accused had not used the drugs he said he did on the 18th of June 2008 when the crime was committed.

[18] State witness Maradonna, brother of the accused, and at some stage referred to by counsel for the State as an accomplice - presumably because the minor complainant had testified that he had chased another boy named Axalosi out of the house before the alleged rape took place – testified about the Accused's state of mind which could shed some light on the matter. Maradonna testified that the Accused acted unusually aggressively towards him, was red- eyed and, when asked by Maradonna why he was inserting his finger into the vagina of the minor complainant, stated that the witness would be the one to be answerable to the police for what he (the Accused) was doing to the minor complainant.

[19] Mr Isaacks for the Accused maintains that this statement was so unreasonable and nonsensical that it was explicable only on the basis that the Accused was so intoxicated from drug use that he did not appreciate the unlawfulness of what he did to the minor complainant.

[20] I will now proceed to consider the totality of the evidence as relates to the use and alleged effect of drugs (cannabis and cocaine) on the Accused on 18 June 2008.

[21] The Accused testified that he had never in his life before the 18th, used either cannabis or cocaine. It was for the first time that he did so on the 18th when a friend of his, Chris, came to invite him to go and clean someone's yard. It was on the way to performing that chore that, at Chris's invitation, he smoked one wrapping of cannabis which was mixed with cigarette.

[22] The following exchange took place between the Accused and his counsel:

> Counsel: Alright. Now what does cannabis do to you? When you smoke it how do you feel?
>
> Accused: When I smoke it, My Lord, I am no longer normal. Like I am not as I am usually.
>
> Counsel: But what does it do to you? How do you feel?
>
> Accused: You feel high, very high, My Lord.
>
> Counsel: When you say high what does it mean? Is it possible to describe what you feel after you smoke the cannabis?
>
> Accused: No, I cannot explain it or describe it in detail, my Lord.

Counsel: Now Maradonna says that cannabis calms you down. Would that have the same effect on you?

Accused: No, it does not have the same effect on me , My Lord.

Counsel: Now what kind of effect does it have on you?

Accused: My lord, what I have noticed was that after I have used it I am wild and lively.

(p 64 – 65 of the record.)

[23] I pause here to remind myself that it is the case of the Accused that he had never before the 18th June used either cannabis or cocaine, yet this evidence, although the contrary is stated, is couched in terms that suggest that he had previous experience with these substances. How he could, after just one off experience, so clearly remember what effect these substances had on him is, not to put too fine a phrase on it, not clear from the evidence. I had asked counsel during argument to refer me to any aspect of the evidence showing any explanation why this man, who had on his version no previous experience with a dependence-producing substance, chose on this particular day to use these drugs. Counsel conceded that no such evidence appears on the record. I make this point to show that there is very strong circumstantial evidence that the Accused is lying when he states to Court that he had never before used these drugs and that the day the alleged offence was committed was the first time he did so and that he has never since that day used these drugs again. I make specific reference to this circumstance to highlight that the Court has to be very careful in considering the Accused’s assertion that he was too intoxicated to know what he was doing and that, considering that the matters bearing on his intoxication are peculiarly within his knowledge and are not capable of easy

contradiction by the State, affords him the opportunity to present events in a manner most favorable to his case.

[24] In chief, the Accused's case can be summed up as follows: In the morning of 18th June 2008 a friend called Chris came to fetch him so they could go and clean someone's yard. On the way they smoked cannabis. At the place where they cleaned the yard they partook of rocks- the street name of a cocktail of cocaine. He testified that, altogether, he and Chris smoked 5 rocks at the place they cleaned the yard. He distinctly remembers getting to the place they cleaned the yard after smoking the cannabis. He also remembers that there they used 5 rocks. He described the effect the 5 rocks had on him as follows:

> 'My Lord, with me, the more I smoke the more I want to smoke it…the more I want to have more.

After that they were paid N$70 for the effort and then they 'returned home or walked to our house'.

Having left the place where they cleaned the yard, the Accused and Chris parted ways resolving to look for more money to buy more rocks. He went home but later went to Chris's house.

[25] When asked what he did at his house when he parted with Chris the Accused testified that he could not *'precisely say what I , at that moment did at the house…'* He testified that he could also not remember what time it was when he got home after cleaning the yard but was emphatic that he did not find anyone at home. When he rejoined Chris at the latter's home, the two of them then moved on to the house of another friend called Eric. The three of them put money together and bought more rocks and used it. He said they used 'many' rocks but he could not remember just how many.

[26] After that, and in his own words,

> ‘ There after my Lord , I cannot recall very much, whether I returned home alone or whatever the case may be. My Lord, I cannot remember much thereafter.’

Asked by his counsel why he could not remember, the Accused stated *:‘I was very high …due to the drugs we used’*. He has no recollection of coming home, having any conversation with Maradonna, meeting with the complainant and violating her; or any other detail for that matter. It was only the following morning that he was told by Maradonna what he had done to the minor complainant.

[27] The following version emerged in cross-examination and I refer only to such of it as is at variance with the version given in-chief. He and Chris had left the place where they cleaned the yard between 11 and 12. He was able to go home after smoking the 5 rocks at the place they cleaned the yard because they did ‘not use all five (rocks) at the same time’. They smoked them ‘one after each other, of time in between’. He suggested they smoked them after intervals of 30 minutes. He then testified under further cross examination that by midday he was ‘already too high into the drugs’ and could not recollect how many drugs he took.

[28] When reminded that he had previously stated that he recollected going home by midday and that that did not reconcile with the version that by midday he was very high on drugs and could not recollect, he testified:

> ‘I cannot recall My Lord, it was the evening that I was at my house.’
>
> He further testified that he and Chris arrived at Eric’s place about 12h30.

When asked where he went from Eric’s place he testified:

> ‘I cannot say with certainty My Lord, where I went exactly , whether I went directly home or whether I went somewhere else ..’

He also does not remember just how many rocks he had at Eric’s place but suggested it was between 8 to 10.

[29] When referred back to the subject of the first rock he took on the 18th, the Accused stated that its effect was to make him ‘*more alive and lively’*. He does not remember what effect the second had on him. In fact he stated:

> ‘I cannot say the effect the second one had on me, because I was already high on rocks.’

He also could not say what effect the third had on him. He remembers taking the fourth and the fifth and, in his own words:

> ‘After the 5th one My Lord, I no longer remember what happened, or what was happening around me...’

[30]He was then asked: ‘Yes, how do you know you could not remember after the 5th one? He answered: ‘Because up till today, up to today, I am still questioning myself what exactly happened on that day My Lord’. The following exchange took place between Mr. Moyo, for the state and the accused:

> ‘Mr.Moyo: …after taking the 5th do you remember taking the 5th smoke, do you remember that?
>
> Accused: yes, my Lord.

Mr.Moyo: but you do not remember the effects of the 3rd and the 4th and the 5th on you?

Accused: my lord, by the time that I took the 2nd and the 3rd rock, I was already into the rocks, because I had already used blocked by then.

Mr.Moyo: by then meaning that day?

Accused: yes my Lord.

Mr.Moyo: Now, but after the 5th which by now we know it was by mid-day you had taken the 5th one right?

Accused: My Lord I am not certain whether it was by mid-day that we had taken the 5th one or whether it was earlier than that my Lord.

Mr.Moyo: earlier than the mid-day?

Accused: I am not certain my Lord.

Mr.Moyo: okay, but after taking the 5th one, you were able to go home, to your house?

Accused: yes my Lord.

Mr.Moyo: and from your house, you went to Chris’s house do you remember that?

Accused: yes my Lord

Mr.Moyo: and from Chris’s house, you went to Erick’s house?

Accused: yes, my Lord.

Mr.Moyo: At Erick’s house, you smoked some more cocaine?

Accused: yes my Lord.

Mr.Moyo: you remember smoking some cocaine at Erick’s house?

Accused: Yes, my Lord.

Mr. Moyo: and at Erick’s house you said you took about ten to, about 8

Accused: I cannot remember how many we took at Erick’s house but we did take many at Erick’s house, my Lord’

[31]The following curious exchange then took place. Curious because on the accused’s own version he does not remember what happened after he partook of rocks at the residence of Eric:

Mr.Moyo: okay, from Ericks place, where did you go?

Accused: I cannot remember whether I went straight home or where I went to my Lord.

Mr. Moyo:yes, when did you arrive home?

Accused: when?

When did you arrive home?

Accused: I cannot remember when I arrived home.

Mr. Moyo: you cannot remember, yes on the 18th did you sleep at home?

Accused: yes, that is precisely right, that specific evening, I slept at home.

Mr. Moyo: yes, what time did you go to sleep?

Accused: I cannot say the time, but it was at night that I went to sleep my Lord.

[32] As must be apparent, the Accused is here able to remember events beyond a point that he initially testified that he was so intoxicated that he did not remember what had happened. From his evidence there is a clear and irreconcilable contradiction. In his evidence in –chief he remembers nothing that happened only after he partook of rocks at the residence of Eric; yet when matters were put in a different order during cross- examination, he was unable

to recollect events as early as the occasion where they cleaned the yard, only to again remember events after he partook of rocks at the residence of Eric. This is inconsistent with innocence.

[33] Counsel for the State succeeded in skillfully diverting the Accused from his rehearsed sequence of events by moving him from one subject to another and then back by so doing exposed the accused's version for what it really was: an afterthought designed to escape criminal liability for his actions towards the minor complainant. That the Accused's defense is an afterthought is corroborated by the fact that he had failed to put through his counsel to Maradonna that it was Maradonna who had for the first time in the morning of 19 June informed him of the events of the previous night and that before that he had no recollection whatsoever of those events.

[34] I am satisfied that it was proved beyond reasonable doubt that the Accused was not so intoxicated by reason of consumption of cannabis or cocaine that he did not know what he was doing when he inserted his finger into the vagina of the minor complainant on 18 June 2008. I accordingly convict him as charged.

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DAMASEB, JP

On behalf of the state:

Adv. Moyo

Instructed by: **Office of the Prosecutor –General**

On behalf of the accused:

Mr. Issacks

Instructed by: **Issacks And Benz Inc.**