NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC 03/2013

THE STATE

And

NELSON NGHIDINI **ACCUSED**

Neutral citation: *S* v *Nghidini (CC 03-2013)* [2015] *NAHCNLD* 40 (6 August 2015)

Coram: TOMMASI J
Heard: 16, 17, 18, 19 February, 16 June, 8 July 2015
Delivered: 6 August 2015

Flynote: Criminal Law: Housebreaking with intent to rape and rape – Rape in terms of common law – Defence of sexual intercourse with consent of the complainant – Consensual sexual intercourse with a girl under 16 not common law rape but contravention of s 14 of the Combating Of Immoral Practices Act 21 of 1980 is an offence – Such is a competent verdict on a count of common law rape - section 16 of same act creates a rebuttable presumption of unlawfulness– Absence of evidence to dissuade court from drawing an adverse inference that he knew his

actions were unlawful State proved contraventions of s14 of the Combatting of Immoral Practices Act – competent verdict.

Summary: The complainant, a 12 year old girl, had sexual intercourse with her uncle, the accused who was 18 years old at the time. The State opted the charge the accused of housebreaking with the intent to rape and rape in terms of the common law and not read with the Combatting of the Rape Act. According to the complainant the accused came to her hut on 3 occasions demanding entrance. She refuse to allow him to enter and he pushed the door open and entered her hut. He then had sexual intercourse with her against her will. The accused admitted having sexual intercourse with the complainant. According to him the complainant asked him for N$6 dollars and he gave it to her on condition she agrees to have sexual intercourse with him. Held that the single evidence of the complainant was unsatisfactory and found to be not credible. The Sate failed to prove beyond reasonable doubt that the accused was guilty of housebreaking with intent to rape and rape. The court however held that the State proved beyond reasonable doubt that the accused contravened s 14 of the Combatting of Immoral Practices Act which is a competent verdict on a charge of rape.

ORDER

Count 1: The accused is found not guilty of housebreaking with the intent to rape and rape but is convicted of having contravened s14 of the Immoral Practices Act, 21 of 1980, as amended, which is a competent verdict on a count of rape.

Count 2: The accused is found not guilty of housebreaking with the intent to rape and rape but is convicted of having contravened s14 of the Immoral Practices Act, 21 of 1980, as amended, which is a competent verdict on a count of rape.

Count 3: The accused is found not guilty of housebreaking with the intent to rape and rape but is convicted of having contravened s14 of

the Immoral Practices Act, 21 of 1980, as amended, which is a competent verdict on a count of rape

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JUDGMENT

TOMMASI J: [1] The accused faced three counts of housebreaking with the intent to rape and rape read with the combating of Domestic violence Act, 2003, Act 4 of 2003. The State alleged that the accused, on three different occasions. Unlawfully and intentionally broke into and entered the house and or/room of LX with the intent to rape and did then unlawfully and intentionally have sexual intercourse with LX, a female person, without her consent. The State confirmed to charge the accused with common law rape and not rape in contravention of the Combating or Rape Act, 2000 (Act 8 of 2000)

[2] The accused did not dispute that he had sexual intercourse with the complainant. He however denied that it was without consent.

[3] The complainant testified that during 2011, she was approached by the accused at night time at her house. (a hut with a door made out of palm branches) while she was sleeping with her 7 year old brother. He wanted her to open the door so that he could have sex with her. She refused and he pushed the door open. He undressed her and had sexual intercourse with her. After he was done and before he left he threatened to beat her if she would tell anyone about it. During cross-examination the complainant testified that on that day she asked the accused for N$1 and he gave her N$6.

[4] She told her mother the next morning that the accused wanted to enter the hut. She did however not tell her that he indeed entered and neither did she report the fact that the accused had sexual intercourse with her against her will. Her mother confronted the accused and demanded that he refrain from coming to her homestead.

[5] The accused thereafter stayed away for some months. During January 2012 he came to her hut on two separate occasions, opening the door of the hut, undressing the complainant and proceeded to have sexual intercourse with her against her will. She did not report these incidents to her mother. During April or May her mother suspected that she might be pregnant and took her to the clinic where her fears were confirmed. The complainant told the nurses in her mother's presence that the accused had sexual intercourse with her.

[6] The complainant's mother, in accordance with their tradition, requested the headman to take the complainant to the house of the accused and to confront him with the fact that he had impregnated the complainant. The accused admitted it.

[7] The complainant returned to school and was allowed to continue with her classes. The matter was reported to the police during July 2012 after the school Inspector insisted on an investigation. The complainant gave birth to a baby girl on 13 September 2012.

[8] The accused admitted that he had sexual intercourse with the complainant during 2011 and in January 2012. His version was that during 2011 on a Monday the complainant asked him for N$6 dollars. He agreed to give her N$6 on condition that they have sexual intercourse. The complainant agreed to these terms. When he came to her hut that evening, she opened the door for him; she undressed herself; and they had consensual sex. As he was leaving the complainant invited him to come back to have sexual intercourse with her. He returned on Wednesday and the complainant once again opened the door for him and led him into her hut where they had consensual sexual intercourse. On Friday they met at a communal water tap and she again invited him to come to her house to have sexual intercourse. Complainant's mother discovered the money he gave the complainant which led the complainant to inform her mother that he came to their homestead. The complainant's mother told him to stop visiting her homestead and he did so. After two days or a week in 2012, the complainant came to his homestead two days in succession and they once again had sexual intercourse in his room.

[9] The undisputed evidence proves that the accused had sexual intercourse with the complainant on three occasions in her hut. The issues in dispute are whether the

complainant consented to sexual intercourse and whether the accused broke into the hut of the complainant.

[10] Mr Matota, counsel for the State, urged the court to accept the version of the complainant and to reject the accused version that the complainant consented as false. He submitted that the accused was a bad witness in that he contradicted himself and failed to put crucial parts of his version to the complainant. He further submitted that the complainant's evidence was clear and satisfactory in every material respect. Mr Nyambe, counsel for the accused, pointed out certain unsatisfactory aspects of the complainant's evidence.

[11] When evaluating the evidence the court is reminded to apply caution to the evidence of the complainant as she is a single witness in respect of the rape. It is trite that the uncorroborated evidence of a single witness is sufficient for a conviction.[1] In *S v Noble* 2002 NR 67 (HC), Maritz J, as he then was, at p 70 F – 71-B stated the following:

"Judicial experience of the inherent danger to convict on the evidence of a single uncorroborated witness 'evoked a judicial practice that such evidence be treated with utmost care' (Du Toit et al Commentary on the Criminal Procedure Act at 24-1). The most basic requirement demanded by our courts for the acceptability of such evidence is that it must be credible. That requirement was also expressly demanded by s 231 of the Criminal Procedure Ordinance, 1963 and its predecessor, s 243 of the Criminal Procedure and Evidence Proclamation, H 1935. The statutory omission of that requirement in s 208 of the Criminal Procedure Act 1977, is, as Diemont JA pointed out in *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

[1] Section 208 of the CPA, 51 of 1977

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.' ”

[12] I have to agree with counsel for the State that the accused was a poor witness. The complainant however corroborated to some degree the fact that she asked him for money and that he gave her N$6. The unsatisfactory aspect of the complainant’s evidence in this regard is that she failed mention this during her examination in chief. It is of significance that the money was exchanged the same day as her first sexual encounter. This unsatisfactory aspect of the complainant’s evidence must be considered together with her testimony that, although she knew that the accused wanted to enter the room with the intent to have sexual intercourse, the thought of waking her brother next to her or raising alarm did not cross her mind. The complainant withheld information of the sexual intercourse with from her mother because the accused threatened her. However she continued to withhold this information after her mother created a secure environment and the accused failed to execute his threat. The complainant furthermore testified that she for no reason at all withheld the fact that the accused had sexual intercourse with her on two occasions during January 2012.

[13] The evidence of the accused that he gave the complainant money on condition that she gives him sex, in view of the corroboration and by the complainant, rings true. I however do not believe his testimony that the complainant was the great temptress who had invited him to return to her hut for sexual intercourse.

[14] In *S v Glaco* 1993 NR 141 (HC) Levy J, as he then was, p 147C - E stated the following:

“However, even if the accused is telling the Court a lie, in this respect this lie does not prove the State's case. The State must prove the guilt of the accused beyond reasonable doubt, and there is no onus on an accused to prove his or her innocence. The fact that the Court may disbelieve the version given by an accused, is immaterial. The accused does not have to convince the Court of the truth of any explanation which he or she gives. If the accused gives an explanation, even if that explanation is improbable, the Court is not entitled to convict, unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of the explanation

being true, then the accused is entitled to an acquittal. (See *R v Difford* 1937 AD 370 at 373.)

[15] Given the entirety of the evidence adduced herein I cannot safely conclude that the complainant told the truth or stated differently, I cannot reject the version of the accused as false beyond reasonable doubt. I must therefore concluded that the accused version, that the complainant consented to have sexual intercourse, is reasonably possibly true.

[16] In terms of the common law, consensual sexual intercourse with a girl between the ages of 12 and 16 years does not constitute rape but a contravention of section 14 (i) of the Combating of Immoral Practices Act 21 of 1980 which reads as follow:

> "Any person who-
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> (a) commits or attempts to commit a sexual act with a child under the age of sixteen years; or
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> (b) commits or attempts to commit an indecent or immoral act with such a child; or
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> (c) solicits or entices such a child to the commission of a sexual act or an indecent or immoral act,
>
> and who-
>
> (i) is more than three years older than such a child; and
>
> (ii) is not married to such a child (whether under the general law or customary law),
>
> shall be guilty of an offence and liable on conviction to a fine not exceeding N$40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.'

[17] The accused in view of the above cannot therefore be convicted of common law rape. It stands to reason that the court, given its evaluation of the evidence herein, cannot reject the version of the accused that the complainant opened the door for him and had consensual sexual intercourse with him, as false. The State thus did not prove beyond reasonable doubt that the accused is guilty of the three counts of housebreaking with the intent to rape and rape.

[18] This however is not the end of it. Section 261 (1)(*e*) of the CPA provides that:

(1) If the evidence on a charge of rape or attempted rape does not prove the offence of rape or, as the case may be, attempted rape, but-

"(e) the statutory offence of-

(i) unlawful carnal intercourse with a girl under a specified age;

(ii) committing an immoral or indecent act with such a girl; or

(iii) soliciting or enticing such a girl to the commission of an immoral or indecent act;

the accused may be found guilty of the offence so proved."

[19] Counsel for the accused submitted that the accused did not know that it was an offence. I am not persuaded that the accused did not know the age of the complainant. In his warning statement he indicated that he "knew the complainant was of young age, of thirteen years." Section 12 of the Combating of Immoral Practices Act provides as follow:

"(1) When in any prosecution in terms of this Act the question arises whether any carnal intercourse between a male and a female was unlawful, such intercourse shall be presumed, until the contrary is proved, to have been unlawful carnal intercourse."

[20] In *S v Narib* 1994 NR 176 (HC) the accused raised the defence that he was deceived by the complainant regarding her age. The court held that the accused bore the onus of establishing on a balance of probabilities that the girl deceived him regarding her age. In this case the accused submitted no evidence to dissuade the court from drawing the adverse inference that he knew that his actions was unlawful.

[21] I find that the State proved beyond reasonable doubt the elements of the statutory offence i.e that the accused had contravened s14 of the Combating of Immoral Practices Act, as amended in that he committed a sexual act with a child under the age of 16 on three separate occasions, that he was more than three years older than the complainant and not married to her.

[22] In the result the following order is made:

Count 1: The accused is found not guilty of housebreaking with the intent to rape and rape but is convicted of having contravened s14 (i)

(a) of the Immoral Practices Act, 21 of 1980, as amended, which is a competent verdict on a count of common law rape.

Count 2: The accused is found not guilty of housebreaking with the intent to rape and rape but is convicted of having contravened s14 (i) (a) of the Immoral Practices Act, 21 of 1980, as amended, which is a competent verdict on a count of common law rape.

Count 3: The accused is found not guilty of housebreaking with the intent to rape and rape but is convicted of having contravened s14 (i) (a) of the Immoral Practices Act, 21 of 1980, as amended, which is a competent verdict on a count of common law rape.

MA TOMMASI J

Judge

APPEARANCES

For The State:	Adv L Matota Office of the Prosecutor-General
For the accused:	Mr M Nyambe Instructed by Legal Aid Shikongo Law Chambers