



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 3/2018

In the matter between:

THE STATE

v

BRENDAN VAN WYK

ACCUSED

Neutral citation: *S v van Wyk* (CC 3/2018) [2019] NAHCMD 43 (6 March 2019)

Coram: USIKU J

Heard: 5 – 8 November 2018, 3 – 6 December 2018 & 18 January 2019

Delivered: 6 March 2019

Flynote: Criminal Law- Contravening section 2(1) (a) read with sections 1, 2 (2), 3, 5, 6 and 7 of the Combating of Rape Act, 8 of 2000 – Accused admitting to having sexual intercourse with the complainants – All what the Court has to determine is whether the sexual acts were committed under coercive circumstances or not – State having proved beyond reasonable doubt that accused had used threats of violence to both complainants and therefore the sexual acts could not have been

consensual under the circumstances – Accused accordingly convicted on all counts of rape.

Summary: Accused stood charged with five counts, in particular, four rape charges and one count of attempting to obstruct or defeat the course of justice. The State conceded that no arrest had been carried out and therefore the charge of attempting to obstruct or defeat the course of justice could not stand. Accused acquitted on that charge.

In respect of count one, the complainant was out with her friends socialising at Strong Bar in Mondesa, Swakopmund. She asked one of her friend to arrange for transportation to get them to their respective homes. Whilst inside the vehicle, the complainant met the driver, the accused and another young lady. The complainant was eventually dropped off near her home. After some few minutes, she heard a knock on her door. When she opened she saw the accused. He informed her that she had forgotten her cell phone in the vehicle. She then thanked him and told him to leave. However, the accused instead pushed her backwards. Whereafter, he took out a knife and threatened to harm her. Accused pushed her down and inserted his penis into her vagina without her consent. The complainant reported a case of rape the next day to the police.

In relation to count three, the complainant, was 14 years old at the time of the incident. Whilst on her way to school on foot during the early morning hours of Friday, 1 April 2016, the accused approached her. He grabbed her by the arm and threatened to kill her whilst holding a knife to her back. He ordered her not to scream. He then took her to Tamariskia Cemetery in Swakopmund, where he raped her by inserting his penis into her vagina without her consent.

In respect of count four and five. The complainant was 3 – 4 months pregnant at the time, she had woken up in the early morning hours of 5 April 2016 to go to Natis for a Driver's Learner's Test. Whilst walking in the street looking for a taxi, the accused approached her. They began to have a conversation which resulted in them walking together. The accused informed the complainant that he was on his way to the Nurses's Home, which was in the same direction as Natis. Accused convinced the

complainant to take a short cut with him through the Mondessa soccer field. As they walked, he then jumped onto the complainant and told her that he would have sexual intercourse with her that day. A fight broke out between the two. Accused threatened to harm her baby with a knife should she fight him off. The complainant however did not see a knife. Accused forced the complainant to have oral sex with her by inserting his penis into her mouth. Thereafter he proceeded to rape her by inserting his penis into her vagina without her consent.

ORDER

Accused found guilty in respect of counts, three, four and five. He is however, found not guilty on counts one and two and acquitted on those counts.

Count One : Rape – Not Guilty

Count Two : Attempting to obstruct or defeat the course of justice – Not Guilty

Count Three : Rape - Guilty

Count Four : Rape - Guilty

Count Five : Rape - Guilty

JUDGMENT

USIKU, J

[1] The accused stood charged with contravening section 2(1) (a) read with sections 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act, 8 of 2000 on count one.

[2] On count two, accused was charged with attempting to obstruct or defeat the course of justice, alternatively, contravening section 35(2)(a) of the Police Act 19 of 1990, which is resisting or wilfully hindering or obstructing a member in execution of his or her duty of functions. During trial, the State conceded that no arrest was actually carried out and therefore the charge could not stand. The accused was subsequently acquitted on that charge.

[3] With regard on count three, accused stood charged with contravening section 2(1) (a) read with sections 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act, 8 of 2000, alternatively, contravening section 14(a) of the Combating of Immoral Practices Act 21 of 1980 as amended, which is committing or attempting to commit a sexual act with a child below the age of 16 years.

[4] In respect of counts four and five, accused stood charged with rape, which is contravening section 2(1) (a) read with sections 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act, 8 of 2000.

[5] When charges were put to him, accused tendered plea of not guilty on all charges and through his attorney, Mr Dube, offered no plea explanation. The State is represented by Mr Khumalo.

[6] The Summary of Substantial facts, the State's Pre-trial memorandum and the Reply thereto were all admitted into evidence as Exhibits "A", "B" and "C" respectively. In relation to counts four and five, a blue t-shirt in colour containing blood stains and belonging to the complainant, Ndati Helvi Jones was handed up as Exhibit 1.

[7] I intend to firstly deal with count one, whereafter I shall deal with count three and lastly with counts four and five jointly.

Count One

[8] In respect of count one, accused is charged with rape in that upon or about 5 May 2015 in the district of Swakopmund, accused wrongfully and intentionally

committed a sexual act with Albertina Arthur, the complainant, by inserting his penis into her vagina under coercive circumstances.

[9] The complainant testified that at the time of the incident, she resided in Mushitila Street, Mondesa, Swakopmund. On 5 May 2015, she had knocked off from work and decided to go to 064 Bar where she sat and waited for her friend Shannon Tjitandi. Shannon eventually arrived with her boyfriend at around 18h00. They drank Hunter's Gold until around 24h00 that evening. Shannon later on suggested that they should go home and offered to make a plan for transport in order to get them home. She found a double cab bakkie. They all went to the car where they found a gentleman (driver), one lady, and the accused who was seated at the back. They got into the car and drove off.

[10] Upon arrival at Shell Service Station everyone got out of the car apart from the complainant. The rest returned to the car and they all proceeded. Later on the car made its second stop where Shannon and her boyfriend disembarked. The complainant was advised to disembark but she refused saying that she would get off later closer to her place. The complainant and the rest of the people then drove off to Strong Bar where they all disembarked. The complainant and the young lady went to the toilet while the driver and the accused went into to the bar to buy some drinks. Again they drove off thereafter. The complainant then asked the driver where they were heading to. He informed her that they would go to the beach for a short while. Upon arrival at the beach the complainant remained in the car while the rest of the people made their way to the ocean. After some time, they returned to the car whereby the complainant asked the driver to drop her at her home. They again drove up to Shell Service Station. The complainant disembarked and proceeded to walk home.

[11] Upon arrival at her flat she closed the door behind her. A few minutes later she heard someone knocking at her door. It was the accused holding a cell phone in his hand. She then realised that she also did not have her phone on her. The complainant asked the accused whether she had left her phone or whether he had taken it. Accused responded that he would not take such a cheap phone. She then asked him to leave but accused pushed her whereafter she fell onto the bed.

Accused threatened to stab her should she scream. He pulled up her skirt, pushed down her panties as he opened his trousers' zip. He proceeded to have sexual intercourse with her, whereafter he stood up and left the room. She did not consent to the sexual intercourse.

[12] The next morning, the complainant got up and left to work. After work she met Shannon and told her what had transpired. The case was reported to the police and she was taken to hospital on the same day for a doctor's examination. The following day, police arrived at the complainant's room to take photographs. The complainant testified that there were stains of sperms on the duvet cover as a result of the rape incident. Accused did not make use a condom. The duvet cover was not taken in as an exhibit even though there were blood stains on it, police only took pictures. She washed it later on. A few weeks later, she attended an identification parade. The complainant identified the accused as her assailant. At the time of the identification parade she and Shannon were kept in different rooms.

[13] Shannon Tjitandi, a childhood friend of the complainant, also testified. Her evidence corroborate the complainant's evidence in as far as it relate to the time when she and her boyfriend disembarked from the car and the next day when the complainant informed her about the rape incident. She further testified that upon arrival at the complainant's room, it was in a mess.

[14] In his defence, accused denied having raped the complainant. According to him, the complainant agreed to have sexual intercourse with him for a fee. It was only after she realised that he did not have enough money on him, that she decided to fabricate a story of having been raped. Accused confirmed to have been at Strong Bar that night, drinking alcohol and watching soccer. He had been in the company of one Alex. They had a blue Nissan bakkie. Him, Mr Alex and a certain lady then drove off to 064 Bar where they met Shannon Tjitandi with her boyfriend and the complainant. Shannon approached them asking for transport to go home. She introduced the complainant to him whereafter, he complimented the complainant that she was beautiful and began to propose her. They all drove off to Shell Service Station where he asked her what she wanted to eat and bought her a meatball and a fruitree drink. Shannon and her boyfriend later on disembarked from the car. She

asked the complainant to disembark but the accused responded by assuring Shannon that she will spend the night with him as they were a couple then. They then drove off to Strong Bar where the complainant and the young lady went to use the bathrooms. In the meantime accused went inside the bar to buy some more drinks. They all drove to the sea.

[15] At the sea, the driver and the young lady made their way towards the ocean while accused and complainant remained behind in the vehicle. They started to kiss. According to the accused he asked the complainant to have sex but she insisted that they should find a place to have sex in exchange for payment. After the driver and the young lady returned they all drove to drop off the complainant at her place. Accused and the complainant disembarked from the vehicle together. She opened the room and they both entered. The complainant told him to get comfortable pointing in the direction of her bed. She then switched off the lights, got on the bed. They started kissing each other and eventually had sexual intercourse. They had consensual sex. After their sexual encounter he then stood up and told the complainant that he was going home. The complainant asked him if he was just going to leave her like that after having sex with her. He understood that as a request for payment. He responded that he had spent all the money on her and did not have much money left. He then opened his wallet and found only N\$ 70.00 which he took out and placed it on her dressing table whereafter he left the room.

[16] Before I deal with the evidence of the individual complainants and other witnesses as far as it is necessary, the following became evident during the course of the trial.

[17] All the complainants testified that they were raped on diverse dates by the accused person whom they each identified at an identification parade held by the police after the accused was arrested on an unrelated case.

[18] In fact there is undisputed evidence by the accused himself that indeed he had sexual intercourse with each of the complainants on different dates. His version being that he proposed each one of the complainants and that each consented to having sexual intercourse with him at the time.

[19] Having regard to the accused's version what the Court has now to determine is whether the sexual acts were indeed consensual as claimed by the accused or not. As pointed out earlier I intend to deal with the evidence in each particular case separately.

[20] The offences that the accused person was arraigned for and to which he had pleaded not guilty have extensively been set out as per the summary of substantial facts forming part of the indictment.

[21] The complainant in respect of the first count Albertina Arthur, is indeed a single witness as far as the sexual intercourse between her and the accused is consent. It is trite that evidence of a single witness need not be satisfactory in every respect as it may be relied upon even where it has some imperfections, provided that the Court can find at the end of the day that, even though there are some shortcomings in the evidence of the single witness, the Court is satisfied that the truth has been told.

[22] The complainant's testimony is that the accused followed her to the room under the pretext that he was delivering the latter's phone which she had left in the vehicle they had been traveling in that evening. The Court have also been informed that the complainant opted to drive with the accused person after her female friend and her boyfriend had disembarked from the vehicle. The complainant remained in the vehicle with the driver, the young lady and the accused.

[23] The accused and the complainant then left together to another bar where the former bought more alcohol before they drove to the ocean by passing the complainant's residence. This is a person who had indicated earlier on that she wanted to get home.

[24] According to the accused's version, he had been proposing the complainant throughout the night and they had been kissing each other already at the time they visited at the ocean. Could the complainant under those circumstances not have

suspected something fishy when he followed him to the room? Why would she open her door for him?

[25] Shanon's testimony about the complainant having reported to her that the accused had raped her the previous evening does not in my view corroborate her evidence of having been raped by the accused. Accused's version is that he had sexual intercourse with the complainant at her room that evening and that there was an agreement to pay her, but he did not have sufficient money on him.

[26] It is the duty of the state to prove its case beyond reasonable doubt. The accused throughout a criminal trial bears no *onus* at all. In the case of *S v Shaanika*,¹ it was held:

'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 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.'

[27] This Court is not satisfied that the truth has been told in respect of the first count. Accused's version of having had a consensual sexual intercourse with the complainant in exchange of payment could be reasonably true. As a result the accused must be given a benefit of doubt. He is acquitted on the first count.

[28] Moving on to the 3rd count in respect of the complainant whose name could not be revealed because of her age. She testified that she was raped in the cemetery after the accused had forced her to climb over the wall. The report of sexual intercourse was immediately made to her mother, at their home.

[29] The medical evidence confirmed that the complainant had a tear on her vagina and was bleeding. That evidence corroborate the complainant's version of having been raped recently. The doctor who examined the victim found sand around her private part and she had a small laceration at her perineum. he victim reported

¹ *S v Shaanika* NR 247 at 252 G.

that she was raped on the ground in the cemetery which is consistent with the doctor's findings.

[30] Having regard to the testimony of the complainant as well as the accused's claim of having had a consensual sexual intercourse, cannot be reasonably possibly true, and therefore it stands to be rejected by the Court, as it is clearly false.

[31] The complainant immediately upon her return to their house informed her mother that she was raped by a men. She did not know the name of the men who raped her. She was scared and was crying. The doctor's observation was that the complainant seemed to be distressed as well as anxious. The lower part of her abdomen was covered in gravel and sand. Sand was also observed in the genital area. All those observations made by the doctor who attended to the complainant clearly show that the rape incident had traumatic effects on her.

[32] During the course of the trial the Court observed the complainant as an unsophisticated young girl who could not have been in a position to lure the accused into sexual activities as claimed by the accused person in his defence. The complainant's testimony is that the accused had threatened to kill her should she scream for help. The incident took place in a cemetery which made it impossible for her to scream, as she was scared after threats were made to her by the accused.

[33] Both the complainant's mother and father corroborated her version that she came home crying and reported to have been raped by a men on her way as she walked to school. There is sufficient evidence that the sexual intercourse could not have been consensual as claimed by the accused. It was done under coercive circumstances. Accordingly the accused is found guilty of rape in respect of the third count. Accused's version of having proposed the complainant and that they had agreed to have sexual intercourse in the cemetery cannot be reasonably possibly true, and the Court will reject it as it is clearly an afterthought by the accused.

[34] With regards to the fourth and the fifth counts in respect of the complainant Helvi Ndati Jones. It must be noted that the incident occurred merely four days after

the incident in respect of the 3rd count, in which the complainant was a minor child aged 14 years at the time.

[35] There is no dispute with regard to the complainant and the accused having met on the morning of the 5th of April 2016. The complainant was on her way to Natis whilst the accused was walking to the Nurses Home. These two places are situated in the same direction.

[36] Like in the incident in respect of the third count, the accused approached the complainant and pretended to be a gentleman. As they walked together, they spoke to each other until they reached the Mondesa soccer field. As the complainant walked she was unexpectedly grabbed by the accused who demanded that she sucks his penis. He made threats towards her and started to push her around and banging her on the stadium wall, which caused the complainant to fall around. The reason for the complainant to comply with the accused's order was merely due to the threats used against her whereby the accused went on and inserted his penis into the complainant's vagina.

[37] In terms of the Combating of Rape Act 8 of 2000 section (1) 1 (a) 'sexual act means (a) the insertion (to even the slightest degree) of the penis into the vagina or anus or mouth of another person'.

[38] The complainant's testimony is that accused had first ordered her to suck his penis whereafter he went on to insert his penis into her vagina. These two sexual acts were committed after one another. Accused's insertion of his penis into the complainant's mouth could not have been or consistent with sound medical practices, carried out for proper medical purposes, but it was meant as form of genital stimulation, to which the complainant had not consented. Her testimony is that she agreed to the sucking of the accused's penis due to fear and under the belief that he would let her go.

[39] Further evidence presented before court is that at the time of the incidences in respect of counts four and five, the complainant was 22 weeks pregnant, which was

also confirmed by the doctor who examined her on the same date of the alleged rape.

[40] Furthermore, at the time of the examination the complainant wore torn jeans which were soiled. The doctor's clinical findings were, abrasions on the right knee and right hand, abrasions on the left elbow as well as bruising on the forearm. His general observation was that the complainant appeared depressed and withdrawn. He concluded that recent physical/emotional trauma had occurred and further that sexual penetration could not be ruled out.

[41] Accused's claim of a consensual sexual intercourse after he had proposed the complainant cannot be true if regard is had to the condition under which the complainant was described by the doctor to have been at the time of the examination. Accused's version is again another fabrication that the Court must reject, as it is clearly false.

[42] The reason why the accused's version must be rejected as false is firstly, because the complainant could not have consented to sexual intercourse with the accused due to the state of her pregnancy. She was a married woman and the sexual intercourse took place in an open space. She sustained injuries during the sexual encounter. All these do not accord an atmosphere of bliss after a consensual sexual intercourse.

[43] Mr Ndjamba to whom the complainant made her first report testified that the complainant approached him whilst screaming and asked him to accompany her to the scene. She told him that she was raped. That is not a behaviour of a person who had just come out from a consensual sexual encounter. The report of having been raped was made by the complainant at the earliest opportunity that presented itself to an unknown man whereafter the complainant was escorted to the police station and immediately registered a case of rape.

[44] There is no doubt that the two separate cases of rape had been proven against the accused beyond reasonable doubt, which are the insertion of the penis by the accused into the complainant's mouth and secondly when accused eventually

inserted his penis into the complainant's vagina. These insertions conform with the definition of Rape as per the Combating of Rape Act 8 of 2000.

[45] Accused is found guilty in respect of counts, three, four and five. He is however, found not guilty on counts one and two and is acquitted on those counts.

Count One : Rape – Not Guilty

Count Two : Attempting to obstruct or defeat the course of justice – Not Guilty

Count Three : Rape - Guilty

Count Four : Rape - Guilty

Count Five : Rape - Guilty

D N USIKU
Judge

APPEARANCES:

On behalf of the State: Mr Kumalo
Office of the Prosecutor General, Windhoek

On behalf of the Accused: Mr Dube
Of Directorate of Legal Aid, Windhoek