

REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF
WINDHOEK



NAMIBIA MAIN DIVISION,

JUDGMENT

Case No: CC 19/2018

THE STATE

versus

KOSMOS KOUYUNI SIKONGO

FIRST

ACCUSED

SIMON KANYEWA SIKONGO

SECOND ACCUSED

Neutral citation: *S v Sikongo* (CC 19/2018) [2020] NAHCMD 65 (26 February 2020)

Coram: SHIVUTE, J

Heard: 1 - 20 June 2019, 16 -17 September 2019 and 17 October 2019

Delivered: 26 February 2020

Fly note: Criminal Procedure - Evidence - Witnesses - Young children - Approach to be adopted - Court must be extra cautious - Reason - Inherent danger and risks in accepting such uncorroborated evidence of a single child witness -

Criminal Procedure - Deviation from statement made to the police - between other witnesses and contradictions between the versions of same witness - Approach - Court must determine what was meant by witness on each occasion - Court must take cognizance that not every error by witness - Not every contradiction or deviation affects credibility - Contradictions and discrepancies to be considered and evaluated on a holistic basis - Court to decide whether evidence is trustworthy despite shortcomings and defects - Whether it is satisfied that the truth has been told - Court found that - Victim's evidence not sufficiently credible and reliable to secure a conviction.

Criminal Procedure - Charge - Formulation of charges - Accused persons charged with several offences which are identical - Alleged to have been committed during 2016 - Witness cannot link a particular accused to a particular offence - Solution to this problem - State should have charged them in terms of s 94 of the Criminal Procedure Act - Various offences to be joined in one charge committed on diverse occasions -

Summary: The complainant is a single child witness whose evidence was not corroborated in respect of several sexual acts that are alleged to have been committed against her. The cautionary rule regarding single child witness' evidence is still part of our law. The approach to be adopted is that the court should exercise extra caution when dealing with evidence of a single child witness. The reason being that there is an inherent danger and risks in accepting such uncorroborated evidence. With regards to deviation from statement made to the police and contradictions between other witnesses, contradictions, between the versions of same witness, the court must among other things determine what the witness meant to say on each occasion in order to determine whether there was an actual contradiction and the nature of the contradiction. Only material contradictions should be taken into account. The court must keep in mind that not every error by a witness and not every contradiction affects the credibility of a witness. The trial judge must consider the contradictions and discrepancies and evaluate them in a holistic basis. Thereafter, the court should decide whether the evidence is trustworthy despite shortcomings and defects and whether it is satisfied that

the truth has been told. In the present case the court made a finding that the victim's evidence not sufficiently credible and reliable to secure a conviction.

Formulation of charges - The two accused persons were charged with multiple counts each that were identical and alleged to have been committed during 2016. The complainant was unable to link a particular offence to a particular accused. She could not tell which of the accused persons had sexual intercourse with her for the last time. This problem could have been solved if the state had charged the accused persons in terms of s 94 of the Criminal Procedure Act which makes a provision for the charge to allege commission of offence on diverse occasions. The various offences could have been joined in one charge and it is sufficient merely to allege the period.

ORDER

Counts 1 – 4 in respect of accused 1:

Accused 1: Not guilty on each count and acquitted.

Alternative to counts 1 - 4

Not guilty on each alternative count and acquitted.

Counts 5 -7 in respect of accused 2

Accused 2: Not guilty on each count and acquitted.

Alternative to counts 5 – 7

Not guilty on each count and acquitted.

JUDGMENT

SHIVUTE J:

[1] The accused persons appeared in this court on indictment containing the following counts.

Counts 1 – 4 in respect of accused 1.

Count 1: Rape

Contravening section 2(1) (a) read with sections 1, 2 (2), 2 (3) 3,5,6,7 and 18 of the Combating of Rape Act, 8 of 2000 read with sections 1,3 and 21 of the Combating of Domestic Violence Act 4 of 2003.

It is alleged that during the year 2015 and at or near DRC in the district of Swakopmund, the accused did wrongfully unlawfully and intentionally commit a sexual act under coercive circumstances with M N V W by inserting his penis into her vagina and the coercive circumstances were that: the accused applied physical force to the complainant and/or

the complainant was affected by helplessness and/or

the complainant was under the age of fourteen years, in that she was nine years of age and the perpetrator was more than three years older than the complainant as he was 29 years of age. At the time of the commission of the offence the perpetrator and the victim had an underlying domestic relationship.

Alternative to count 1:

Contravening section 14 (a) of the Combating of Immoral practices Act 21 of 1980 as amended – Commit or an attempt to commit a sexual act with a child under the age of

sixteen years read with sections 1, 3 and 21 of the Combating of Domestic Violence Act, 4 of 2003.

During the year 2015 at DRC location in the district of Swakopmund, the accused did wrongfully and unlawfully commit or attempt to commit a sexual act with a child under the age of sixteen years to wit, the complainant as mentioned in the first count and the perpetrator was more than three years older than the complainant who was aged nine and the perpetrator 29 years of age. At the time of the commission of the offence the perpetrator and the victim had an underlying domestic relationship.

Count 2 – Rape

Contravening Section 2 (1) (a) read with sections 1, 2(2), 2(3), 3, 5, 6, 7 and 18 of Act 8 of 2000 read with sections 1, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003.

It is alleged that during the year 2016 and at or near DRC in the district of Swakopmund the accused person did wrongfully, unlawfully and intentionally commit a sexual act under coercive circumstances with M N V W, the complainant, by inserting his penis into her vagina and the coercive circumstances were that:

the perpetrator applied physical force and/or

the, complainant was affected by helplessness and/or

the complainant was under the age of fourteen years in that she was nine years of age and the perpetrator was more than three years older than the complainant as he was 29 years of age. At the time of the commission of the offence the perpetrator and victim had an underlying domestic relationship.

Alternative to count 2:

Contravening section 14(a) of the Combating of Immoral practices Act 21 of 1980 as amended – commit or an attempt to commit a sexual act with a child under the age of sixteen years, read with sections 1, 3 and 21 of the Combating of Domestic Violence Act, 4 of 2003.

It is alleged that during the year 2016 at or near DRC location in the district of Swakopmund, the accused did wrongfully and unlawfully commit or attempt to commit a sexual act with a child under the age of sixteen years to wit, the complainant in the first and second counts and the perpetrator was more than three years older than the complainant, who was aged nine and the perpetrator 29 years of age. At the time of commission of the offence the perpetrator and victim had an underlying domestic relationship.

Count 3 – Rape

Contravening Section 2 (1) (a) read with sections 1, 2, (2), 2 (3) , 5,6,7 and 18 of Act ,8 of 2000, read with sections 1,3 and 21 of the Combating of Domestic Violence Act, 4 of 2003.

Particulars of the offence are that during the year 2016 and at or near DRC in the district of Swakopmund the accused persons as mentioned above did wrongfully, unlawfully and intentionally commit a sexual act under coercive circumstances with the above mentioned victim in the previous counts, by inserting his penis into her vagina and the coercive circumstances were that:

the perpetrator applied physical force to the complainant and/or

the complainant was affected by helplessness and/or

the complainant was under the age of fourteen, in that she was nine years old and the perpetrator was more than three years older than the complainant as he was 29 years of age. At the time of the commission of the offence the perpetrator and victim had and underlying domestic relationship.

Alternative to count 3:

Contravening section 14 (a) of the Combating of Immoral Practices Act 21 of 1980 as amended – Commit or an attempt to commit a sexual act with a child under the age of sixteen years, read with sections 1, 3 and 21 of the Combating of Domestic Violence Act, 4 of 2003.

It is alleged that during the year 2016 at or near DRC location in the district of Swakopmund, the accused did wrongfully and unlawfully commit or attempt to commit a sexual act with a child under the age of sixteen years to wit M N V W and the perpetrator was more than three years older than the complainant, who was aged nine and the perpetrator was 29 years old. At the time of the commission of the offence the perpetrator and the victim had an underlying domestic relationship.

Count 4 – Rape:

Contravening section 2 (1) (a), read with sections 1, 2(2), 2(3) 3,5,6,7 and 18 of Act 8 of 2000, read with sections 1, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003.

It is alleged that during the year 2016 and at or near DRC in the district of Swakopmund, the accused did wrongfully, unlawfully and intentionally commit a sexual act under coercive circumstances with the complainant in the previous counts by inserting his penis into her vagina and the coercive were that:

the perpetrator applied physical force to the complainant and/or

the complainant was affected by helplessness and/or

the complainant was under the age of fourteen years, in that she was nine years of age and the perpetrator was more than three years older than the complainant, as he was 29 years of age. At the time of the commission of the offence the perpetrator and victim had an underlying domestic relationship.

Alternative to count 4:

Contravening section 14 (a) of the Combating of Immoral Practices Act 21 of 1980 as amended – Commit or an attempt to commit a sexual act with a child under the age of sixteen years, read with sections 1, 3 and 21 of the Combating of Domestic Violence Act, 4 of 2003.

It is alleged that during the year 2016 at or near DRC location in the district of Swakopmund, the accused did wrongfully and unlawfully commit or attempt to commit a sexual act with a child under the age of sixteen years to wit M N V W and the perpetrator was more than three years older than the complainant, who was aged nine and the perpetrator was 29 years old. At the time of the commission of the offence the perpetrator and the victim had an underlying domestic relationship.

Counts 5 – 7 in respect of accused 2

Count 5 – Rape

Contravening section 2 (1) (a), read with sections 1, 2 (2), 2 (3) 3, 5, 6, 7 and 18 of Act 8 of 2000.

In that during the year 2016 and at or near DRC in the district of Swakopmund, the accused did wrongfully, unlawfully and internationally commit a sexual act under coercive circumstances with M N V W by inserting his penis into the vagina of the complainant and the coercive circumstances were that:

The perpetrator applied physical force to the complainant and/or the complainant was affected by helplessness and/or

the complainant was under the age of fourteen years, in that she was nine years of age and the perpetrator was more than three years older than the complainant, as he was 25 years of age.

Alternative to count 5:

Contravening section 14 (a) of the Combating of Immoral practices Act 21 of 1980 as amended – Commit or an attempt to commit a sexual act with a child under the age of sixteen years.

In that during the year 2016 at or near DRC location in the district of Swakopmund, the accused did wrongfully and unlawfully commit or attempt to commit a sexual act with a child under the age of sixteen to wit, the complainant in the main count and the perpetrator was more than three years older than the complainant, who was aged nine and the perpetrator 25 years of age.

Count 6 – Rape:

Contravening section 2(1) (a), read with sections 1, 2 (2), 2 (3) 3,5,6,7 and 18 of Act 8 of 2000.

It is alleged that during the year 2016 and at or near DRC in the district of Swakopmund, the accused did wrongfully, unlawfully and intentionally commit a sexual act under coercive circumstances with the complainant in the previous counts by inserting his penis into her vagina and the coercive circumstances were that:

The perpetrator applied physical force and/or

the complainant was affected by helplessness and/or

the complainant was under the age of fourteen years in that she was nine years of age and the perpetrator was more than three years older than the complainant as he was 25 years of age.

Alternative to count 6:

Contravening section 14 (a), of the Combating of Immoral Practices Act 21 of 1980 – Commit or an attempt to commit a sexual act with a child under the age of sixteen years.

In that during the year 2016 at or near DRC location in the district of Swakopmund, the accused did wrongfully and unlawfully commit or attempt to commit a sexual act with a child under the age of sixteen years to wit, the complainant in the main count and the perpetrator was more than three years older than the complainant who was aged nine and the perpetrator 25 years of age.

Count 7 – Rape

Contravening section 2 (1) (a), read with sections 1, 2 (2), 2 (3) 3, 5, 6, 7 and 18 of Act 8 of 2000.

The allegations are that during 2016 at DRC in the district of Swakopmund, the accused did wrongfully, unlawfully and intentionally commit a sexual act under coercive circumstances with the complainant in the previous counts by inserting his penis into her vagina and the coercive circumstances were that:

the perpetrator applied physical force to the complainant and /or

the complainant was affected by helplessness and/or

the complainant was under the age of fourteen years in that she was nine years of age and the perpetrator was more than three years older than the complainant as he was 25 years of age.

Alternative to count 7

Contravening section 14 (a) of the Combating of Immoral Practices Act 21 of 1980 as amended – Commit or an attempt to commit a sexual act with a child under the age of sixteen years.

In that during 2016 at DRC location in the district of Swakopmund, the accused did wrongfully and unlawfully commit or attempt to commit a sexual act with a child under the age of sixteen years to wit, the complainant M N V W and the perpetrator was more than three years older than the complainant who was aged nine and the perpetrator 25 years of age.

State's evidence

[2] Accused 1 – 2 are brothers. Accused 1 was in a romantic relationship with the victim's mother and he was residing on the same premises with the victim and her mother at the time the offences were allegedly committed. Although it was alleged that accused 2 was also staying on the same premises at the time of the alleged commission of the offences, such allegation has however been disputed by accused 2. Both accused persons pleaded not guilty to the charges and put it to the state to prove all the allegations.

[3] The first witness to be called by the state was Sylvia Musisi, an aunt to the victim's mother. Her testimony was that during October 2016, she was approached by the victim and her friend. They appeared to be sad. She inquired from the victim as to what the problem was but she could not tell her immediately. Later in the evening, she told them to go back home. The victim informed her (witness) that she was afraid of going home because the stepfather used to sleep with her during the mornings after the mother had gone to work. The father would wake her up but before she went to school he used to sleep with her. She explained to her that the father held her by the mouth for her not to scream and had sexual intercourse with her. She further said the (father) promised to buy her a bicycle. By referring to the father the victim meant accused 1.

[4] The victim had also reported to the witness that accused 2 also had sexual intercourse with her. The witness did not ask the victim how many times each accused had sexual intercourse with her because, she was shocked. The victim did not also indicate how the sexual intercourse took place apart from saying accused 1 and 2 held her by the mouth and had sexual intercourse with her. It is worth mentioning that the alleged sexual intercourse did not take place at the same time. Upon receiving the information, the witness reported the matter to her sister and the victim's mother. Thereafter, they all went to the police station to report. It was further the witness' testimony that she met accused 2 during March 2016 at accused 1's house. Each time she visited accused 1's house she would find accused 2. The complainant had also informed her that the incidents took place at their home where both accused persons,

the victim and her mother were staying. That was the reason why the witness concluded that accused 2 was staying at accused 1's house.

[5] Kayumina Anastacia Namutenya testified that accused 1 and 2 were living at the same house in DRC location. On a certain Wednesday during October 2016, the complainant and her friend (the witness' daughter) by the name L approached her. The victim was crying. The witness inquired why the victim was crying and the victim said she was beaten by her father. The victim further told her that when her mother goes for work her father used to call her in the room, undress her and had sexual intercourse with her. She explained that her father put his penis into her vagina. The complainant further said she was afraid to go home and she wanted to spend the night at the witness' house because, if she tells her mother the father would kill both of them. By referring to the victim's father the witness meant accused 1. The victim did not explain how many times the alleged sexual intercourse took place and she never told the witness that accused 2 also had sexual intercourse with her. Through cross-examination the witness testified that the victim told her that on the date she reported to her, the father had sexual intercourse with her in the morning. She further testified that during October 2016, accused 2 was staying with accused 1.

[6] The third witness to be called by the State was the victim M N V W. At the time she testified she was 12 years old. However, the incidents allegedly took place when she was 9 years old. Her evidence was that on an unknown date and year whilst she was living in DRC location in Swakopmund district with her father accused 1, her mother and her young brother, she and her friend went to refill the gas cylinder. From there, they went to her friend's place, after that they went back to her house. Her mother and father beat them because they reached home almost when the sun was about to set.

[7] The witness escorted her friend up to her house. There she told her friend's mother that her (victim's) father used to rape her. But she did not tell her friend's mother that accused 2 also raped her although she had informed her friend L earlier on, that both accused 1 and his brother had raped her.

[8] The victim further testified that on a different date she had also reported to Ms Musisi Sylvia that her father and his brother raped her. It was further the victim's testimony that her father raped her three times. She could not remember the date and the year when her father allegedly raped her. She explained that her father used to hold her by the hands threw her on the bed and inserted his penis into her vagina and then 'white things' came out of her vagina and his penis. She took a towel, clean up and went to play with her friends. She again explained that the first time the alleged rape took place on the mother's bed. Her father said he wanted to send her but she realised that it was not true. He held her by the hands and at the mouth and then had sexual intercourse with her.

[9] The second incident took place on her bed. She was bathing to go to school. Before she went to school her father told her that she should wait a bit. He then raped her on her bed. The father promised her to take her out for a tour to see animals and to buy her a bicycle. The third incident took place again on her mother's bed whilst her young brother was sleeping there. Accused 1 held her by the hands and told her that should she tell anyone he would kill her and her mother. Thereafter, he pulled out his penis and inserted it into her vagina.

[10] With regard to accused 2 it was the victim's testimony that he only raped her twice. Both rapes allegedly took place in the same fashion. Accused 2 held her by the hands, mouth and inserted his penis into her vagina. The victim was lying on her back. On the first occasion the victim was cleaning in the kitchen before she was held by the hands and raped. On the second occasion the victim was found in her room by the accused. Both alleged rapes by accused 2 took place in her room. The accused persons did not rape her in the presence of each other.

[11] Through cross-examination the witness testified that she could not remember whether the alleged rapes by the two accused persons took place during the same year. The witness further confirmed that she made two statements to the police, the first one

was dated 29 October 2016 and the second one was dated 1 December 2016. She testified that on the day she reported to Musisi Sylvia she was not raped that day, but weeks back before she reported. She first told L's mother and after a week passed, she reported to Musisi. She confirmed that if she told Musisi on 28 October 2016 it was possible that accused 1 raped her more or less on 21 October 2016. The first day the incident allegedly took place she was not supposed to go to school it was a holiday. She again testified that she told the police that the first incident took place during 2015. She could not remember whether the first and second incident took place during the same year. The second incident took place whilst she was planning to go to school.

[12] She also could not remember whether when the third incident took place she went to school or not. The witness further testified that she told the police that the first incident took place in her mother's room and not in her room as the police wrote in her statement. She also testified that she never informed the police of the threats made to her by the father. It was again her testimony that she told the police that the first incident with her step father took place during 2015 as well as the second incident. The witness testified that the third incident took place during 2016 and she could not remember whether she was planning to go and play or to go to school. However, according to one of her statements A12 she said she was going to have a bath to go to school. When she was questioned further whether she was going to school or to play she said she could not remember.

[13] According to the witness's first statement to the police she said the third incident took place in her mother's room however, she was asked why she told the court in her testimony that the last incident took place in her room? She responded that she could not remember very well. She further said the first accused did not undress himself but he only pulled out his penis. When it was put to the witness that accused 1 used to go to work around 06h00 and he would first drop the victim to school and thereafter the victim's mother at work. The witness replied that she could not recall him dropping her to school. She only used to see him taking her mother to work.

[14] When the witness was cross-examined in connection with accused 2, she said accused 2 was staying at her place. He was sleeping in the victim's room whilst the victim was sleeping in the kitchen. Accused 2 only moved from the victim's house after he got employment. The witness insisted that she had told her friend L that both accused persons raped her except that she never mentioned to L's mother that accused 2 also raped her. It was further the victim's testimony that she only informed her mother about the incident after the arrest of both accused persons. The witness was further asked by counsel for accused 2 what she told the police regarding what she was doing prior to the alleged rape because according to the statement she gave to the police regarding what she said accused 2 found her alone at home from school cooking macaroni, he switched off the stove, pushed her on the bed, removed her clothes and put his penis in her vagina whilst in court she testified that accused 2 found her washing dishes. The witness replied that she could not explain the contradictions in her statement as she could not remember very well. When she was asked about her second encounter with accused 2 as to why she told the police that she was sleeping after she came from school and that the second accused removed the blanket she used to cover with, her clothes, including underpants and had sex with her contrary to what she testified in court, she answered that it was not correct because she was not asleep but rather busy folding her clothes.

[15] After the victim testified, the state called her friend L M who is of the same age as the victim. She testified that on a certain Wednesday after school the victim told her that her father had raped her. When they went to the victim's house, the victim's father accused 1 sent them to go and fill up a gas cylinder. They did not come back early. When they went back to the victim's house accused 1 beat them. The victim escorted her to the witness' house. The victim was crying and the witness' mother enquired from her why she was crying. The victim then told the witness' mother that her father had raped her. She also said he had beaten her up. During the same week the victim had also reported to her grandmother (Musisi) that her father had raped her.

[16] The next witness called by the state was Amanda Baard a social worker in the Ministry of Gender Equality and Child Welfare who testified that she interviewed the victim in connection with this case and prepared a victim impact report exhibit 'H'. The victim was assessed during the period 2 November 2016 and 22 February 2017. The information she gave during the assessment period remained the same. She did not exaggerate or change the content of the incidents. The victim had sophisticated knowledge of the sexual act as well as the details surrounding it such as "white things" and the accurate and constant recall of the same information are important aspects for the confirmation of the truthfulness of the child's disclosure.

[17] She further testified that what made her to arrive at this conclusion was because the child narrated the story to her. She identified the two suspects to her namely; her step father and his brother. The child narrated how the incidents of sexual abuse took place separate from each other. The sexual abuse modus operandi would remain the same. Both perpetrators would grab her by her arms where after the perpetrator would push her to the bed. She would lie on her back on the bed and the perpetrator would be on top of her. The perpetrator would remove her clothes and her underpants. The perpetrator never removed his clothes but only took out his penis and inserted it into her vagina. The child victim was able to narrate correctly on anatomical dolls displayed. The witness further testified that after the perpetrator had sex with the victim "white things" were seen on her private parts and on the perpetrator's 'thing' penis. According to the witness the child was able to remember the specific circumstances of four specific incidents although the sexual abuse took place more than four times.

[18] The first incident took place when she was found cooking and when 'K' accused 2 came in and had sex with her. The second incident she was busy preparing herself to go to school where 'S' accused 1 came and had sex with her. The third incident happened whilst she was sleeping and 'K' accused 2 had just arrived from Kavango and had sex with her. She was also able to recall another incident where 'S' accused 1 promised that he would buy her a bicycle if she had sex with him and he then had 'sex'

with her. 'S' would tell her that she should not tell anyone otherwise he was going to kill her.

[19] After the social worker read her report into the record, it was admitted in evidence and marked as exhibit 'H'. The witness further explained that although the report was titled the 'Victim impact report' it referred to the forensic part about what the child reported to her and the witness explained her developmental stage which explains why she may be saying certain things.

[20] The state further called Doctor Kennedy Manhando who was a medical officer at Swakopmund State Hospital. He testified that he examined the victim in this matter and prepared a medical report J88. He read the report into record and the report was marked as exhibit 'J'. According to the doctor's report there were no specific findings. No open wounds, no fractures and no internal injuries were found. The hymen did not have fresh tears or no tears at all but the 2 O'clock and 10 O'clock position were clefts. A cleft is a kind of knot depression that shows an irregular outline of the hymen. The doctor was able to insert his two fingers in the vagina of the victim with ease. The doctor explained further that it was unusual to insert two fingers with ease in the private parts of a nine year or ten year old girl. He further stated that in some instances one cannot insert a finger or may only insert one finger. He was however of the opinion that it may vary from patients to patients. It was the doctor's further testimony that the hymen was intact but concluded that previous sexual penetration could not be ruled out. The doctor again explained that the depression or position of the clefts did not confirm a clear finding. He further testified that he found no active bleeding, no discharge and no bruising noted. He further made a finding that: 'Possible old genital trauma, penetration not ruled out'. His findings were not specific, they were inconclusive.

[21] Apart from the above mentioned exhibits produced in court, certain documents produced during the trial include, the certified copy of the full birth certificate of the victim that reveals that she was born on 8 November 2006 and it was marked as exhibit

'D'. The two statements made by the victim to the police that were marked as exhibits 'F' and 'G' respectively.

[22] At the end of the State case, counsel for accused 1 made an application for the victim to be recalled in terms of s 186 of Act 51 of 1977. The basis of the application is part of the record. The court declined to recall the victim as its witness and the reasons for the ruling are also part of the record of proceedings. Accused 1 and 2 were placed on their defence. Accused 1 gave evidence under oath and called the victim's mother as his witness. Accused 2 gave evidence under oath and called no witness.

Defence evidence

[23] Accused 1 testified that during 2015 he was working for a mine up to 16 April 2016. During that time he was staying at the camp where the mine workers were staying which was about 90 km from Swakopmund. He was only able to go home for about twice per month. After he left the employment of the mine, he worked for a construction company in Swakopmund. During that time he was staying at DRC location with the victim and her mother. During that period he used to wake up around 06H00 to prepare himself to go to work. He would take the victim to school and her mother to work. The arrangement was that the three of them would leave the house together. He dropped the victim at school first and thereafter the mother to work. In view of this, it was not possible for him to commit the alleged offences whilst the victim's mother was at work or before the victim leaves for school.

[24] He was knocking off at 17H00. If he goes home and the victim's mother was not at home, he would go and fetch her from work. The accused further testified that during 2015 to 2016 they had a housekeeper who was looking after their two year old son. Accused 1 confirmed that he had chastised the victim and her friend because on that particular day when he knocked off from work, he did not find the victim at home. Accused 1 disputed that he had committed sexual acts with the victim as alleged by the State. It was accused 1's testimony that the complainant's mother filed a withdrawal

statement that reads among other things 'I want to withdraw it he is an innocent person'. That withdrawal statement by the victim's mother was produced in court and marked as exhibit 'K'

[25] In essence paragraph 2 of the withdrawal statements reads as follows:

'I want to withdraw all two cases because I cannot afford to see my children alone and feeding them. B cannot grow up without his father, 'K' help me care and look after 'M' since she was 3 month's old. The father of 'M' only comes in now when this case was reported all time he was present. I want to withdraw it because him 'K' was helping me. He is an innocent person. He got a baby B with him. 'K' is a brother of 'K' and they must all go out.' (sic)

The withdrawal letter was signed by the mother of the victim. It was further the evidence of accused 1 that when accused 2 came to Swakopmund he was not staying at his (accused 1's) place. Although the witness mentioned the full names, the court only wrote the initials in order to protect the child victim.

[26] The mother to the victim E H gave evidence that she was a girlfriend to accused 1 and that accused 1 is a brother to accused 2. She further testified that she is the biological mother of the victim. During 2016 she received a report from Musisi concerning this case. Upon the report, the witness, Musisi, the victim and the two accused persons went to the police station. After the matter was reported to the police, the following day the victim informed her mother of what happened. She reported to her that accused 1 had sexual intercourse with her three times in the morning and that accused 2 had sexual intercourse with her two times on Saturdays. The witness further testified that she filed a withdrawal statement after she has asked the victim again whether what she said about the allegations was correct and she said it was not correct that is how the witness came to file a withdrawal statement.

[27] The witness further testified that during 2015, accused 1 was working for the mine and he was staying at the camp. However, after he left work at the mine he came to stay with them in Swakopmund. At that time accused 1 and the witness had a one

year old son. The witness used to leave the son with a friend who was staying in the same yard. This happened during 2015. Apart from that friend, there was also a person who looked after the boy from 14 January 2016. She only stayed for four months. There was also a time when the boy was taken to a day care.

[28] The victim's mother continued to testify that at the time accused 1 was working at the mine the victim walked to school and that was during 2015. When accused 1 was in Swakopmund, sometimes he and the witness (victim's mother) used to drop her but sometimes the witness used to start work at 06H00 and the victim could walk to school on her own. With regard to the issue whether accused 2 was staying at accused 1's house the witness testified that he indeed stayed with them when he arrived in Swakopmund during March 2016. Through cross-examination the witness stated that during 2015 when the victim was in grade 2 she used to start her classes at 12H00 and finish at 17H00. This was going on from the beginning of 2015 until the middle of the year. She later started her school at around 7H00. According to the witness, accused 2 stayed with them for about three months.

When accused 2 arrived in Swakopmund he was not working but accused 1 was working at a Chinese company in Swakopmund. After sometime, accused 2 started work as a security guard and he was starting his work around 17H00. At the time, accused 2 was staying at accused 1's place he was sleeping in the victim's place. The witness was leaving accused 2 at home when she was going for work. It was again the witness' testimony that there were days when accused 1's car had no fuel and each of them walked to work and school respectively. When the car had no fuel the witness (victim' mother) used to leave the house first. During 2015 when accused 1 was off work he could drop off the witness at work. However, the witness could not tell whether after accused 1 dropped her off at work and went back home, that he found the victim still at home or already gone to school.

[29] On the other hand, accused 2 testified that he arrived in Swakopmund during March 2016 and he started to work as a security guard in April 2016. When he arrived in

Swakopmund he was staying with his other brother and not accused 1. He denied to have committed the offences as alleged by the State and that he was falsely implicated. Briefly that was the defence case.

Argument by the State

[30] Counsel for the State argued that the court had the opportunity to observe the state witness and that they were credible witnesses therefore, the court should accept their versions. The victim disputed that accused 1 used to drop her off at school as she used to walk to school. The victim testified that accused 1, had sexual intercourse with her thrice in the mornings before she left for school and that accused 2 also had sexual intercourse with her on two occasions. The victim testified about the *modus operandi* used by both accused persons. Counsel urged the court not to draw any inferences only from the length of the delay between the commission of the offence and the laying of a complaint.

[31] Although the State acknowledge that the victim's evidence was inconsistent and that she contradicted herself in some respects like how many times she was raped by each accused, where the incidents took place and what she was doing immediately before she was raped. The State is of the view that despite these inconsistencies and contradictions the victim is still a credible witness and she should be believed. The court should contextualise her evidence with that of the Social Worker especially when the Social Worker testified that it is highly unlikely for the complainant of that age to falsely tailor such allegations of events.

[32] Furthermore, counsel argued that the victim's mother who testified on behalf of accused 1 corroborated the victim's version that accused 1 was not always dropping off the witness to school but only sometimes. She also corroborated the victim that on the

date she was given a hiding she was sent to fill up the gas bottle. The victim and her mother also corroborated each other that when accused 2 went to Swakopmund he stayed with them.

[33] With regard to the medical evidence, counsel argued that although the complainant's hymen was intact it had clefts that the doctor described as depression or an irregular occurrence. He could insert two fingers into the vagina of the victim who was about 10 years of age at that time and the insertion appeared to be something unusual for her age. The witness could not rule out the possibility of previous sexual penetration. The fact that the hymen was intact does not mean that there was no penetration. Therefore, the court should find that accused 1 raped the victim three times by inserting his penis into the vagina and that accused 2 raped the victim twice in a similar fashion during 2016. In the event that the court does not find the accused persons guilty of the above stated charges than they should be found guilty of the alternative charges of committing a sexual act with a child under the age of 16.

Arguments by the defence

[34] On the other hand, counsel for accused 1 argued that the state witnesses contradicted each other. When the victim's grandmother testified she said the victim told her that accused 1 used to rape her when the mother goes for work in her room. However, the witness was confronted with her statement that she gave to the police that, the complainant also told her that even the very day the complainant reported to her, accused 1 had slept with her before she went to school as opposed to her version that after the sexual act she would go and play with her friends.

On the first occasion accused 1 told her that he wanted to send her somewhere but instead accused 1 raped her on her mother's bed. However, in the statement she gave to the police she said accused 1 went to her room, undressed her and had sex with her in her own room which is also a contradiction. The victim had also contradicted herself when she said the reason why she did not scream was because the perpetrator held her by the mouth. Again she said she screamed but there was no other people at home.

[35] It was further counsel for accused 1's criticism of the victim's evidence that in respect of the last incident, she told her grandmother that the last rape happened weeks before she reported. In respect of the first incident again the victim testified that the victim went to play after the incident although she was supposed to go to school but later on she changed her version that she was not planning to go to school as it was during the school holidays.

[36] Furthermore, counsel argued that the victim testified that she did not report the matter to her mother because accused 1 threatened to kill her and her mother. However, this was not stated in her statement to the police. The witness also told the police that the reason why she did not tell her mother was because accused 1 looked at her in a bad way. With regard to the second incident, the victim during cross-examination said when it happened the nanny was not yet working for the family however, in the statement to the police she said the second incident happened after the nanny went back to Rundu. It was again put to the victim through cross-examination that according to her statement A12 both the first and second incidents occurred during 2015 and she confirmed it.

[37] Counsel further argued that when the witness was confronted with her initial, statement concerning the third and last incident, when accused 1 allegedly raped her, it was last Wednesday, which meant it was a week before she told her friend. When she was asked where the incident happened she said it was in her room contrary to what she testified in court that the last incident with accused 1 happened in her mother's room where her brother was sleeping on the bed. According to her initial statement she also said accused 1 had lowered his trousers down and he was naked. In cross-examination she said accused 1 was not naked but he only pulled out his penis.

[38] It was again counsel's argument that witness Kayumina testified that the victim told her that every time the mother goes to work, her father slept with her. This is contrary to the version when the victim told her mother that it was on three occasions.

Furthermore, the victim informed the social worker that each accused 1 slept with her on two occasions. Which means the sexual intercourse took place four times in total. Again, although the social worker testified that the victim was able to remember clearly what happened this was not correct as there were a lot of inconsistencies in the victim's testimony on record.

[39] With regard to the medical evidence, counsel argued that although the victim reported to the doctor that the last sexual act happened three days prior to the examination, upon examination of the hymen there was no fresh tears. The witness found no evidence to suggest that penetration had ever taken place. Counsel argued further that accused 1 although he gave a mere denial he was a truthful witness and that there is no reason for his version to be rejected.

[40] With regard to the version of the victim's mother, counsel argued that she informed the court that the victim told her that she was not raped, that is why she filed a withdrawal statement because, the accused persons were innocent. Counsel urged the court to accept the version of the victim's mother as her evidence is truthful and correct in material respects as opposed to the evidence of the victim who is a single witness and her evidence is not corroborated. Lastly it was counsel's argument that the state had failed to prove its case.

[41] With regard to counsel for accused 2, she reminded the court to be mindful that the victim was a single witness whose evidence was riddled with inconsistencies and contradictions which negatively impacts the reliability of her version. The victim contradicted herself as to the number of times she was allegedly raped by each accused person. She also contradicted herself as to the reason why she did not scream. She again told the Social Worker that she screamed but there was nobody nearby. Complainant told witness Kayumina that she was raped the day she made a report to her but complainant denied that during cross-examination. The repeated sexual abuse is not supported by medical evidence which is inconsistent with repeated sexual intercourse by two adult males and the child of nine years. It was again counsel

for accused 2's criticism of the victim's version that the way she described that she was raped on different occasions by the accused persons separately in the exact identical fashion was highly improbable. The victim had also testified that she could not recall which of the accused persons raped her on the last occasion. Counsel further argued that it was possible that the victim made false allegations because she was chastised by accused 1.

[42] With regard to the Victim Impact report, it is of no value as it was not a victim impact report but a forensic exercise compiled by the Social Worker who is not a forensic expert. She tried to prove that the victim was not lying about the alleged sexual abuse, so, counsel argued. In view of this, she urged the court to acquit accused 2 as the state had failed to discharge the onus of proof. This court was referred to authorities by counsel for the state and counsel for accused 2 which authorities will be considered.

The applicable law regarding single/child witness

[43] Having summarised the evidence and arguments presented before this court, it is evident that the state rests its case on the evidence of a single witness who is also a young child. Although there is no statutory requirement that evidence of a young child must be corroborated before it is accepted in court, it has been accepted in our courts that such evidence should be treated with caution due to the dangers inherent in such evidence.

[44] Some of the arguments advanced by both counsel for the defence were that the complainant was a single witness whose evidence has never been corroborated. Counsel have also argued that there have been contradictions in the state witnesses' evidence, contradictions between the complainant's evidence-in-chief and previous statements.

In Minister of Basic Education, Sport and Culture v Vivier No and Another 2012 (2) NR 613 SC at 614 (B-C) it was stated in the headnote with reference to evidential concerns relating to the assessment of the credibility of child witnesses as follows:

'The approach of the courts in assessing the credibility of child witnesses and their reliability of their evidence was informed by the evidential risks associated with their, as yet, inchoate social, emotional, and intellectual abilities: their suggestibilities and imaginativeness; their capacity to accurately observe, remember, recollect and relate events and experiences; their appreciation of the duty and importance of being truthful when testifying and their, sometimes, incomplete comprehension of the- often complex- matters which they were required to testify about. These evidential concerns must always be individualised when courts assess the evidence of child witnesses but, given the gradual maturation of children's social skills and of their emotional and intellectual abilities from infancy to adulthood, it normally followed naturally and logically that the younger a child witness was, the more pronounced these concerns became and the greater the measure of care required from the court in assessing the reliability of their evidence.'

The court continued to observe in the same headnote as follows:

'These judicial concerns and also those which arose when the prosecution was seeking a conviction on the evidence of a single, uncorroborated witness, required of courts to make a guarded assessment of the veracity and reliability of the testimonies given by such witnesses in criminal proceedings. As a rule this cautionary approach had consistently been applied in this jurisdiction. Not as a formalistic procedural requirement to which mere lip service must be paid, but as an intrinsic part of a broader logical and reasoned inquiry into the substance of the evidence against the accused: after due appreciation and assessment of the peculiar and inherent dangers of convicting the accused on the evidence of the single/child witness who testified at the trial, was the evidence of that witness, when considered in the context of and together with all other evidence adduced at the trial, sufficiently credible and reliable to prove the guilt of the accused beyond reasonable doubt?'

[45] Furthermore, section 208 of the Criminal Procedure Act 51 of 1977 reads as follows:

‘An accused may be convicted of any offence on the single evidence of any competent witness.’

In *S v Sauls and others* 1981 (3) SA 172 (A) at 180 (E-G) the court with regard to evidence of single witnesses stated the following:

‘There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. 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.’

This approach was followed in our jurisdiction in several cases.

Judicial approach with regard to, material differences between witnesses’ evidence and previous statement and contradiction between the statement and evidence in court.

[46] The guiding principles with regard to the above subject matter were set out in *S v Mafaladiso en andere* 2003 (1) SACR 583 (SCA) at 593e – 594h where the court held:

‘The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, *inter alia*, between her or his *viva voce* evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous

statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions – and the quality of the explanations – and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings.'

[47] In deciding whether the accused persons are guilty or not I will rely on the aforementioned legal principles. Although the victim is a minor in this case, it is the duty of the state to prove the guilt of the alleged offenders beyond a reasonable doubt. There were no eye witnesses in this case as far as all the rape allegations are concerned. At the pain of being repetitive, the doctor's findings whether sexual intercourse took place or not is inconclusive, therefore the medical evidence is not of assistance to the court. There is some material discrepancies, and contradictions in the victim's evidence in court and her previous statements. There are discrepancies in her evidence regarding how many times she was allegedly raped by each accused, where the alleged rape took place and what she was doing immediately before she was raped, she could also not remember whether the first incident took place during the year 2015 or 2016. Furthermore, although the witness is alleging that the two accused persons raped her during 2016 in other counts, she could not tell exactly between the two accused persons who had sexual intercourse with her for the last time. In other words the victim could not correlate a particular charge to a particular accused or to a particular period.

[48] Although accused 1 was charged with four counts, the witness testified that accused 1 only had sexual intercourse with her thrice, this is in contradiction to her earlier statement in which she told the police that apart from the rape that was allegedly committed on a 'last Wednesday', before the matter was reported there were other four instances of alleged sexual abuse by accused 1. With regard to accused 2, although three counts were proffered against him, as per the report that was made by the victim to the police, the victim testified that accused 2, only had sexual intercourse with her twice. When she was asked to give an explanation in connection with the contradictions and inconsistencies in her versions, she explained that she was unable to explain because, she could not remember very well or that the police misunderstood her. Other contradictions with regards to what she reported to other state witnesses which have been pointed out by counsel for accused 1, through cross-examination and during his argument are evident on record and I do not find it necessary to repeat them. The court should also not lose sight of the fact that this matter was reported after the victim was chastised by accused 1.

[49] Mrs Baard, an expert witness who is a Social Worker in the Ministry of Gender Equality and Child Welfare testified that the victim had accurate and constant recall of the same information. According to her, these were important aspects for the confirmation of the truthfulness of the child's disclosure. Unfortunately this was not confirmed by what transpired in court and the court is of an opposite view to that of the Social Worker.

[50] Both accused persons' defence was a mere denial. However, the mother to the victim testified that the victim told her that the allegations she made concerning accused 1 and 2 were not true. Unfortunately this version was not put to the victim, but this cannot count against the defence because, the victim's mother was a state witness and the state decided not to call her. Accused 1 therefore decided to call her as a witness. Although the victim's mother testified that she filed a withdrawal statement because the victim told her that she falsely implicated the accused persons, that aspect was not specifically stated in the withdrawal statement. It appears to me that the main reason

why she wanted to withdraw the case was because she did not want the son she has with accused 1 to grow up without a father as she stated in her withdrawal statement.

[51] The victim's mother further corroborated her and the second state witness Musisi, who testified that accused 2 when he arrived from Rundu stayed at accused 1's premises. Therefore, accused 2's defence that it was not possible for him to commit sexual acts with the witness because he was not staying on the premises where the victim was residing has no merit. There is also evidence from the victim's mother that there were occasions when she used to go earlier to work leaving accused 1 and the victim at home. She also said that there were times accused 1's vehicle had no fuel and each of them used to walk to their respective work places and the victim to school.

[52] The questions this court should consider are: Why would the victim's mother testify in court that she was told by the victim that she falsely implicated the accused persons? If it is so that she wanted to protect the accused persons, why did she not support their defence that it was not possible for them to have sexual intercourse with the victim because each of them had no opportunity to be in the company of the victim in the absence of other people?

Secondly, is the evidence of the child victim, who is a single witness when considered in the context of and together with all other evidence placed before court sufficiently credible and reliable to prove the guilt of each accused beyond reasonable doubt?

[53] Before I respond to these questions I deem it fit to turn to the charges contained in the indictment. Except for count 1 and its alternative in respect of accused 1 that was alleged to have been committed during 2015, all charges in respect of each accused are allegedly committed during 2016. These charges are drafted in a peculiar manner. They are identical except where it is alleged that there was an underlying domestic relationship between accused 1 and the victim.

[54] In criminal cases, the burden of proof lies with the prosecution. The standard required is very high namely; beyond reasonable doubt. According to the evidence

placed before court, the witness could not remember the sequence as to how these offences were committed. She could not remember whether the first count was committed during 2015 or 2016. She also could not remember between accused 1 and accused 2 who had committed the alleged last, sexual act with her. In other words she could not link a particular accused to a particular charge. In order to avoid this problem, the state could have employed the provisions of s 94 of the Criminal Procedure Act that reads as follows:

'Where it is alleged that an accused on diverse occasions during any period committed an offence in respect of any particular person, the accused may be charged in one charge with the commission of the offence on diverse occasions during a stated period.'

According to this section it is not necessary to specify the dates in which differed offences were committed in respect of the same person. But it would suffice for various offences to be joined in one charge and it is sufficient merely to allege the period.

See also *S v Leopeng and another* 1966 (4) SA 484 (A).

[55] I would now turn to the questions I posed earlier. It is common cause that the alleged sexual encounters constituted the evidence of a single witness which is riddled with contradictions and discrepancies and it is also uncorroborated. In applying the above stated legal principles to the facts of this case, this court is alive to the inherent dangers and risks to accept such evidence as it did not measure up to standard. This court having had treated the victim's evidence with caution and having had considered the evidence in a holistic way and upon a careful assessment of the evidence, it has come to the conclusion that the victim's evidence when considered in the context of and as a whole is not sufficiently credible and reliable to secure a conviction in respect of each accused on all the counts and their alternatives. Therefore, this court finds that the guilt of the accused persons has not been proved beyond reasonable doubt.

[56] In the result the following verdicts have been arrived at:

Counts 1 – 4 in respect of accused 1:

Accused 1: Not guilty on each count and acquitted.

Alternative to counts 1 - 4

Not guilty on each alternative count and acquitted.

Counts 5 -7 in respect of accused 2

Accused 2: Not guilty on each count and acquitted.

Alternative to counts 5 – 7

Not guilty on each count and acquitted.

NN Shivute
Judge

APPEARANCES:

THE STATE:

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Office of the Prosecutor-General

FIRST ACCUSED:

Mr Wessels
Instructed by Directorate of Legal Aid

SECOND ACCUSED:

Ms Gebhardt
Instructed by Directorate of Legal Aid

