

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

JUDGMENT

Case no: CC 01/2012

THE STATE

v

SESEHO SLASKEN

ACCUSED

Neutral citation: *S v Slasken* (CC 01/2012) [2018] NAHCNLD 32 (11 April 2018)

Coram: TOMMASI J

Heard: 1 March 2018

Delivered: 11 April 2018

Flynote: Criminal Procedure — Evidence – Single witness — Court must be satisfied that the truth has been told — Evaluation of evidence — Court must consider evidence as a whole.

Summary: The accused was charged with having raped the complainant on four occasions, having attempted to rape her on one occasion and having assaulted her with a whip with the intention to do grievous bodily harm. The complainant testified that she was raped by her stepfather over a period but was unable to give exact dates when the incidences occurred. She reported the issue to her mother and her aunt but

they did nothing about it. She fell pregnant and was sent to live with her brother. She went to the clinic where she informed the nurse that she was impregnated by her stepfather who raped her on several occasions. She was referred to a community counsellor and she laid a complaint with the police against the accused. She also had a sexual relationship with one Fabian and she admitted at a traditional meeting that the said Fabian impregnated her. The accused denied having had sexual intercourse with the complainant and having impregnated her. The court held that it was not safe to rely on the evidence of the single witness given the number and nature of the contradictions and inconsistencies in her testimony. The court furthermore held that she was not corroborated in respect of when she made a report that she was raped by the accused. The court was not satisfied that the complainant and her mother told the court the truth and the accused was discharged on all counts of rape and attempted rape. In respect of count 2, assault with intent to do grievous bodily harm, the court found that the complainant contradicted herself in respect of the number of times she was assaulted. The court considered the mother an unreliable witness. The court held that it may draw an adverse inference from the State's failure to call the neighbour i.e. that he would not corroborate the testimony of the mother and the complainant. The complainant was a single witness in respect of the assault referred to in count 7. The court held that it would not be safe to convict on the evidence of the complainant given her unsatisfactory explanation why she sought no medical attention for the deep wound she suffered and for not reporting to the aunt with whom she was living with at the time. The court found that the State failed to prove that the accused was guilty of all the counts beyond reasonable doubt. He was found not guilty on all counts.

ORDER

1. Count 1 – contravening section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) rape read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) – The accused is found not guilty and discharged;

2. Count 2 – Assault with the intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) – the accused is found not guilty and discharged;
3. Count 3 - contravening section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) rape read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) – The accused is found not guilty and discharged;
4. Count 4 - contravening section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) rape read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) – The accused is found not guilty and discharged;
5. Count 5 – Attempted Rape read with the Riotous Assemblies Act 17 of 1956 – the accused is found not guilty and discharged;
6. Count 6 - contravening section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) rape read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) – The accused is found not guilty and discharged;
7. Count 7 - Assault with the intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) – the accused is found not guilty and discharged.

JUDGMENT

TOMMASI J:

[1] The accused was charged with four counts of rape in contravention of the Combating of Rape Act, 2000 (Act 8 of 2000), one count of attempted rape and two counts of assault with the intent to do grievous bodily harm. The accused pleaded not guilty.

[2] The complainant herein was a 13 year old girl at the time and she was living with her biological mother and the accused, her stepfather. The accused was 40

years old at the time. In all four counts of rape the coercive circumstances were: (a) the fact that the complainant was under the age of 14 years (b) that the accused is more than three years older than the complainant (c) that physical force and threats to do harm was used; and (d) that the accused was in a position of trust and authority over the complainant. It is alleged that count 1 (rape), 2 (assault GBH), 3 (rape) and 4 (rape) were committed during August 2008. It is alleged that count 5 (attempted rape), count 6 (rape) and count 7 (assault GBH) were committed on an unknown date during 2008. The state alleged that in both count 2 and count 7 the accused beat the complainant with a whip and caused the complainant certain wounds, bruises or injuries.

[3] The accused offered a bare denial in his plea explanation but made formal admissions placing the age of the complainant, the fact that she gave birth to a male child on 7 July 2009 and that the child died on 15 July 2009 out of dispute.

[4] The complainant recounted an incident in August 2008 when she returned from school. She found her stepfather in the courtyard and he asked her to fetch him water which was inside the house. He followed her inside and he grabbed her, pushed down her skirt, removed her underwear, pulled down his pants to his knees, took his penis and inserted it into her vagina and proceeded to have sexual intercourse with her. After he was done he threatened her that he would stab her with a screwdriver if she would tell her mother.

[5] On the second occasion, which was the following day, she came home from school and her stepfather was once again inside the courtyard. She testified that she went straight into the house to put her books down. Whilst inside her father grabbed her by her leg and her waist. She started struggling and managed to free herself. She ran away but he caught up with her. He hit her twice with a traditional shambok on her back. She went outside the courtyard and was crying. Her mother came and enquired why she was crying. She informed her mother that her stepfather was beating her because she refused to have sexual intercourse with him. She did not sustain injuries as a result of the assault. Her mother confronted the accused and he assaulting both of them.

[6] The third occasion occurred on a Saturday in 2008. She could not recall the date or the month. She returned from church and found him again in the courtyard.

He asked her: 'what did you tell your mother'. He then grabbed her, pushed down her skirt, removed her underwear, pulled down his pants to his knees, took his penis and inserted it into her vagina and proceeded to have sexual intercourse with her. He told her that if she tells anyone he will assault her.

[7] The following day she went to school and she did not come home. She went to her aunt's house. She found her mother and stepfather were drinking beer at a place. The accused instructed her to return to his house and she refused. She remained at her aunt's house.

[8] On a date not specified she returned from school and she found her stepfather in the courtyard of her aunt's home. Her aunt informed her that her mother is sick and told her that she must go see her. The accused wanted her to go with him and she requested the aunt not to allow the accused to take her along as he was going to rape her on the way. She did not go the same day but went to see her mother the next day. She remained with her mother until she was well. This was during 2008 although she was not able to remember the month or the date.

[9] When her mother was well, her mother left her alone with the accused. She was in the courtyard when he grabbed her, pushed down her skirt, removed her underwear, pulled down his pants to his knees, took his penis and inserted it into her vagina and proceeded to have sexual intercourse with her.

[10] On a Monday evening her mother sent her to collect fire wood and the accused followed her. This was during 2008 but the complainant was unable to remember the date. Whilst in the bush the accused grabbed her, pushed down her skirt, removed her underwear, pulled down his pants to his knees, took his penis and inserted it into her vagina and proceeded to have sexual intercourse with her. When he was done he threatened to stab her with a screw driver if she tells her mother. She did not tell her mother about the sexual intercourse in the woods. Although her mother and aunt already knew about it she was still scared to tell them about the rape as she feared that the accused would stab her with the screwdriver.

[11] She left to stay with her aunt for a month. According to her, it was during this period that her aunt observed that she was pregnant and she confirmed that she was pregnant. She was however not pregnant when she returned to visit her mother.

[12] After a month she returned to visit her mother. This was still 2008 but the month and date she was not able to recall. Her mother went to Bikabanja Village and she remained with her stepfather in the courtyard. She struggled with him and she managed to free herself. The accused chased her and caught up with her and he whipped her again with a traditional *sjambok* (whip). She sustained an injury on her breast. She did not tell anyone because she was scared. She had a big open wound but she received no treatment for it. During cross-examination she indicated that she showed her mother but her mother did nothing about it and she could not explain why her mother did not take her to the hospital for treatment of the wound.

[13] She remained with her aunt and returned to visit her mother the next year in January 2009. When she returned her mother told her that she suspected that she was pregnant and she sent her to live with her brother in Katima Mulilo. She went to her brother in Katima Mulilo and at the clinic she was asked by a nurse why she was at the clinic. She told her that she came for check-ups. The nurse asked her who was responsible for the pregnancy and she informed her that it was the accused. The baby was premature when it was born. According to her the nurse informed her in June when she went for the check-up that she was six months pregnant. On this occasion she was accompanied by her brother's wife.

[14] She admitted that she had a boyfriend, Fabian and that they used to have sexual intercourse with condoms. According to her testimony her relationship started during March 2009.

[15] In respect of the attempted rape she testified that the accused on a date she could not remember in the year 2008 the accused was naked in the house. His penis was erected. He grabbed her but she fled outside.

[16] During cross-examination she testified that she only had sexual intercourse with her boyfriend once and it was in the course of 2008. She was reminded of a meeting which was held with Mr Fedelis about the pregnancy. She denied having knowledge of such a meeting. She admitted that Fabian was her boyfriend but appeared not to know whether it was during March 2009 or March 2008 when she had a relationship with Fabian.

[17] During cross-examination it was put to the witness that there was no courtyard and that there was a table with water outside the house. The complainant denied and testified that there was a courtyard and the water was kept inside the house.

[18] During cross-examination she testified that she wanted to scream but the accused covered her mouth and threatened to stab her with a screwdriver if she screamed. She testified that after he was finished he threatened to stab her with a knife if she tells her mother. She did not tell anyone. She also testified that she saw him holding a screwdriver. She was informed that the accused does not own a screw driver but she insisted that he owns a screw driver. She also saw the knife. The accused was directing her attention to the knife and informing her that he would use it to stab her. The knife was on the roof of the house at the time. Her explanation for failing to mention the knife was the fact that the accused had the screwdriver in his hand whereas the knife was on the roof. She however reverted to her original testimony that he threatened her only once with a screwdriver.

[19] The complainant could not recall where the sjambok was kept in the house but recalled that he had it in his hand when he caught up with her. She later recalled that it was kept in the area where she slept. She also testified that he beat her many times while she was screaming and crying. She could not offer any reason why she changed her testimony that she was beaten only twice. She elaborated on the assault on her mother and herself according to her, the accused beat both of them many times. During cross-examination she testified that the neighbour came to find out why the accused was assaulting the people in his courtyard. The accused informed him not to interfere and Mr Fedelis returned to his own house. The latter witness was not called by the State.

[20] The complainant was confronted with her previous statement. Although she indicated that she used to read her statement to remind her of the events which happened in 2008, she indicated that she is not able to read the statement when presented with one of the statements she made. There were a number of inconsistencies between her evidence before the court and the statement she gave to the police. In one of her statements she indicated that she had sexual intercourse with her boyfriend more than once. This contradicted her testimony in court that she

only had sexual intercourse with her boyfriend once. She indicated that what was written in her statement was correct.

[21] In another statement she indicated that she recalled a meeting with the Induna where she informed the people at the meeting that Fabian was the father of the child. She stated during her testimony in court that she did not recall the meeting as it happened such a long time ago. She also conceded that Fabian was present at the meeting whereas she testified that he was not aware of the pregnancy. She indicated that she was not sure because it was not Fabian who impregnated her. She was unable to say with certainty when the meeting was held.

[22] She testified that when her mother confronted her with the fact that she looked pregnant, she did not know that she was pregnant. She was afraid of the accused so she informed her mother that Fabian was responsible for the pregnancy. She was also confronted with a statement that a day lapsed between the first and second incident. She indicated that the statement was wrong and that the second incident occurred the day after the first incident. In her statement she stated that she found the accused inside the house whereas she testified that the accused followed her into the house. She indicated that her statement was correct in this regard.

[23] In her statements there she indicated that she reported incidents to her mother whereas this was not apparent from her testimony in court. She also mentioned in her statement that she informed her mother's youngest sister about the rape whereas this was omitted from her testimony in court. In the statement the complainant indicated that she stayed at her aunt's house until January 2009 and she returned to her mother's house. It was at this point that her mother noticed that she was pregnant.

[24] The State called the paternal aunt of the complainant. She testified that she saw the complainant coming into her courtyard and she noticed that the complainant was pregnant. She sat her down and she asked her who the father was of the child she was carrying. The complainant told her that her stepfather was responsible for her pregnancy. She asked her how it was possible for him to be the father and the complainant informed her that whenever he wanted to have sexual intercourse with her, he threatened her with a spear or a knife. She wanted to know whether she told her mother. The complainant informed her that if she tells anybody he was going to

beat her. She told her that her stepfather raped her in the house and sometimes in the bush. She undertook to discuss the matter with her mother. When her mother came she discussed the matter with her. The complainant's mother informed her that if she continues to talk about the fact that her husband impregnated her daughter that she was going to take her to the traditional "Kuta" (court). She recalled that the complainant used to stay with her occasionally and then for only for a week. She could not recall a time when the complainant stayed with her for a month. She also recalled a time when the stepfather came to her place to take the complainant home as her mother was not well. The complainant refused to go and she informed her aunt that her stepfather would rape her on the way. According to her this happened during 2009.

[25] During cross-examination she indicated that she first noticed that the complainant was pregnant and it was thereafter that the accused came to visit at her house to inform the complainant that her mother was not well. She confirmed that during 2008 there was a court yard and she could see this from the communal water point in the village of the accused. The complainant never told her that she was having sexual relations with another person.

[26] The State called the nurse who attended to the complainant. She testified that she noticed the complainant at the ante-natal clinic on 9 June 2009. She saw that the complainant was 13 years old. She examined her and determined that she was 6 months pregnant. The complainant told her that her stepfather was raping her and she reported the matter to the community counsellor. During cross-examination she testified that the complainant was not accompanied by anyone. According to her calculation the child was conceived between October and November 2008.

[27] The mother of the complainant testified the complainant informed her that she was raped in the bush whilst collecting firewood and that the pregnancy she was having was for the accused. She decided to send the complainant to Katima Mulilo. The accused offered to take the complainant. She confirmed that the aunt informed her that her husband was raping the complainant and she asked her not to say anything because the accused was threatening to kill them. The complainant first told her about the rapes and thereafter the complainant's aunt told her. She confirmed that Fabian proposed to marry the complainant and that there was a

meeting held and that Fabian was present at the meeting when they discussed the pregnancy of the complainant. She was adamant that the accused knew about the pregnancy but stated that the issue of Fabian came later.

[28] She confirmed they kept the water inside the house and that there was a 'nice courtyard which was meant to keep the accused out. 'She later corrected this to state that: 'it was such a nice court yard, that you not say it belonged to the accused'. She testified that the accused raped the complainant twice and on the third occasion he whipped both her and the complainant. She was not able to give details of the incidents. During cross-examination she reverted to her testimony that the first time she was told was after the incident in the bush. She thereafter testified that there was a time she was told but the complainant asked her not to tell anyone. During cross-examination she testified that she questioned Fabian at the traditional meeting as she agreed with the accused to summon him to the meeting. At this time she knew about the rape for a long time already. She was scared of the accused and this was the reason why she did not publicly accuse him.

[29] This witness was confronted with the statement she made to the police wherein she stated that she noticed in May 2009 that her daughter was pregnant and when she demanded to know who the father was, the complainant informed her that it was Fabian. She only learnt about the allegation that the accused was the father during July 2009. She testified that it was not the first time she found out about the accused raping her daughter she was just too scared to talk about it although the accused never threatened her directly. She was scared to tell the truth to the police. According to this admission she lied to the police officers. She testified that she does not know how to determine the dates but the officers would put in the date according to her description of the time of year e.g. when they are planting or harvesting.

[30] The final witness of the State was Judea, the brother of the complainant. He testified that he called his mother and she informed him that his sister is pregnant. When he asked who impregnated his sister, his mother informed him that it was Fabian but she did not sound too sure about it. He requested his mother to send her to him to be closer to a clinic. The complainant did not want to disclose who the responsible person was. She returned with a police officer to the house after her second visit to the clinic. He only then learnt from the complainant that it was the

accused who impregnated her. She explained that she was afraid he might not want to help her if he knew and she was further threatened that she and her mother would be killed if she discloses the information. According to him he never had any quarrel with the accused nor did he ever insult the accused. He confirmed that there was a courtyard around the accused's house, that they kept their water inside the house and that the borehole was a stone throw away from the accused's house. He however confirmed that you could bring the water closer to where you are if you are sitting under the tree. He also confirmed that there was no courtyard during 2008 and that he encouraged the accused and his mother to build a courtyard.

[31] The accused testified in his defence. He testified that he was married to the complainant's mother. The reeds around the house had rotten away. There was therefore no courtyard in 2008. He had reeds which someone gave him to build the new courtyard. The complainant was not rude and she was obedient. According to him the complainant was influenced to implicate him in this matter. He emphatically denied having raped and impregnated his stepdaughter. He also denied having whipped the complainant.

[32] He testified that there were bundles of reeds that were under the tree and he at no time sent the complainant to fetch water as the water was kept under the tree which was next to the house. The water was taken inside the house during evening time. According to him his wife was the one who placed the water under the tree as she is the one who used the water for cooking which is done outside the house. He denies that he possessed a screwdriver. According to him the only reason for a person to have a screwdriver is a person who owns a radio. He also denies owning a sjambok as he does not own any cattle.

[33] The accused testified that he was informed during 2008 of the complainant's pregnancy and his wife sent him to the place where the person who impregnated the complainant lived. He went to the person's place and the person undertook to come to their place. His wife also sent him to inform the headman. The headman came along with his wife to the meeting. His wife's sister happened to visit at the time and she joined the meeting. Both the complainant and Fabian admitted at the meeting that Fabian was responsible for the pregnancy.

[34] During cross-examination he admitted that they ought to have reported the fact that Fabian was having sexual intercourse with the complainant who was underage. He denied that there was a courtyard but admitted that the aunt used to collect water from the borehole. During cross-examination he admitted that he met the complainant at a drinking place near her aunt's house. He could not remember the date this took place. He however denied that he instructed her to go home. He denied that he at any stage informed her that her mother was ill. He was confronted with the fact that this was not disputed by his counsel during cross-examination of the complainant. He maintained that Judea held a grudge against him and that Judea informed him that he can falsely make a case against him and even take his mother away from him.

[35] The complainant is a single witnesses in respect of all the incidents, save the assault with intent to do grievous bodily harm described in count 2. It is trite that this court may convict on the evidence of a single witness. Her evidence need not be satisfactory in every respect, provided the court finds that even though there were some shortcomings in the evidence of the single witness, the court is satisfied that the truth had been told (see *S v Unengu* 2015 (3) NR 777 (HC)).

[36] Mr Mudamburi, counsel for the State, submitted that the account of the complainant was straight forward, truthful and not shaken under cross-examination. Mr Nyambe, counsel for the accused pointed out a number of discrepancies in the testimony of the complainant and other witnesses called by the State.

[37] When evaluating the evidence the court takes into consideration that the complainant gave her testimony in chief on 18 October 2016, 8 years after the incident. She was cross-examined on 29 January 2018. The reasons for the delay is not that important but it is important to note that there has been a considerable passage of time from the date of the incident to the date she testified in court and a further passage of time after she gave her evidence in chief. The complainant however assured the court that she read her statement to remind her of the events. The court also takes into consideration that the deponents, when they made their statements to the police, made use of translators who spoke a different language to that of the deponents.

[38] The first difficulty the court experienced with the testimony of the complainant is the fact that there were no clear dates on which the rape incidents occurred. It was furthermore challenging for this court to determine the chronological order of the events.

[39] The testimony of the complainant was far from straight forward. This court found some material discrepancies and shortcomings in her testimony and some of these I have already highlighted above. There is sufficient reason for this court to warn itself as to the inherent danger of accepting the single testimony of the complainant.

[40] The complainant gave conflicting evidence in court in respect of whether or not she reported the rape incidents to her mother. There is also contradictory testimony of both the complainant and her mother as to the date of the report to her mother. At times it would appear that the complainant reported the incidents as it happened and at other times it would appear that her mother first noticed that the complainant was pregnant and only informed afterwards that she was raped by the accused. There are furthermore contradictions in respect of who she reported to be responsible for the pregnancy.

[41] The complainant's mother was a poor witness. She contradicted herself often in respect of when and what she was informed by the complainant. She furthermore appears to have a bias adverse to the accused as she accused him of marrying both her and her daughter. She also created the impression that she only became aware of the sexual activity of the complainant when she noticed that the complainant was pregnant and at other times she indicated that she was aware of the rape before the complainant became pregnant.

[42] The aunt's testimony in this regard was clear i.e. that she was informed of the rape after she noticed that the complainant was pregnant. This does not corroborate the testimony of the complainant that her aunt knew about the rape prior to her becoming pregnant.

[43] The court cannot under these circumstances exclude the possibility that the complainant never mentioned the fact that she was raped prior to the discovery that she was pregnant. Failure to report a rape *per se* does not mean the rape did not

occur but her contradictory testimony negatively impacts on her credibility as a witness.

[44] The second material aspect which is not satisfactory is the fact that the complainant gave different accounts as to who the father of the child is. It is not essential that it is proved that the accused was the father of the child as this is not necessary to prove rape. If the accused is proven to have impregnated the complainant it would be a fact pointing to his guilt and it would nullify his denial. It is unfortunate that the State did not subject the parties to paternity tests as this would have settled the issue of credibility without further ado. However in the absence of forensic evidence this court is left with the testimony of the complainant as to the paternity of the child. Her evidence in this regard is examined to determine her credibility as a witness.

[45] The complainant named both the accused and Fabian as the father of her unborn child. She explained that she was scared to implicate the accused at the traditional meeting as he had threatened her with a screwdriver. She admitted during her evidence in chief that she had a relationship with Fabian but she omitted to mention that she gave a false admission and the reason why she did so. It was only during cross-examination that her admission came to light. The complainant, when she first gave a statement to the police on 11 June 2009, omitted to mention her sexual relationship with Fabian. It was only on 24 October 2010 when she gave an additional statement disclosing her relationship with Fabian. There is thus a pattern of this witness selectively suppressing crucial information. In terms of her statement her mother discovered in January 2009 that she was pregnant. The meeting was arranged when it came to light that the complainant was pregnant. It would be natural to infer that the meeting took place soon after her return and the inference is that she already had sexual intercourse with Fabian prior to her return to her mother's house in January 2009. This is contrary to her testimony that the relationship started only in March 2009. In light of the contradictions and inconsistencies, it is reasonably possibly true that the accused did not impregnate the complainant.

[46] The complainant testified that the accused beat her only twice with the sjambok but it transpired during cross-examination that it was more than that and the

neighbour, who is also the headman, came to investigate the assault of the accused on complainant and her mother. The mother confirmed this incident but as I already indicated that it is not safe for this court to rely on her evidence. The headman was not called to testify despite the fact that he could have corroborated the complainant. The failure by the State to lead this witness is detrimental to its case given the fact that they bear the onus to prove the assault. The second assault the complainant was alone and she testified that she reported it to her mother. She suffered a deep cut wound on the second occasion. In her statement she indicated that the day after she left her mother's house and stayed with her aunt until the next year. There was no evidence that she reported this incident to her aunt and neither did she request her aunt to seek medical advice. She testified that it was up to her parents to take her for medical attention but she omitted to indicate that she went to stay with her aunt.

[47] The accused offered a bare denial. He denied having threatened the complainant with a screwdriver since he does not own one. His wife maintained that he had two and Judea mentioned that he saw that the accused had one. He further denied that there was a courtyard in 2008. His allegation that there was no courtyard in 2008 was confirmed by Judea. His wife and the aunt of the complainant maintained that there was a courtyard during 2008. The wife of the accused further gave an explanation regarding the fence which makes little or no sense. It is reasonably possibly true that there was no courtyard during 2008.

[48] The accused maintained that the version of the complainant that he sent her to fetch water inside the house is not correct since the water was kept outside under the tree for cooking purposes. The complainant, his wife and her son testified that the water is kept inside although the son conceded that you may bring the water outside to be close to you when you are outside. He denied that the complainant fetched wood in the bush as this was his duty whereas both his wife and the complainant testified that the complainant also used to fetch wood. I am not entirely persuaded that the accused's version in this regard is the truth. The fact that the accused is untruthful about the fetching of the wood must be seen in light of the fact that the complainant testified about incidents which occurred without giving any specific date. The wife of the accused testified that he was herding cattle at the time whereas the complainant testified that he followed her from the house to the bush.

[49] When evaluating the evidence I am reminded that the court must consider the evidence as a whole following the approach adopted in *S v Chabalala* 2003 (1) SACR 134 (SCA), where Heher AJA (as he then was) at 139i - 140b states the following:

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture in evidence.'

[50] I entertain serious doubt that the complainant told this court the truth. She deliberately omitted to tell the police about her sexual relationship with Fabian when she first reported the matter and failed to take this court into her confidence regarding her admission that he was the father of the unborn child. She contradicted herself in respect of when she commenced her relationship with Fabian. The complainant was not candid about her relationship with Fabian and it is conceivable that she implicated the accused as the father of the child so as not to disclose her sexual relationship with Fabian. The accused was of the opinion that the son of his wife fabricated these charges against him. The son of the complainant made a favourable impression and this court is satisfied that he harboured no ill feelings against the accused. The accused's allegation that he said he would make a case against him and that he will take his mother from him, to my mind is devoid of truth. The accused to my mind merely speculated about the son's involvement in the laying of the charges and it does not take the State's case any further.

[51] The complainant's mother's testimony cannot be accepted as corroboration that the complainant reported the rape to her prior to the discovery that the complainant was pregnant. The aunt categorically stated that the allegations of rape came to light after she noted that the complainant was pregnant.

[52] It would not be safe under these circumstances to rely on the complainant's testimony in respect of the rape incidents, the attempted rape and the assault with intent to do grievous bodily harm described in count 7 as the complainant was the only witness to these incidents.

[53] In respect of count 2 the assault was witnessed by her mother whose evidence was such that this court could also not rely on it. The complainant, as I already indicated was not a credible witness and I have pointed out the contradictions between her testimony in chief and during cross-examination. The headman who enquired from the accused why he was assaulting the complainant and his wife did not testify and the court makes an adverse inference that he could not corroborate the complainant and her mother in respect of this assault. I am mindful that the defence also had the opportunity to call this witness but there is no onus on the accused to prove his innocence. The State bears the onus to prove its case beyond reasonable doubt. I am not satisfied that the State proved the assault on the complainant beyond reasonable doubt.

[54] For the above reasons, I am not persuaded that the State proved beyond reasonable doubt that the accused committed the offences he has been charged with.

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

1. Count 1 – contravening section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) rape read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) – The accused is found not guilty and discharged;
2. Count 2 – Assault with the intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) – the accused is found not guilty and discharged;
3. Count 3 - contravening section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) rape read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) – The accused is found not guilty and discharged;

4. Count 4 - contravening section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) rape read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) – The accused is found not guilty and discharged;
5. Count 5 – Attempted Rape read with the Riotous Assemblies Act 17 of 1956 – the accused is found not guilty and discharged;
6. Count 6 - contravening section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) rape read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) – The accused is found not guilty and discharged;
7. Count 7 - Assault with the intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) – the accused is found not guilty and discharged.

M A Tommasi
Judge

APPEARANCES:

For The State:

Mr L Matota
Office of the Prosecutor-General, Oshakati

For The Accused:

Mr M Nyambe
Of Shikongo Law Chambers, Ongwediva

Instructed by Legal Aid