

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

JUDGMENT

Case no: CC 16/2012

In the matter between:

**THE STATE**

**v**

**SEM SHAFOISHUNA HAUFIKU**

**ACCUSED**

**Neutral citation:** *S v Haufiku* (CC 16/2012) [2019] NAHCNLD 40 (31 January 2019)

**Coram:** TOMMASI J

**Heard:** 22 October 2018

**Delivered:** 31 January 2019

**Flynote:** Criminal law – theft – sufficient to prove theft of property – the quantity or value of the items stolen is not an element of the offence of theft but is generally taken into consideration when it comes to sentencing or to alert the court as to the seriousness of the offence (See *S v Kauleefelwa* 2006 (1) NR 102 (HC) at 104E – G)  
Criminal law – housebreaking with intent to rob and robbery – the accused gained entry to a cuca shop by administering threats to the victim and got her to open the

door (break in). The accused found guilty of housebreaking as he used her as a tool to gain entry.

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**ORDER**

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- Count 1      Housebreaking with intent to steal and theft – The accused is found guilty.
- Count 2      Contravening section 2 (1) (a) of the Combating of Rape Act, 2000 (Act 8 of 2000) – Rape – The accused is found guilty.
- Count 3      Housebreaking with intent to rob and robbery – The accused is found guilty.
- Count 4      Contravening section 2 (1) (a) of the Combating of Rape Act, 2000 (Act 8 of 2000) – Rape – The accused is found guilty.

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**JUDGMENT**

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TOMMASI J;

[1]      The accused was charged with one count of housebreaking with intent to steal and theft, two counts of rape as defined in the Combating of Rape Act, 8 of 2000 and one count of housebreaking with intent to rob and robbery. He pleaded not guilty to all four counts.

[2]      The State alleges that the accused broke and entered into the *cuca* shop of Suoma Shoombe and stole N\$250 cash, a 750 ml richelieu valued at N\$72 and two bottles of castelo wine.

[3]      The remaining counts arose from the events which took place at the second *cuca* shop which belongs to Abed Kalenga. The State avers that the accused raped the complainant, an employee of Abed Kalenga, in her room while using physical force and /or threatening her with physical force (count 2). According to the State,

the accused thereafter, broke into the *cuca* shop by forcing the complainant to open the door, forcing her into submission with assault or threats of assault whilst wielding a knife. He then robbed her of the goods listed in annexure “A” (count 3). He thereafter returned with her to her room and raped her for a second time (count 4).

Count 1 (Housebreaking with the intent to steal and theft)

[4] The accused admitted that he broke and entered into the *cuca shop* of Suoma Shoombe at Etikilo Location on 18 July 2011 and that he took N\$50 and one bottle castelo wine.

[5] The admissions are tantamount to a plea of guilty. The accused admitted all the elements of the offence of housebreaking with the intent to steal and theft. He did not dispute the unlawfulness and intent. He only disputed the value and quantity of the goods he stole.

[6] The quantity or value of the items stolen is not an element of the offence of theft but it is generally taken into consideration when it comes to sentencing or to alert the court as to the seriousness of the offence<sup>1</sup>.

[7] Suama Shoombe, the complainant, testified that three bottles of wine were stolen. She later corrected herself and testified that only two bottles of Castelo wine were taken. She further testified that she left N\$250 cash in the shop the night before. Frieda Vitaleni, a neighbour, testified that she saw two bottles of Castello wine and half a bottle of Richelieu at the *cuca* shop of the complainant. The accused exercised his right to remain silent and did not testify in his defence and the evidence of the State was left unchallenged.

[8] I am satisfied that the State proved beyond reasonable doubt that the accused broke into the *cuca* shop of Suama Shoombe with the intention to steal and that he stole N\$250 cash, 2 bottles of Castello wine and 1 bottle of Richelieu brandy.

Count 3 (Housebreaking with the intent to rob and robbery)

[9] The accused admitted that he entered the shop of Abed Kalenga and that he threatened the complainant with a knife. He further admitted that he took one beer, a

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<sup>1</sup> See *S v Kauleefelwa* 2006 (1) NR 102 (HC) at 104E – G and *S v Undari* 2010 (2) NR 695 (HC), at page 699 para 13.

nokia cellphone, one luncheon roll, dunhill cigarettes and a knife. He once again disputed the list compiled by the State and did not expressly admit to breaking into the shop.

[10] The complainant testified that the accused kicked or forced the door of her room open and raped her. He thereafter asked her for money. He was wielding a knife at this time. She told him that she does not have money. It was common cause that he took her cell phone. He thereafter ordered her to open the *cuca* shop which she did. She opened the *cuca* shop and he took money and approximately three carrier bags containing goods. She was unable to say what he took. Frieda Vatileni, the complainant's co-worker, testified that she did stocktaking and discovered that cash and goods were taken. She was unable to say how much cash and what items accused took. Her testimony in this regard was not clear. This court may under the circumstances accept the accused's admission in respect of the goods he took.

[11] The State proved all the elements of robbery beyond reasonable doubt and the only issue for determination is whether the accused committed the offence of housebreaking with the intent to rob.

[12] In *S v Cupido & others* 1975 (1) SA 537 (C) the court held that where a person, by intimidation, forces another to do an act for him, the act is regarded as that of the first-mentioned person. Watermeyer J stated the following at page 538 E - H:

'It seems to me, however, that the present case can be decided on general principles. Under our law the actual perpetrator of a crime is not always the person who commits the *actus reus* with his own hands. ... All such cases seem to me to be cases where *the maxim qui facit per alium facit per se* would be held to apply.

Likewise if a burglar wished to gain entry to a house and, by the administration of threats to another, got the other person to do the breaking for him so that he could enter, it seems to me that the burglar would be guilty of housebreaking. If the threats were administered to the owner of the house, and the owner were to unlock the door so that the burglar could enter, the same considerations would logically apply, and it seems to me that it can make no difference whether the owner, at the time the threats are administered, is outside the house or, as in the present case, inside it. In each case the burglar would be using the owner as his tool to do the breaking for him.'

I agree with this dictum and see no reason why, the principle of the innocent agent cannot find application in this case. The accused applied force to the complainant and used her as a tool to gain entry into the shop of Abed Kalenga.

[13] I am satisfied that the State proved the offence of housebreaking with intent to rob and robbery of the items as admitted to by the accused.

Count 2 and 4 - (Contravening section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000 - Rape)

[14] The final determination is whether the State proved beyond reasonable doubt that the accused raped the complainant on two separate occasions. The State bears the onus to prove beyond reasonable doubt that he indeed perpetrated a sexual act under coercive circumstances on two occasions.

[15] The complainant's testimony was that she, during the night in question, was woken by some noises coming from the cuca shop. She was pregnant at the time. The accused kicked or forced the door open and grabbed her by her neck. He wanted to know if she knew him. She told him that she did not know him. He then enquired whether she knew Kaveli (her co-worker Frida Vatileni). The accused at some stage told her his name as well as his mother's name. She struggled and screamed and managed to flee out of the room.

[16] Once outside she noticed the accused had a knife. He dropped or tripped her and she fell to the ground. He then committed a sexual act with her. He scratched her with a knife on her upper lip during the sexual act. During cross-examination the complainant was not sure whether she saw the knife inside or outside the room. She confirmed that she was hit with the door on her face when confronted with her statement to the police. She later informed the court that the police did truthfully record she was hit in the face with the door. Her testimony that the accused cut her with the knife on her lip, was not recorded in her statement to the police.

[17] The accused, after having forced sexual intercourse with her, forced her to open the cuca shop and robbed her. He ordered her to lock up and to go back to her room.

[18] Back in her room he once again had forced sexual intercourse with her, only this time he put on a condom. She experienced severe pain and started bleeding. The accused dropped the condom on the floor when he was done and left. She informed the court during cross-examination that the accused removed the condom during sexual intercourse and thereafter continued having sexual intercourse with her. She testified that she had forgotten about the fact that the accused took off the condom during sexual intercourse with her.

[19] The complainant further testified that she reported the matter to Frieda, a man named Peter, and the village headman. Ms Hamalwa of the Women and Child Protection Unit took her to Okahao State Hospital where she was examined and took her black panty.

[20] The accused did not testify. The court thus has to determine on the evidence adduced by the State whether the state proved beyond reasonable doubt that the accused committed a sexual act under coercive circumstances.

[21] The complainant is a single witness and it is trite that the court must apply caution given the inherent dangers of relying on the uncorroborated testimony of the single witness. In *S v Sauls and Others* 1981 (3) SA 172 (A) at 180 D-E, Diemont JA states that: '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. ...It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

[22] The accused did not dispute that he committed the robbery and that he had a knife. This places the accused at the scene of the crime. His identity has thus been proven beyond reasonable doubt.

[23] The complainant's testimony that she had been raped twice was confirmed by those to whom she reported it. The majority of these witnesses confirmed that shortly after the incident she told them that the accused removed the condom during sexual intercourse. There is however a discrepancy between her evidence in chief and her testimony during cross examination in respect of whether the accused removed the

condom during sexual intercourse or afterwards. It must be borne in mind that the complainant testified almost two years after the incident.

[24] She furthermore was confronted with the difference between her statement to the police that she was hit by the door on her lip and her testimony in court that she was cut with a knife on her lip. The medical report reflects an injury to the lip. The accuracy of this report was however greatly challenged during cross examination and I shall revert to this issue later in this judgment. The court takes into consideration the fact that the accused admitted that he had a knife which he used to force the complainant to open the door of the cuca shop.

[25] Ms Mugaviri, counsel for the accused, pointed out that the complainant failed to mention that she struggled again during the second rape when she gave her evidence in chief. She also highlighted the fact that her version that there were no close neighbours was not corroborated by her co-worker. Frieda testified that there are people living 4 – 5 meters from the place where she was raped. It is my considered view that these inconsistencies and contradictions are not material.

[26] Detective Irmaly attended the scene on the same day and compiled a photo plan which was handed into evidence by agreement. One of the photos depicts marks in the sand close to the room of the complainant. He testified that the complainant pointed out the place where she was raped outside her room and the sand in the photograph shows visible signs of a struggle. The photo plan also depicts the room of the complainant and a blood stained and used condom on the floor of the room. These photos are consistent with the testimony of the complainant that she was raped on two occasions and at two different places.

[27] The record of the proceedings in the lower court was handed into evidence by agreement. The accused was charged with one count of rape, robbery and housebreaking with intent to steal and theft. He pleaded guilty in terms of section 119 of the Criminal Procedure Act to all three counts. When questioned he admitted that he was the one who committed the offence, that he inserted his penis into the vagina of the complainant. He thereafter explained as follow: 'I found her at the shebeen, she was selling. I entered inside and I held her. I then committed a sexual act/sexual intercourse with her.' Mr Shileka, counsel for the State, submitted that the plea in terms of section 119 forms part of the evidential material and that the

accused was required to challenge the correctness of the record of proceedings. It is indeed so that the admissions made during section 119 proceedings constitute evidential material. The accused made inculpatory admissions which were left unchallenged.

[28] Ms Mugaviri further submitted that the reports by the Forensic Science Institute ought not to be relied on in view of the State's failure to prove the chain of custody and the likelihood of contamination of evidence.

[29] Dr Onele compiled the medico-legal examination report in respect of a patient whose name he omitted to insert on the report. He also compiled the form for the collection of evidence form. The medico legal report recorded the following information: The date of examination is 19 July 2011 and the time is 14H40; the date of birth of the patient is 4 December 1974 (this corresponds with the complainant's birth certificate handed into evidence by agreement.); the patient was 13 weeks pregnant; the gynaecological examination reflects erythematous on both sides of the *labia minora* and records no other injuries to the genitalia. Samples were taken and the seal number of the evidence collection kit is recorded as 07N2A0686 in section F of the report. A sticker bearing this number also appears at the top of page one of the medico legal examination report. The report further records that the specimens were handed to Sgt. J N Hamalwa who also appended her signature to confirm receipt.

[30] The duplicate original Collection of Forensic Evidence form which was handed into court bears the same seal number which appears on top of the medico legal examination report as well as at section F of the same report. It is noted that the seal number is not written or pasted on this form but printed. This form also makes provision for the name of the patient to be inserted. The surname and initials of the patient were not clear on the duplicate original. The court requested for the original to be obtained. The original form clearly indicates that the name and surname of the patient is lipinge H H and her identity number is 73120410217. This name and identity number belongs to the complainant. This form reflects that the evidence collection was done on 19 June 2011 at 14H40 and the date of incident is given as 18 July 2011 at 22H30. This is clearly a genuine mistake. The date of the incident is correctly stated.



[31] Dr Onele was extensively cross-examined on his failure to insert the name on the medico legal examination report and the incorrect date when the samples were collected. I am satisfied that Dr Onele examined the complainant and recorded his findings in the medical legal report and the Collection of Forensic Evidence on the same day and at the same time. I am satisfied that he sealed the box containing the Forensic Collection kit and handed same to Sergeant Hamalwa. The Collection of Forensic Evidence form reflects that the following evidence was collected: (a) a panty (b) an oral swab; (c) hair cutting and combing; (d) pubic hair; (e) genital swabs of the vulva, vestibule, vaginal vault and cervical OS and (f) an anal swab.

[32] The same report was completed for the accused on 21 July 2011 by Dr Mundjeso who likewise took sample specimen and handed it to Warrant officer Bernadette Andowa. The seal number of the evidence collection kit was not recorded by the Doctor but the number which appears on page 1 of the report reflects the number 07N2A0689. A collection of Forensic Evidence form was similarly completed for the accused with the same seal number as the medical legal examination report. This form indicated that genital swabs of the shaft and glans were obtained. Warrant Officer Andowa gave the sealed box to Sergeant Hamalwa.

[33] Sergeant Irmaly testified that he collected the condom from the scene and he booked it into evidence. Sergeant Hamalwa testified that she collected it from the scene and placed it inside a brown envelope and kept it in her office. She also kept the two sealed boxes (Evidence Collection kits of the complainant and the accused) in her office until 29 July 2011 when she handed it over to Detective Sergeant Mutubulwa to take to the Forensic Science Institute in Windhoek. An Application for Scientific Examination which was handed in by agreement, records this handover. This form reflects that the following exhibits were included: (a) a rape kit bearing the serial number 07N2A0686 which contains genital swabs of the vulva, vestibule vaginal vault and cervical os; (b) the rape kit of the accused with serial number 07N2A0689 containing a swab of the shaft and glans; and (c) a condom. The condom was placed in a brown paper bag.

[34] During the trial the State applied for a reference sample to be obtained from the accused (buccal swabs). The accused agreed and Detective Sergeant Mutumbulwa testified that she Sergeant Hamalwa on 15 May 2014 took the accused

to Dr Mdala and he collected a blood sample which was placed in a tube with a purple cap. She placed it in a forensic bag no 35524 and placed it in a freezer where they keep exhibits. On 20 May 2014 she took it to the Forensic Science Institute in Windhoek. Dr Mdala confirmed her testimony. An Application for scientific examination form reflects that Sergeant Hamalwa completed the form and signed it and that Sergeant Mutumbulwa handled the exhibit which was marked "Exhibit D".

[35] There is no evidence that the collection of rape kits were tampered with. The National Forensic Science Institute Report indicated that these kits were sealed. The condom was placed in brown paper envelope and stapled. There is also contradictory testimony as to who collected the condom from the scene and where it was kept. In light hereof the examinations done on this exhibit ought not to be relied on.

[36] The National Forensic Science Institute completed four reports. The first report compiled on 15 May 2013, concluded that semen was immunochromatographically detected on the genital swabs, external anal swab, rectal swab and panty of the complainant as well as on the condom.

[37] The second report compiled on 14 October 2014 reflects the results of the examination of the vulva swab of the complainant. The sample was subjected to differential extraction separating the epithelial fraction from the sperm fraction. Sufficient amplifiable DNA was found to proceed with an STR analysis and it resulted in a mixed profile consistent with having originated from at least two individuals, one of which is a male. The epithelial fraction yielded a full profile, the contributor whereof is female. The semen fraction yielded a mixed profile consistent with having originated from at least two individuals one of which is male. This report recommends that the known reference samples of both the complainant and the accused ought still to be subjected to STR typing for comparison purposes.

[38] The third report compiled on 10 April 2014 reflects that a Reference blood sample obtained from the complainant was used. It is not known how this was obtained and submitted as no form to this effect was submitted into evidence. This sample was subjected to DNA analysis and it resulted in a female profile. This profile was matched to the DNA analysis of the vulva swab, the panty and the condom. The

report however states that in the absence of a blood or buccal sample of the accused, no forensic inference could be made.

[39] The forth report compiled on 7 July 2014 indicate that the exhibit subjected to DNA analysis was a reference buccal swab (exhibit D). Exhibit D however is not a buccal swab but a blood sample taken of the accused. There is no document or testimony indicating that a buccal swab was collected of the accused.

[40] Given the discrepancy in the report compiled on 7 July 2014, the court cannot rely on the forensic results.

[41] The evidence of the complainant is credible and undisputed. It is in addition corroborated and consistent with the objective evidence (photographs) admitted into evidence. The inculpatory plea of guilty by the accused in the district court further corroborates the complainant's testimony that she was raped. The formal admissions by the accused place the accused at the scene with a knife. The evidence calls for a rebuttal. In *S v Auala* 2010 (1) NR 175 (SC) the court referred to the following citation in *S v Boesak* 2001 (1) SA 912 (CC) (2001 (1) SACR 1; 2001 (1) BCLR 36):

'The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.'

[42] I am satisfied that the State proved beyond reasonable doubt that the accused forcefully committed a sexual act with the complainant on two separate occasions.

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

Count 1      Housebreaking with intent to steal and theft – The accused is found guilty.

- Count 2      Contravening section 2 (1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) – Rape – The accused is found guilty.
- Count 3      Housebreaking with intent to rob and robbery – The accused is found guilty.
- Count 4      Contravening section 2 (1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) – Rape – The accused is found guilty.

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M A TOMMASI

JUDGE

Appearances:

For the State:

Mr R Shileka  
Office of the Prosecutor General, Oshakati

For the Accused:

Ms G Mugaviri  
Of Mugaviri Attorneys, Oshakati  
Instructed by Legal Aid