CASE NO.: SA 06/2001

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE APPELLANT

AND

GODFRIED VRIES

RESPONDENT

CORAM: Strydom, C.J.; O'Linn, A.J.A. *et* Chomba A.J.A.

HEARD ON: 1 October 2001

DELIVERED ON: 7 December 2001

APPEAL JUDGMENT

STRYDOM, C.J.: The respondent appeared in the High Court before GIBSON, J, on a charge of rape. It was alleged that he, on the 23rd December 1995, at or near Katutura, in the district of Windhoek, wrongfully and unlawfully had sexual intercourse with one SE, a female person aged 10 years. The respondent pleaded not guilty and was represented by a Legal Practitioner, Mr. Van Vuuren. After evidence was heard the respondent was convicted of attempted

rape and sentenced to seven years imprisonment of which two years were suspended.

The appellant was not satisfied with the conviction and applied for leave to appeal. This application was refused. A petition to this court was successful and the appellant was granted leave to appeal against the conviction of the respondent of attempted rape. The main thrust of the appellant's appeal was against the conviction of attempted rape notwithstanding the finding of the Court-*a*-*quo* " .....that the State had proved beyond reasonable doubt that the accused did insert his penis into the complainant's private parts and that the accused did intrude into the complainant's labia as far as the labia minora."

Miss Verhoef, who also appeared in the Court-*a*-*quo*, represented the appellant whereas Mr. Potgieter appeared on behalf of the respondent.

In the light of the Court-*a*-*quo's* finding, the first issue which must be decided, is what in our law constitutes the crime of rape. In this regard Counsel for the appellant submitted that the slightest penetration of the male genital organ into the genital organ of the female would be sufficient to constitute the crime of rape. I did not understand Mr. Potgieter to dispute that that was the law. His attack on the judgment of the Court-*a*-*quo* is based on the finding of the learned Judge that there was proof beyond reasonable doubt that there was an intrusion into the vulva of the complainant with the penis of the respondent. In fact Counsel for the respondent submitted that on the medical evidence it is not even sure whether the injuries, caused to the labia minora of the

complainant, was caused by the penis of the respondent or by fondling of the organ with his hand, as was testified by him.

Various excerpts from the judgment by the learned Judge-*a*-*quo* demonstrate the correctness of the submission made by Counsel for the appellant namely, that the Court was satisfied that penetration, in this instance, took place into the labia and as far as the labia minora by the penis of the respondent. I have already referred to one such extract, which is set out on page 118 of the record. On page 114 of the judgment the Court, referring to the medical evidence, stated as follows:

> "The doctor was very firm that while penetration into the vagina was excluded penetration of the labia minora could have occurred."

Further, down the same page, the following was stated:

> "But he (the doctor) did agree with counsel in cross-examination that if the penis had gone deep inside the vagina he would have expected to find greater injuries than there were on the complainant. This answer though noted does not in my view detract from the evidence of the complainant because she was very clear when she said penetration was only a little bit."

The following extract taken from page 115 of the record, is to the same effect:

> "At the end of the doctor's evidence it came over to me as absolutely certain that there was an intrusion into the complainant's private parts, the labia minora, with an object other than a finger or a rubbing with a finger."

Because of the findings, set out above, the Court concluded as follows on page 118, namely:

> " In the result while the accused intruded into the complainant's labia minora with his penis he did not effect penetration as defined in this type of charge. He is only guilty in my finding not of rape but of attempted rape."

As I understand the above extracts from the judgment of the Learned Judge-*a*-*quo* she was satisfied that there was an intrusion per penis into the complainant's labia as far as the labia minora. Whether one calls it an intrusion or penetration does not seem to me to make any difference as long as it is thereby understood that such intrusion/penetration was accomplished by the respondent by means of his male genital organ. The further finding of the Court that the respondent did not thereby effect penetration as defined in this type of charge, and the consequent conviction of attempted rape, postulate in my opinion that the Court found that penetration by the male organ into the vulva of the female organ did not constitute the complete crime of rape. The learned Judge further explained this when she refused leave to appeal against the conviction. See p. 156 of the record. In this regard reference was made to certain reported cases and the learned Judge stated that such cases were more in accord with the dictionary meaning of the word "vagina". The Court then referred to The Shorter Oxford Dictionary.

Bearing in mind that the meaning of the word vagina as given in the said dictionary as "the canal between the uterus and vulva of a woman....", it

seems to me that it would not be wrong to conclude that the learned Judge was of the opinion that to constitute the crime of rape there should be penetration of the vagina by the male genital organ.

Me. Verhoef referred the Court to many cases. A reading of these cases shows that the issue of penetration, and what would be sufficient to constitute the crime of rape, was not always addressed and when addressed it was perhaps not always made clear what was meant thereby. See R v Theron, 1924 EDL 204; R v Giles, 1926 WLD 211; R v V, 1960(1) SA 117(T); R v E, 1960(2) SA 691(FC) and S v Molefe, 1969 2 PH H213(Bot.). Based on the above cases and other authority such as van Leeuwen, Censura Forensis, the author, I.E. Milton, S.A. Criminal Law and Procedure, Vol. II, 3rd Edition, p 448 states in this regard as follows:

> " (2) The slightest penetration is sufficient. Once penetration has occurred the necessary element for liability of the male is established. It is thus irrelevant that the male does not emit semen, nor does it matter that the woman's hymen is not ruptured in the act."

In note 122 the learned writer, discussing the nature of the penetration required, states:

> "That is, entry (in the sense of *res in re*) into the labia (the anterior of the female genital organ) is sufficient."

See also Snyman, Criminal Law, third edition. In an article in the South African Law Journal, Vol 108, 1991, p 148, Prof. J.M.T. Labuschagne, Professor of Law at the Pretoria University, also addressed this issue. The article is titiled Die

Penetrasie Vereiste by Verkragting Heroorweeg. (The Penetration Requirement for Rape Reconsidered – my translation.) The learned author referred to and discussed this issue with reference to what is required by the law of various countries. In regard to the position in South African law the following is stated on p150, namely:

> "In die hedendaagse Suid-Afrikaanse reg word verkragting gepleeg deur die geringste mate van penetrasie van die vroulike geslagsorgaan (blykbaar die vulva) deur die van die manlike geslagsorgaan." (In current South-African law rape is committed by the slightest penetration of the female genital organ (apparently the vulva) by the genital organ of the male. – my translation.)

Labuschagne, op cit, at p. 151 points out that according to English law penetration of the labia was sufficient to constitute rape. (See Smith and Hogan: Criminal Law, Eighth ed. P 151.) In the case of S v K en 'n Ander,1972(2) SA 899(AA) the appellants were convicted of rape in the Court-*a-quo* and the first appellant was sentenced to death and the other one to 15 years imprisonment. They appealed against their sentences and the Court of appeal came to the conclusion that this was not an extreme case and altered the sentences to ten years and three years respectively. In the course of the judgment the Court mentioned the fact that it was common cause that penetration went beyond the labia but that the hymen was still in tact. Although the case dealt with sentencing and not with what would constitute penetration for the purposes of rape, the Appeal Court accepted, so it seems, that there was penetration to constitute the crime of rape. See also in this regard the judgment of the Namibian High Court in S v Immanuel Mbai, case no.:CC94/98, unreported, delivered on 1998/06/03. However in the case of S v

F, 1990(1) SACR 238 (AD) the following clear statement was made by Kumleben JA who stated on p 244g – h that in law the slightest penetration of the male genital organ into that of the female would constitute the crime of rape.

Dealing with this issue the Court-*a*-*quo* found support for her view in the cases of R v Theron, *supra*, and S v Molefe, *supra.* As was pointed out by Ms. Verhoef the Court in Theron's-case did not decide that vulvae penetration was not sufficient to constitute the crime of rape. What the Court decided was that there was no evidence of any degree of penetration and concluded that the accused was only guilty of an assault with intent to commit rape. The Molefe-case is a case in point. However this case was decided in Botswana and was at the time not in accordance with English law on this point. (See Archbold, 36th edition, para 2879).

Under the circumstances I have come to the conclusion that the submissions made by Counsel for the appellant are correct and that to constitute the crime of rape the slightest penetration of the male genital organ into the vulva of the female genital organ will suffice. It follows therefore that on the finding of penetration by the Court-*a*-*quo* the respondent should have been convicted of the crime of rape and not an attempt to rape. However this is not the end of the matter as Mr. Potgieter submitted that the State did not succeed in proving even this slight degree of penetration. In fact, as was previously pointed out, Counsel submitted that the respondent only fondled the private parts of the complainant and is therefore only guilty of indecent assault.

It is clear that the Court-*a-quo* did not accept the version of the respondent that he only fondled the private parts of the complainant. In this regard the complainant testified that she and the respondent were lying on the bed on their sides and facing each other. After he had removed her panty and also pulled down his own shorts and underwear he then parted the lips of her genital organ with his fingers and inserted his penis into her private parts. She said that he then made up and down movements with his buttocks and she felt pain. He later turned her on her back and repeated the whole process. At the time they were both covered with a blanket. All this happened in the presence of another 10 year old girl, namely EE. EE testified that the complainant and the respondent were first lying side by side but that the respondent later lay on top of the complainant and that she saw him making up and down movements with his buttocks. Both little girls also testified that they saw the penis of the respondent and that it was erect.

After the respondent was arrested he made an exculpatory statement to the police in which he stated that he did not know what had happened on that particular day because he was totally drunk and that he had not slept the previous night. He ended this short statement by saying that he did not know whether he did it or not. This latter part is seemingly a reference to the allegation that he had raped the complainant. This statement was in total conflict with his evidence in the Court where he could describe in detail what had happened on this particular occasion. Respondent, not surprisingly, had great difficulty in explaining this discrepancy. Although the statement was

taken some two days after the event the respondent said that he was still so confused that he did not want to tell the police something which he was not sure of and that was why he said that he did not know what had happened. Only afterwards, and when he had time to reflect, was he able to put everything together.

There is evidence that the respondent was intoxicated. A blood sample taken at the time showed that the concentration alcohol per 100 ml. of blood was 0,30. However it was never part of the respondent's case that he was so drunk that he did not know what he was doing or that he was not capable of forming the intent necessary to commit the crime of rape. In fact the respondent testified that he knew what was going on. This was also demonstrated when he gave detailed evidence of what had happened when he testified.

There are other unsatisfactory features in the evidence of the respondent to which the learned Judge-*a-quo* referred in her judgment. The respondent testified that whilst he was busy fondling the complainant she seemed to have enjoyed it. This can hardly be so where that fondling resulted in a bruising of the labia minora. The respondent was also mindful of this and he denied that he had caused the complainant any injury or that she was crying when she left him. I agree with the Judge that these lies go a long way to destroy the evidence of the respondent. In my opinion the learned Judge correctly rejected the evidence of the respondent that he was only fondling the private parts of the complainant and correctly accepted the graphic description of the

complainant of what had happened. Complainant's evidence on this issue was not shaken under cross-examination and she was to a certain extent supported by the evidence of E. There is also the evidence of SE, the uncle of the complainant, that she was crying when he came to fetch her at the house of the respondent, which evidence supports the version of the complainant and contradicts that of the respondent.

The question remains whether the appellant proved beyond reasonable doubt the requirement of penetration to constitute the crime of rape. Regarding this issue I have already referred to some of the evidence given in this regard by the complainant. To this must be added her evidence given under cross-examination. She first of all admitted that prior to this incident she did not know what was meant by the words sexual intercourse. She further stated that the respondent penetrated her with his penis whilst they were lying side by side and again when she was lying on her back with the respondent on top of her. She stated that this penetration was a little bit deep and when she felt the pain she could then feel how deep it was.

In regard to the evidence of penetration I think that it would be dangerous to accept the evidence of the complainant at face value. That is not so because she was lying to the Court but because of her total inexperience in matters concerning sexual intercourse. In the nature of things her opinion of a penetration could only be based on what she felt. This evidence must be contrasted with that of the doctor who was of the opinion that if there were such penetration he would have expected more injuries. Although the

evidence of the complainant that the respondent parted the lips of the labia can in my opinion be accepted, the fact of the matter is that an intoxicated respondent, who could in any event most probably not see what he was doing did not, by doing so, facilitate a possible easier way of entry.

The only finding by Dr. Ashour, which indicates sexual interference with the complainant, was the finding of recent bruises on her labia minor. These bruises were found on the right side of the labia minora. All else were normal and the hymen of the complainant was intact. This caused the doctor to conclude that the injuries were caused by external manipulation with a hard or soft object such as a penis or anything else, probably by just rubbing with such an object on the labia minora. The evidence of the complainant that she felt the penis of the respondent inside her thing was put to the doctor by Me. Verhoef and he was asked whether his findings were consistent with what was testified to by the complainant. The doctor said that it could be possible. Also when the complainant was lying on her back it was possible that a rubbing of the penis could have caused the injuries. Lastly Counsel asked the doctor whether penetration of the labia majora and minora was possible. The answer of the doctor was that it could be possible.

Under cross-examination Dr. Ashour stated that it was not very likely that a finger caused these injuries although he did not exclude the possibility. The witness was asked by the Court whether the labia minora was situated deeper than the majora and the doctor’s answer was no, it was superficial. On a further question whether it was situated on the inner part, seemingly of the

vulva, the doctor said yes but he repeated his answer that it was superficial. On a direct question by Counsel for the defence whether he would say that in this case penetration took place the doctor answered as follows:

> "I would say that penetration to that labia minora or labia majora, both of them, could be highly suspected. Because I have written external manipulation was highly present for such case. But I do not know from the object or from penis or anything. It could be anything of these. But it is highly suspected to be present in such case."

Mr. Potgieter pointed out that many of the answers given by the doctor were difficult to understand. There is no doubt that the doctor had a problem expressing himself clearly in English. The above answer is one example of many. Looking at the above answer it is not at all clear to me whether the doctor wanted to convey that there exists a high degree of suspicion that penetration did take place or whether it is suspect to a high degree that it did not take place. The reference to "external manipulation" is also ambiguous. Does it mean that something external was responsible for the injuries or does it mean that the manipulation was external i.e. not internal?

In re-examination Counsel for the State asked Ashour whether a small child undergoing the trauma of a rape would be able to differentiate between something, which she feels deep inside her, or something, which she only feels superficially. This question was obviously asked with a view to reconcile the evidence of the complainant when she said that she could feel that penetration occurred " a little bit deep" with that of the doctor. The witness

declined to express any opinion in this regard. This, so it seems to me further demonstrates that little reliance can be placed on the say so of the complainant as to whether there was penetration per penis into her private parts or not. It would even be more difficult for an inexperienced person, such as the complainant, to express an opinion with any certainty where it is clear that even if it is accepted for the sake of argument that there was any penetration that it was of a very superficial nature.

Another aspect, which is of concern, is the lack of medical evidence as to the development of the complainant. From the evidence of Dr. Ashour it is clear that the complainant, who was ten years old, had not yet reached puberty. Although the doctor testified that the development of her genital organ was normal it is not at all clear whether thereby is meant that her development is normal for a little girl of 10 years which may be quite different from the development of a girl well into her puberty. This is an aspect which may have a bearing on the question whether there was penetration or not and in a case such as the present where penetration, or the lack thereof, is an issue, prosecutors must ensure that all relevant evidence is placed before the Court. I must further point out that the medical evidence is not at all clear where the bruising occurred on the labia minora. The doctor testified that it was on the right side but did not say whether it was on the inside or the outside of the lip or on the edge thereof. The sketch on the J88 is not of much help and seems to indicate that the bruising was mostly on the outer edge.

Lastly I must refer to the evidence of EE. She claimed that she saw that the penis of the respondent did penetrate the genital organ of the complainant. What is more she was even able to give the Court an estimation of how deep this penetration was namely from between three to four centimeters. The Court-*a*-*quo*, correctly in my view, did not base its finding that there was penetration on this evidence. It is first of all, given the evidence of the complainant that she and the respondent were covered with a blanket, highly questionable whether the witness could see anything. As I understood the evidence of complainant the blanket only came off when E pulled her out from under the respondent at which moment the respondent then fell off the bed. Also given the position of the bodies of the complainant and the respondent, with the latter lying on top of the complainant, it seems to me highly unlikely that the witness would have been able to see what she professes to have seen and, what is more, to provide the Court with an estimation of how deep such penetration was. In my opinion this part of the evidence of E must be rejected.

Bearing in mind all the evidence I am not satisfied that it was proven beyond reasonable doubt that there was penetration of the genital organs of the complainant. The medical evidence, at best for the appellant, does in my opinion not go further than raise the possibility that there was penetration as required by law but on the medical evidence it is difficult to conclude that this was the only reasonable inference to be drawn from the evidence. In my opinion the various answers given by the doctor did not exclude other reasonable possibilities, e.g. that the injuries could also have been caused by the penis of the respondent rubbing on the vulva without there being

penetration. I do not agree that the evidence of the complainant cleared up this uncertain evidence. Her evidence was not, as was found by the Court-*a*-*quo*, that penetration only occurred a little bit. Her evidence was that penetration was a little bit deep into her genital organ, which is not supported by the medical evidence especially where the doctor was at great pains to point out how superficial the labia minora was.

Under the circumstances I find that the appellant was correct that in our law the slightest penetration of the female genital organ by that of the male genital organ would constitute the crime of rape. However I am not satisfied that it was proved beyond reasonable doubt that there was penetration as required by the law and consequently the appeal must be dismissed.

In the result the appeal is dismissed.

(signed) STRYDOM,C.J.

I agree.

(signed) O'LINN A.J.A.

I agree.

(signed) CHOMBA A.J.A.

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