CASE NO.: SA 08/2001

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ALBERTOS MONDAY ACCUSED

AND

THE STATE

RESPONDENT

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

HEARD ON: 9 October 2001

DELIVERED ON: 21/02/2002

APPEAL JUDGMENT

O'LINN, A.J.A.:

SECTION A:

INTRODUCTION:

The appellant was convicted in the High Court on 19th May 2000 on a charge of Rape, read with the provisions of section 94 of the Criminal Procedure Act, Act 51 of 1997. He was sentenced to twelve (12) years imprisonment.

The trial judge, Teek, JP, refused to grant leave to appeal to this Court. This Court however, granted leave to appeal but only against conviction.

Mr. Cohrssen appeared for the appellant before us, *amicus curiae,* and Ms Lategan appeared for the State.

For the purpose of convenience, the appellant will hereinafter be referred to as the accused and the respondent as The State. In view of the tender years of the victim, the said victim will hereinafter be referred to as Ms. L., her sister as L1. and her mother as Mrs. D.

The State contested the appeal. Before the hearing of appeal, the Chief Justice, after consultation with the other judges of appeal, gave the following notice to counsel through the medium of the Registrar of the Supreme Court:

> "Should the allegations by the accused that he was not suffering from gonorrhea, not have been investigated and if so, what is the effect if it was not so investigated?"

This issue was raised *mero motu* by this Court because, when the alleged victim was examined by the medical practitioner, Dr. Linda Liebenberg after the complaint was lodged, she was found to suffer from gonorrhea. The accused, although available, was not examined for gonorrhea, but a sample of his blood was drawn to be examined for other purposes.

During the accused's trial and in the course of his cross-examination of Dr.

Liebenberg, the accused indicated that he did not suffer from gonorrhea and suggested to the Court and to Dr. Liebenberg that he should be examined to establish whether or not he suffered from gonorrhea. Dr. Liebenberg expressed the opinion that such an investigation would be futile at that stage and counsel and the Court did not take the matter further.

The accused conducted his own defence after Mr. Neves, the legal practitioner instructed to defend the accused by the Legal Aid Directorate, withdrew before plea and the Directorate refused to appoint another counsel.

The charge contained in the indictment was changed on the application of the prosecutor, Ms. Lategan, before the accused was requested to plead. The relevant part of the charge originally read:

> "In that on or about May 1999 and at or near Katutura in the district of Windhoek the accused unlawfully and intentionally had sexual intercourse with Ms. L., a female person, under the age of consent, namely 8 years old."

The time of the alleged offence was changed to read: "… From November 98 until and including May 1999…".

In the State's summary of substantial facts it was alleged:

> "The accused, who is a family friend, had sexual intercourse with the complainant on three different occasions during May 1999 at his house in Katutura in the District of Windhoek."

The particulars in this summary remained the same and was thus inconsistent

with those contained in the indictment as amended.

SECTION B:

THE MAIN GROUNDS ON WHICH THE APPEAL WAS ARGUED:

1. THE ACCUSED DID NOT HAVE A FAIR TRIAL:

Counsel, Mr. Cohrssen, contended that:

1.1 The manner in which Mr. Neves withdrew from the defence constituted an irregularity in the proceedings.

The facts relating to this issue as it appears from the record are:

At the outset of the trial before plea, Mr. Neves made the following announcement:

> "My Lord I have to inform the Court that at this stage I have to withdraw as legal practitioner of the accused and I will place the following on record. I have discussed the contents and the consequences of this matter with my client I did inform him of the possibility of a plea of guilty and I was suddenly faced with the response that I'm forcing him to plead guilty. Next issue that I was requested was to ask for a postponement so that one of the defence witnesses could be summonsed to be here. I informed my client that we do not need that witness at this stage, it is the State to conduct their case and when it is our turn we will then surely have enough time to have the witness here. Then the next thing I was requested My Lordship was to apply for bail of which I do not have instructions. In light of the above I humbly apologize to the Court for

> wasting its time but I cannot proceed in such a confusion of instructions and accusations. I did not force anybody to plead guilty, those are my submissions when consulting with a client and I have the evidence before me and it does not look good My Lord if I can put it in plain and simple English. Due to this My Lord I will inform Legal Aid of what happened and my reasons for withdrawing and I will leave it then in their hands to decide if they want to appoint another practitioner for Mr. Monday. As the Court pleases."

The Court then put the position to the accused as follows:

> "Now the lawyer want to withdraw because you are accusing him of unethical behaviour and are giving him conflicting instructions."

The interpreter then conveyed the accused's reaction to the question as follows:

> "Mr. Monday is saying he received a lawyer but the lawyer cant force him to plead guilty because he didn't do it. So that's why he asks for cancellation."

The Court then said:

> "Are you saying the lawyer was forcing you to plead guilty or not?"

The accused replied, according to the interpreter:

> "Since the lawyer said he should plead guilty

> because if not they are going to give him maybe 8 years or 15 years imprisonment."

Thereafter, Ms. Lategan, for the State, expressed herself as follows:

> "As the Court pleases Your Lordship. Well if Mr. Neves don't see his way open to continue in this matter my only concern is with the children that has to testify and it appear that most likely if another representative from Legal aid is obtained for the accused it will go the way of a trial. Therefore I would want to suggest that Mr. Neves report back to the Legal Aid Board and see whether they can acquire another person for tomorrow because the matter has been set down for three days. I must also just inform the Court and Mr. Neves is also aware thereof that the J88 examination was performed by Dr. Liebenberg who is currently not in the country anymore and has moved to South Africa where she is busy with further studies. ... I have spoken to her this morning. An arrangement is made, there is also other cases I understand from my colleagues where in which she would have to come and testify and arrangements have been made with her for the 18th and the 19th of May on which date she will come just to testify in several post-mortem and J88 examinations. So this matter would in any event not conclude this week with the State's case but as I said because of the youthfulness of the complainants I also would beg of the Court that it is not postpone for a long period of time and that the children still testify about it when it's fresh in their memories."

The Court then wished to know from Mr. Neves whether there was a possibility for someone else to take over the defence by the next morning at 10h00. Mr. Neves responded:

> "Your Lordship I will try my outmost best to inform Legal aid and to inform them of the seriousness of the matter and of the State's request and that there is young children involved in this matter and ask them to try their utmost best to obtain a new legal representative for Mr. Monday. Your Lordship I just wish to place on record further that when Mr. Monday refers to 8 years imprisonment and 10 years imprisonment it was explained to him the two consequences of wasting the Court's time when there is no case My Lord apparently on my views and the consequences of wasting and being unethical..."

The Court in conclusion excused Mr. Neves in the following terms:

> "Mr. Neves you are excused you may withdraw from the case and please try to find a substitute in your place for tomorrow morning 10h00."

The Court then adjourned. When the Court resumed the following morning at 10h00, Ms. Lategan made the following report to the Court:

> "When I by this morning 09:45 haven't heard anything from Legal Aid I phoned there and spoke with Mr. Windstaan who is employed with Legal Aid he then informed me that Dr. Mtopa who is apparently in charge of deciding who gets legal aid or not have decided after Mr. Neves conveyed to him the situation and what the reasons for his withdraw was that Legal Aid would not further provide legal counsel for the accused before Court. In the premises of that Your Lordship I again whish to stress as I already yesterday put on record that there is minor

> witnesses involved and the Court roll being full until November of this year, the State would argue and do submit that the accused can't misuse the due processes of law and him having not been satisfied with the counsel that has been provided for him and Legal Aid now not having being granted to him again should continue on his own because on the other hand if not also being the interest of justice that this matter is again postponed for a lengthy period of time when a trial date is available due to the fact that the witnesses as I said is minor children and do forget the evidence as the time passes by and I shortly just wish to refer Your Lordship to a recent decision in this court by your Sister Gibson, J, State vs Hoveka delivered on the 8th of February 2000 where apparently it was also a matter where the accused was not satisfied with the counsel provided for him and then wanted another counsel where the Court gave the accused an hours time to get the counsel that he wanted then and whereafter, when he didn't succeed in getting that counsel the Court ruled that the matter is continuing and the accused then has to appear on his own behalf. That is the State's argument on this aspect Your Lordship."

The accused was then asked by the Court:

> "Yes, accused where is your counsel?"

He replied that he had no counsel but was willing to accept another counsel appointed by the Legal Aid Board. The Court then reacted:

> "Legal Aid is not prepared to give you another counsel because you rejected the one they gave you".

The accused then asked for bail in order "to continue with his employment so that he can find another lawyer who can continue with his case. It must be noted that the accused had been in detention for approximately 9 months before the date when the matter was brought to trial. According to the evidence, the accused was also employed before his arrest.

The request of the accused was rejected. The relevant part of the Court's ruling read as follows:

> "The accused now applies for a postponement and to be granted bail so that he could get an employment and be in a position to pay for legal services. Any further postponement is opposed by the Prosecution on the basis that not only are there witnesses to be called of tender years but also the complainant is of tender years at the time of the commission of the crime 8 years. And that it would not be in the interest of justice, the administration of justice if further postponement is granted, especially when regard is had to the fact that the accused had the benefit of the services of a legal representative which he did not make good use of. I'm therefore not prepared to grant the accused further postponement and the case should continue today and tomorrow. Yes, you may be seated."

It is clear from the above-quoted proceedings that:

(i) Mr. Neves strongly advised the accused to plead guilty and that the accused strongly resisted that course.

If that is all that happened, no criticism could be levelled at either party. However, the legal representative's advice that if the accused refused to plead guilty, he could be sentenced from 8 – 15 years imprisonment because he would be wasting the Court's time, was a misrepresentation of the legal position, because even if he pleaded guilty, he could be sentenced to "8 – 15 years imprisonment". Of course, the Court would take into consideration once an accused has been found guilty, that the accused by pleading "Not Guilty" and persisting in an obviously false defence, had not shown any remorse and would consequently be dealt with more harshly than an accused who had admitted his guilt and co-operated with the prosecution in bringing the matter to an expeditions conclusion. But the conviction on behalf of the legal representative that the accused has "no case", does not justify him declining to defend the accused if the accused persisted in pleading "Not Guilty". It is a trite rule of professional ethics that the legal practitioner, who is not the judge, is not entitled to prejudge the issue of guilt. In such a case he is bound to continue with the defence, even if the accused persists in denying guilt. Even where an accused admits guilt to the

legal practitioner, but wishes to plead “Not Guilty”, the accused may be allowed to plead “Not Guilty”, but with the clear understanding that the legal representative would not call the accused as a witness to testify under oath and will not make factual assertions to state witnesses in cross-examination which is inconsistent with the accused’s admission of guilt to his legal representative.

In this case however, the latter course was not in issue because it is common cause that the accused had at all times in his instructions to Mr. Neves, claimed that he was innocent.

The approach of Mr. Neves in this regard was unprofessional and wrong.

(ii) The remarks in open Court by Mr. Neves to justify his withdrawal aggravate the wrongfulness of his conduct.

To tell the Court that he “has the evidence before him and it does not look good My Lord” and that “there is no case”, is not only completely unnecessary, but outrageous. What must the accused and the public think if the legal representative of the accused,

appointed and paid by the State, portrays the accused as “guilty” even before the opportunity to plead to the charge.

Ms. Lategan has argued that such remarks would not necessarily influence the Court and that judges are trained to obliterate inadmissible material from their consideration. That may or may not be correct. Unfortunately, judges are also human, and some more human than others. Even if they do what Ms. Lategan contends, it would be difficult to remove such material altogether from your mental process. It may subjectively influence the best of judges.

But this is not the only problem. It is important that not only the accused, but the public, should have the perception that the proceedings are fair to the accused, as well as the victim. Mr. Neves was appointed by the Director of Legal Aid to defend the accused. It must be emphasized that a legal representative so appointed, is bound by the same rules of professional ethics as a legal representative appointed by an accused himself.

It must also be pointed out that the accused had not accused Mr. Neves of “unethical behaviour” as stated

by the trial judge, but this was a description used by the judge for the behaviour complained of.

(iii) Mr. Neves also told the Court in justifying his withdrawal, that the “next issue” was the request by the accused to apply for a postponement so that one of the defence witnesses could be summoned to be here. “I informed my client that we do not need that witness at this stage, it is the State to conduct their case and when it is our turn we will then surely have enough time to have the witness here”.

Once again the attitude of Mr. Neves left much to be desired. If there were other defence witnesses, how would he be able to judge the veracity and usefulness of such witnesses, if they are not summoned to be available for consultation and calling as witnesses, if not subpoenaed to be present at or even before the trial. Mr. Neves would have been better able to judge whether or not his client had a case, if he arranged for them to be subpoenaed before the trial started. Furthermore, he would not have known what to put to the state witnesses in cross-examination, if the defence witness or witnesses were not subpoenaed in advance.

(iv) The next point mentioned by Mr. Neves was that the accused requested him to apply for bail but he did not want to do that because, as he said – “I did not have instructions”.

This is incomprehensible. Mr. Neves had, according to him, a request from his client to apply for bail. Surely this was his only relevant instruction.

(v) Mr. Neves further said: “I cannot proceed because of the confusion of instructions and accusations”.

The accused according to him told him that he was innocent, wanted to plead “Not Guilty”, requested his legal representative to subpoena a witness or witnesses before trial and to apply for bail.

If there was “confusion” herein, it was not the “instructions” given by the accused, but those in the mind of the legal representative. And if there were “confusion” in the “instructions” and “accusations” it must have been accusations and instructions not mentioned by Mr. Neves – because those he mentioned in Court were quite straight forward

> In all the circumstances, it is not surprising that the accused lost confidence in the legal representative allotted to him.
>
> What is surprising however, is that the learned trial judge appeared to have accepted the cogency of the arguments and statements by Mr. Neves, instead of accepting that the accused had just cause to refuse to follow the advice of Mr. Neves.
>
> To add insult to injury, the trial judge, in refusing bail and/or a postponement, gave as the reason that the witnesses to be called by the State are of tender years and that it would not be in the interest of justice, the administration of justice, if further postponement is granted, but then added: "<u>especially when regard is had to the fact that the accused had the benefit of the services of a legal representative which he did not make good use of</u>." (My emphasis added.)

In the circumstances herein set out, there was no justification for the latter ground of refusal by the learned trial judge.

1.2 <u>The trial Court also erred in not taking appropriate steps to enable the accused to be legally represented.</u>

Mr. Cohrssen contended in this regard:

"The right to legal representation of a person's own choice is cornerstone of the right to a fair trial. Art. 12(1)(e) of the Namibian Constitution provides:

> 'All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement and during their trial, and shall be defended by a legal representative of their choice.'"

Mr. Cohrssen further contended that the Court's failure to ensure compliance with the provisions of this Article read with sections 8(2) and 10(1) of the Legal Aid Act, amounted to a failure of justice in the circumstances of this case.

I agree with Mr. Cohrssen for the following reasons:

i) The interest of accused, the prosecution and the victim had to be balanced by the Court in fulfilling its function to ensure a fair trial.

ii) In performing this balancing act, the following facts had to be kept in mind.

The accused was not responsible for the delay of almost nine (9) months in bringing the matter to trial. During these 9 months, the accused was in prison and as a result could not

earn a living by working. Before his arrest and detention, he was, according to the evidence, in full-time employment and owned a house in Windhoek where he resided at all relevant times. His domicile and employment was known to the State.

A further postponement of 3 months, when the crucial state witness Dr. Liebenberg was available to testify, and which necessitated a postponement to May 2000 in any event, would not have prejudiced unduly, the two state witnesses of tender years, in view of the further fact that they had made written statements to the police, from which they could refresh their memory, with the assistance of the police and/or their mother. Such a postponement, particularly if accompanied by an order releasing the accused on bail, could have made it possible for the accused to obtain legal representation at his own expense.

iii) A postponement to obtain legal representation at his own expense, or legal representation provided by the Legal Aid Board, was crucial to

a fair trial in this case, because the accused was facing a very serious charge and the indictment as amended, covered a long period, without any specific dates on which the alleged three instances of rape allegedly occurred. A conviction would inevitably have resulted in a very long period of imprisonment.

The accused clearly was not schooled in the law. He would not be able to avail himself of the benefits and protection provided by section 93 of the Criminal Procedure Act 51 of 1977, if he could and wished to raise an alibi defence.

iv) The trial Court could have and should have taken more effective steps, in my respectful view, to ensure that the Legal Aid Board and/or Legal Aid Director, provide the accused with another legal representative, in the place of Mr. Neves.

At the time of trial, section 8(2) of the Legal aid Act was still applicable which read:

> "If an accused before the High Court is not legally represented and the Court is of the opinion that there is sufficient reason why the

> accused should be granted legal aid, the Court may issue a legal aid certificate."

Section 10(1) provided:

> "The Director –
>
> (a) shall grant legal aid to any person in respect of whom a legal aid certificate has been issued under section 8(2)."

The discretion of the High Court Judge to issue the certificate amounts to a quasi-judicial discretion which had to be exercised in a reasonable manner and on reasonable grounds. That is also the position since article 18 of the Namibian Constitution became part of the Supreme Law of Namibia in 1990.

In the circumstances of this case, the trial judge had to consider this course and to exercise this discretion in accordance with section 8(2) of the Legal aid Act, read with Articles 12(1)(e) and 18 of the Namibian Constitution.

v) In the alternative to issuing a certificate, the trial judge could at least have ensured that the

accused, who was in detention at all relevant times, had a proper opportunity to put his case to the Legal Aid Board or the Director of Legal Aid. This is so because Mr. Neves had told the Court that he would now explain to the Director of Legal Aid, the reasons for his withdrawal. That Mr. Neves version above was put before the Legal Aid Board, is quite clear from the report of Ms. Lategan to Court and in Court the following morning when she confirmed that further legal aid was refused by Dr. Mtopa, on behalf of the Legal Aid Directorate, after Mr. Neves had "conveyed to him the reasons for his withdrawal". No wonder, that further legal aid was refused in the absence of an explanation by or on behalf of the accused.

The learned trial judge must have anticipated that in the absence of the accused, or the Court record or a favourable recommendation by the trial judge himself, only a biased picture would be placed before the Legal Aid Directorate and that the result would be a foregone conclusion. The learned trial judge apparently did not take such steps because in

his own words in refusing bail and postponement, he stated that the accused had not “made good use” of the counsel provided.

In my respectful view, the learned trial judge had failed to exercise a proper discretion in accordance with section 8(2) of the Legal Aid Act, read with Articles 12(1)(e) and 18 of the Namibian Constitution, alternatively had failed to take the necessary steps to ensure that the accused’s case is placed fairly before the Legal Aid Directorate.

vi) The Legal Aid Directorate on the other hand had failed to take the necessary steps to ensure that the accused’s case for Legal Aid was properly and fairly considered in accordance with Article 12(1)(e) read with Article 18 of the Namibian Constitution.

It failed to consider that the reason for granting legal aid in the first place, still remained, notwithstanding the withdrawal of Mr. Neves.

It failed to give the accused an opportunity to

put his side of the case, orally or in writing, before it reversed its previous decision to provide legal aid.

In my respectful view, both the Court *a quo* and the Legal Aid Directorate had failed to comply with the letter and the spirit of Articles 12(1)(e) and 18 of the Namibian Constitution read with section 8(2) and 10(1) of the Legal Aid Act as it stood at the time of the decisions aforesaid.

1.3 The restriction of and interference by the Court in the cross-examination by the accused of Mrs. D., the mother of the victim.

Mr. Cohrssen contended in this regard:

> "In this matter the accused was effectively restricted from cross-examining the person whom he alleges falsely caused the charges to be laid against him."

It is trite law that a Court should do everything reasonably possible to assist an accused who is not defended by a legal practitioner, to put his case before Court by calling witnesses and cross-examining the state witnesses.

Mr. Cohrssen also correctly points out:

> "The clumsy attempts of an undefended accused in a criminal trial to cross-examine a witness should not be met with the placing of obstacles in his way, but should rather be guided by the presiding officer. Assisting an accused in these circumstances in any event assist the Court in making its findings of fact at the end of the day."[1]

Mr. Cohrssen further argues:

> "Too much is often expected of undefended layman defending themselves in criminal trials. Too much is also frequently read into their failure to cross-examine, or to cross-examine thoroughly. The importance of this factor can easily be exaggerated."[2]

Mr. Cohrssen referred to a number of passages where, according to him the trial judge "severely curtailed" the cross-examination by the accused.

i) The first passage related to a visit by the said Mrs. D. to his house and the accused's questions in that regard. The accused asked: "If she can tell the Court the truth. Can she recall when she told me that her belongings are outside, outside the house…". Before the accused could finish the question, the trial judge intervened by saying: "Yes,

1 S v M, 1989(4) SA 421T at 425 B – I.

2 S v Mngomenzulu, 1983(1) SA 1152(N) at 1153 B – 1154 B.

> those questions have nothing to do with your case.". The interpreter then said: "He is saying that is where she started to send her kids to his house.". The Court then once again said: "That has nothing to do with his case.".[3]

I must note here before I proceed that the Court did not ask the accused to give a plea explanation in terms of section 115 of the Criminal Procedure Act after he had pleaded "Not Guilty".

The Court also did not ask the accused what was the relevance of his question. How the Court concluded summarily that the questions "had nothing to do with his case" is not apparent from the record. It must also be pointed out that the accused had already put it to the victim, Ms. L. that he had a relationship with her mother.[4]

The accused may have put this question to get more particulars as to the precise date or dates when the witness or her children visited the accused. He may also have put the question as introductory to his case that Mrs. D. came to stay with him and had a sexual relationship with him. This is indicated by him asking her whether she could recall "when she told him that her belongings were outside, outside his house." Be that as it may, the learned presiding judge was patently wrong in disallowing the

3 Record p. 74, lines 12 – 19.
4 Record, Vol 1, p. 40

question and in doing so on the ground that it had nothing to do with the accused's case.

ii) The next example relied on by Mr. Cohrssen relates to an occasion when the accused attempted to question Mrs. D. about the time and place of her alleged observation that the victim had a discharge on her panties. The accused asked: "Now on the second time when you say the discharge, on which day was it? The witness answered the question but before the accused could proceed with his further cross-examination, the Court once more intervened by saying: "Now let me assist you a bit. The witness testified that on a certain night you arrived there with the complainant, crying, what do you say about that?"[5]

The accused thereupon left the issue about which he was cross-examining, namely the occasions when a discharge was seen, and tried to switch to what he thought the presiding judge was referring to, namely the allegation by Mrs. D. that the accused had brought the child to her one night – crying.

When the accused tried to cross-examine on the latter allegation, the Court again intervened by saying: "No, no I won't allow those

5 Record, Vol 1, pp 78 - 79

kind of questions." The Court then put the following question to the accused: "Are you saying that you arrived there with the complainant crying at the place or the house where the witness was or not?" The accused replied to the question by the judge: "I don't know anything about it."

The Court then put it to the witness that the accused says that he knew nothing about such an event. Mrs. D., in reply, reiterated her allegation.[6]

It seems that the Court managed for the time being in changing the direction of the accused's cross-examination. Why the Trial Court proceeded in this manner, is unclear to this Court. What is certain however, is that it must have been confusing to the accused and that the intervention was unjustified.

iii) When the accused continued asking questions about the alleged occasion, all or most of which was not a direct translation by the interpreter in the first person and consequently sometimes difficult to follow for that reason, the judge again intervened and said: "No, no, any other question." The judge did not explain to the accused what was wrong with his question.

6 Record Vol. 1, p 78- 80.

iv) The accused at one stage returned, or attempted to return to the issue of Mrs. D's December visit to his house and whether he escorted her to any address and if so, which address. In the course of trying to get more clarity from her in this regard, the accused asked: "Now did I take you, did I escort you at this Nama 833 or ..." the Court again intervened and ruled: "No, that question has nothing to do with this case."[7]

The learned judge did not ask the accused about the relevance of the question or explain to him why the question had nothing to do with the case. The Court, immediately after ruling that accused's question had nothing to do with his case, continued with a questioning of the witness during which he elicited evidence about the explanation of the victim when confronted by the witness. This examination by the judge proceeded as follows, whilst the accused was reduced to a mere spectator:

"Q: You testified that the complainant made a report to you after you confronted her with this discharge. What did she tell you?

A: When I asked her where she was coming from she told me that she was coming from Uncle Albertos' house and when I asked her why her panty is looking like that, where is the discharge coming from and then she told me that uncle Albertos did it to her.

Q: Did she tell you how many times or on how

7 Record, Vol. 1, p. 82

many different occasions that happened with her between her and the accused?

A: Yes, she did.

Q: What did she say? How many times?

A: She said for the first time it was in the sitting room that Uncle Albertos came out an started touching her and kissing her and stuff like this and that where …(intervention).

Q: Yes. No what I just want to know. I don't want to know details. Did she tell you how many times the accused had sexual intercourse with her or not?

A: She said three times."

The judge now turned to the accused and put the following question to him: "Yes what do you have to say about that, that the complainant made a report to the witness upon the witness seeing the discharge on her panties that you had sexual intercourse with the complainant, thrice? Are you saying that that never happened? It is not true. The complainant lied to her?" The accused answered: "Yes."

Then the judge again turned to the witness and put the following question to her: "Yes, what do you have to say? The accused says what the complainant told you was not true. She was making up those stories against him". The witness then confirmed that her testimony is true and came with the following new allegation: "My Lord, if he is saying that the child is lying then I am asking, the time that we were sitting in the vehicle why did he then say why didn't I come to him first so that we could

have talked about the case so that he could pay me N$200 every month?"

The Court then put this new allegation to the accused, but added words to the allegations which were not contained in the allegation made by the witness. The question as formulated by the Court was: "Yes – the witness also testified that while you were seated in the police vehicle in the presence of the complainant, you asked the witness why she reported the matter to the police and why she didn't come to you to discuss the issue with you because you were going to lose your house and your employment and your children will suffer and you would give her N$200,00 a month. What do you say about that? Did that happen or not?" (My emphasis added to distinguish the words added by the judge to the allegations by the witness.)

The accused replied: "It didn't."

Thereupon the Court again put the accused's denial to the witness and the witness confirmed her previous allegation.

And to crown it all – the Court now turned to the accused and asked: "Is that all? Do you have any other questions?" But as soon as the accused asked his first further question he was again silenced. This part appears as follows in the record:

Q: "When you three arrived at the Women and Child Abuse Centre, who got out of the car first?"

COURT: "No, no, no. I wont allow this kind of question. What has that got to do with the evidence? You denied that you told her, you asked her those questions. Any other question you have?"

The accused then tried to proceed on another point. He asked: "As the complainant told you that I raped her now should the discharge b e blood or should it be some whitish or yellowish substance? The Court once more intervened: "No, the witness is not a doctor, you can put that question to a doctor."

It must be noted here that the evidence elicited by the judge about the report of the "complainant", was deliberately prevented by the prosecutor, Ms. Lategan, when she examined the witness in chief. Ms. Lategan then said: "The question was just, did Ms. L. relate a story to her? I don't want to know what was said."[8]

The obvious reason why Ms. Lategan did not want the

8 Record, Vol 1 p. 70

witness to testify about the contents of the report was that the report amounted to inadmissible hearsay in the light thereof that it did not comply with the requirements of a first report because it was elicited by the witness Mrs. D. by threat. The evidence in chief of Mrs. D. was that after several questions to the victim Ms. L. and the denial by the victim that anything untoward had happened, Mrs. D. told her: "Tell me the truth. Where are you coming from? Tell me the truth. Where are you coming from? Otherwise I will beat you."

The Court thus not only elicited new evidence from the witness prejudicial to the accused, during the attempted cross-examination by the accused, but evidence which was inadmissible hearsay against him.[9]

This is an irregularity distinct from the irregular and prejudicial intervention by the judge and even turning the accused's opportunity to cross-examine the state witnesses into cross-examination by the Court of the accused.

(v) The accused attempted another angle with what appears to be a completely relevant question. He asked the witness Mrs. D.: "Did you that first week until the 14th, the

9 State v T, 1963(1) SA 484 (AD)
The South African Law of Evidence, by Hoffmann & Zeffert, 3rd ed pp 117 – 122.

witness mentioned that she saw the first discharge on the Tuesday, now why did she, exactly from that stage, why didn't you exactly go to the police to report this?" The judge then intervened and said: "Any other question?"

The accused tried several other questions, some about the dates on which the witness sent the children to his house and indicated that without her help, he was unable to recognize the days. He probably required the dates to assist him in proving his defence that he was absent at the time.

The learned judge motivated his refusal to allow such question by saying: "That's a matter for argument. You have stated your statement to her that you did not have sexual intercourse with the complainant. So the dates have become irrelevant."

The Court's refusal was based on a wrong premise. Surely even if an accused denies that he had raped a person, it is nevertheless justified for the defence to require dates of the alleged incidents of rape to enable the defence to disprove the allegations of the State, particularly if the defence is an alibi or an alibi in part.

The accused finally tried to explain: He said: "I want to

know this because I have been accused. That is why I want to know whether the mother knows." The Court then commented: "Yes neither the complainant nor the mother can help us with specific dates. Any other question? If you have no more questions you may be seated."

The Court did not allow the witness to answer. She may have been able to say whether or not she did not remember any specific dates. But even if she did not know any specific date, she may have been able to give the month or the week or whether it was daytime or nighttime.

(vi) I have quoted the proceedings relating to the accused's attempted cross-examination of this witness extensively.

It is obvious that the accused's attempts to cross-examine were clumsy and inept. But instead of assisting him the Court frustrated his every endeavour.

(vii) The position is aggravated by the fact that the Court in its judgment held it against the accused that he had failed to put to Mrs. D. in cross-examination the defence that he had an affair with the mother of the victim but had chased her from his house because she drank excessively and that she concocted the case against him in revenge.

When the accused began to put questions to her about her arrival at his house with her belongings outside his house, he was stopped.

In any event, this is a clear instance where the Court should have recalled the witness to give the accused the opportunity to put this part of his defence to her. Alternatively, the Court itself should have, after the recall of the witness, put to the witness this part of the defence of the accused.

The Court did not only have the power to act in such manner, but in the circumstances of this case, it had the duty to act in terms of section 167 of the Criminal Procedure Act 51 of 1977.

This is so *inter alia* because unless this course was taken, the Court would not have been justified to reject the evidence of the accused in this regard merely on the ground that he had failed to put it to the defence witness in cross-examination. On the other hand, if the Court accepted the uncontradicted evidence of the accused in this regard, because it was uncontradicted, that would unduly have prejudiced the state case and the interests of the victim.

Consequently, the only way for the Court to ensure that

justice was done in this case, was to make use of section 167 of the Criminal Procedure Act 51 of 1977. This it had failed to do.

The power and duty to act under section 167 and 186 have been referred to and explained in many decisions of the High Court and Supreme Court but it seems that some judges of the High Court still ignore these provisions and decisions or for some other reason, fail to implement it.[10]

This is a regrettable situation and is not in the interests of justice.

In the instant case, the failure by the Court to recall the witness and to allow the accused a further opportunity to put this allegation to her or if necessary, to put the allegation itself, amounts to a misdirection, if not an irregularity, particularly in view thereof that the Court used the failure of the accused to put the allegation to the witness as one of the reasons for rejecting the accused's defence.

The manner in which the Court interfered with the cross-

10 S v van den Berg 1995(4) BCLR, 479 Nm at 523 – 531 A. Also reported in 1996(1) SACR 19 at 63g – 72c
S v K 2000(4) BCLR 405 NmS 426 C – I
S v Silunga NmS 28/12/2000, not reported, where the aforesaid decision are referred to and discussed extensively; Kadila and Others v the State (NmS) 9th October 2001, not reported, pp 12 – 16,.

examination by the accused of the witness and disallowed several of his questions and even elicited inadmissible hearsay evidence against him, amounts to a further irregularity in the procedure, which clearly prejudiced the accused in his defence and so undermined his fundamental right to a fair trial.

1.4 <u>The failure of the state, the investigating police officers, the prosecution to have the accused examined to establish whether or not he was suffering from gonorrhea and the failure of the trial court to consider and examine and/or investigate the issue or having it considered examined and/or investigated</u>

This issue, as explained in the Introduction, *supra,* was raised *mero motu* by the Court. It arose in the following manner in the Court *a quo*: The State witness, Dr. Linda Liebenberg, testified that the alleged victim, Ms. L., was examined by her on the 16th May. She testified: "There were no extra-genital injuries but the hymen was torn, thick, red and inflamed. The tears did not appear completely fresh but due to the inflammation it was difficult to state or decide on a time that the tears had been sustained. Then I did not measure the extent of the hymen because the examination was too painful. The fourchette, that is the posterior aspect of the vaginal opening was thin and red, also indicating infection and inflammation. The perineum, that is the

area between the vagina and the anus, showed skin excoriation as one sees with a chronic vaginal discharge. Then there was discharge from the vagina, namely thick yellow pus. No haemorrhage seen. The examination was painful. ... At the time the findings I thought to be consistent with the full penetration causing the hymen to tear all round and there was definite evidence of infection like gonorrhea."

The clinical evidence to substantiate the finding relating to gonorrhea according to her was: "This very red inflamed appearance of the genitalia and the thick yellow pussy discharge. The various sexually transmitted diseases have a relatively specific clinical signs and this is most consistent with gonorrhea." Doctor Liebenberg further confirmed that gonorrhea is a sexually transmitted disease that could not be transmitted in any other way than by a sexual act for example by a penis and not by means of the mouth or fingers or skin contact. Dr. Liebenberg did not say that gonorrhea could only be transmitted by full penetration during intercourse. Whether or not it could be transmitted by a sexual act not amounting to full penetration and intercourse, was not canvassed and remains an open question. The gonorrhea of the victim, consequently indicates no more than a sexual act, with a person having gonorrhea. In further questions, Dr. Liebenberg explained: "The transfer of this disease is by genitalia contacting."

Smears were also taken from the victim as well as blood samples from both the victim and the accused. The blood samples showed that Ms. L. and the accused belonged to different blood groups. No semen or spermatozoa was detected by the Forensic Laboratory to whom the vaginal smears and sanitary pad of the girl was sent for analysis.

Apart from the blood sample, no further examination was done to establish whether or not the accused was suffering from gonorrhea or any other sexually transmitted disease, notwithstanding the fact that he was available and apparently cooperated with the police and medical practitioner.

It is clear from the aforesaid evidence that it was impossible to determine, not even approximately, when the hymen was torn, when the intercourse, causing the tear, took place; whether intercourse took place on diverse occasions, and if so, on which of the aforesaid occasions and when gonorrheal infection took place. It seems further clear that no chemical tests or other tests were done to establish beyond doubt from what sexual disease Ms. L. was suffering, although the probability was that she was suffering from gonorrhea. On the assumption that Ms. L. was indeed suffering from gonorrhea, it follows not only that someone suffering from gonorrhea must have transmitted the disease to Ms. L., but that once she had contracted the disease, she in turn could transmit it to anyone with whom she had sexual intercourse

or with whom she had committed a sexual act as described above.

At the outset of Dr. Liebenberg's cross-examination by the accused, the intelligible part of his first question was: "... So, it means, can a child still walk properly if it is raped and with this evidence by the doctor. Is it possible?" Before Dr. Liebenberg could answer, the learned presiding judge said: "I don't think the Dr. is in a position to answer that." Then the judge apparently tried to improve on the accused's question and said: "Doctor, when the complainant, I think what the accused want to know is, when the complainant was brought to you on the 16th May 1999, yes, what was the information given to you? When was she actually molested or assaulted?" Dr. Liebenberg replied: "What I had written there is that the alleged incident would have been around two weeks before my examination. No specific date was given. The mother was doing most of the talking. The child just agreed. So it was difficult to establish precisely what, when, where, how etcetera but two weeks was more or less the working information." It must be pointed out that this "working information" was of course inadmissible hearsay evidence.

The accused further put it to Dr. Liebenberg: "So, I was accused that I raped the complainant so as it is stated that no spermatozoa was found in the complainant's vagina so how is it possible that I am the one who have given this gonorrhea to the complainant?" Dr. Liebenberg replied: "... There are no scientific evidence

linking him with the tests that was done…”.

Then the following question and answer followed:

> “Q: As I was not having any intention of raping the complainant, is it possible for the doctor to examine me also so that they can maybe find out whether I was having this gonorrhea which has been found on the complainant?
>
> A: My Lord, maybe just to clear up matters I could just say men are capable of carrying gonorrhea without having symptoms. They can be asymptomatic carriers although they might have gone through a phase of burning discharge or burning when urinating. I am not in a position to examine this accused and since the lapse of time is a year it would be senseless.”

Thereafter the accused commented: “So, as the doctor say she can’t examine me, I have nothing more to say.” The Court commented: “Yes, thank you, you may be seated.”

Notwithstanding the many questions the learned presiding judge asked the State witness Mrs. D. during the purported cross-examination by the accused, no further questions were asked by him on this occasion and the issue was ignored by the Court in its judgment.

In my respectful view, it was necessary in the interests of justice not to have accepted the mere say so of Dr. Liebenberg, without at least questions for clarification to enable the Court to decide what course it should take on the important issue raised by the accused. It was an important issue because if the accused was found to have gonorrhea at the time of the examination of the alleged victim, that would have constituted strong circumstantial evidence corroborating the State's case. But if not, it would have corroborated the accused's denial to the effect that he never had intercourse with the victim.

If the Court allowed the accused to be examined at the time when Dr. Liebenberg gave evidence nine (9) months later, the result may still have been a fact, or factor in the form of circumstantial evidence, corroborating the one or other version, although obviously at that late stage, it would carry less weight.

The fact that the examination was not done, on any of these occasions, was not the fault of the accused. Once it was found that the alleged victim Ms. L. was probably suffering from gonorrhea, it was obvious that an examination of the accused to establish whether or not he was suffering from gonorrhea, was the obvious course for the prosecution, consisting of the police and prosecutors, to take. They, and Dr. Liebenberg, had the power to do so in terms of section 37(1)(c) of the Criminal Procedure Act. The Court furthermore had the power to order such an

examination in terms of section 37(3) of the said Act.

The purpose of these provisions is quite clearly not to aid or prejudice one or other of the parties, but to assist in the search for the truth and so ensure that justice is done.

It is quite clear that the accused did not at the time object to the taking of his blood. There is no reason to believe that he would have objected to have his body examined in accordance with section 37 to establish whether or not it shows any condition or appearance – in this case whether it showed that he was suffering from gonorrhea or not.

During the trial, the cross-examination of Dr. Liebenberg by the accused, amounted to a clear indication that he was inviting such an examination. But even if the accused objected to such an examination at any stage, he would have had no leg to stand on.

So all that the investigating police officer had to do was to request Dr. Liebenberg to do the examination. Dr. Liebenberg on the other hand, being an experienced medical practitioner employed by the State, could and should even have suggested or initiated it once she found that the victim was suffering from gonorrhea. The accused could not have been expected to initiate such an examination, because he obviously had no knowledge of the law and was in detention at all relevant times after the complaint was

laid. He was probably unaware of the doctor's findings regarding gonorrhea until the trial.

Mr. Cohrssen referred the Court to "The Forensic ABC in Medical Practice, a Practical Guide" by T.G. Schwär, J.A. Olivier and J.D. Laubser where it is stated at p. 389:

> "The accused or suspect in a rape case may be brought to a medical practitioner by the investigating police officer, for examination. The latter should hand over a formal written request to the medical practitioner – the completed SAP 308(A) or a request with similar particulars. This includes written confirmation that the accused or suspect has been formally arrested. The medical practitioner can then proceed with his examination without the consent of the accused or suspect, but he must always attempt to obtain the full cooperation of the accused or suspect."

Amongst the guidelines under the heading "Examination of the genitalia", one of the specific guidelines is: "Look specifically for the presence or absence of sexually transmitted diseases". Such an examination has become even more important since an accused person may transmit a deadly disease such as HIV. to a victim and such fact would be an aggravating factor in considering sentence.

To return now to the explanations given by Dr. Liebenberg in reply to the accused's question whether she could examine him whether "he was having gonorrhea" or whether he was "still having gonorrhea".

Explanation (i): "I could say that men are capable or carrying gonorrhea without having symptoms. They can be asymptomatic carriers although they might have gone through a phase of symptoms of burning, discharge o burning when urinating."

Comment: Even if taken at face value, Dr. Liebenberg's phrases "are capable of" does not say that a diagnosis that the person has gonorrhea will not be possible when a proper examination, including blood tests, are done. The phrase also does not say or even imply that symptoms will generally not be discernable externally. The words they "can be asymptomatic carriers" certainly does not mean that they all are asymptomatic carriers. Her qualification that in those cases where men are "asymptomatic carriers, they might have gone through a phase of some symptoms of burning, discharge, or burning when urinating", makes that part of her statement very confusing because the "discharge" at least would be a symptom visible in an external examination.

According to Dr. Liebenberg, gonorrhea is a very "treatable disease" but if untreated, "it would have very serious consequences in a child especially because of anatomical ... reasons. This infection can travel upwards and cause fatal peritonitis. If not that severe it can still cause permanent sterility due to the infection of the internal genitalia, the uterus and

fallopian tubes. It can lead to various types of systemic disease, arthritis, uvulitis, cystitis it can be a very severe prolonged illness".

Dr Liebenberg also confirmed that she gave Ms. L. the standard treatment which not only treated "the gonorrhea, but also the other sexually transmitted diseases that she might have been at risk of".

Although again Dr. Liebenberg did not testify how gonorrhea would normally affect the male person and was not asked about this important issue, it must follow as a matter of common sense and general knowledge, that if gonorrhea contracted by a male person is not treated, it could also have grave consequences for such male. In such cases, symptoms of such diseases, would probably also be discernible.

Without examination of such male person, his state of illness will not be discernable. It is consequently nonsensical not to examine a male person, on the ground that he may be "asymptomatic".

Explanation (ii): "I am not in a position to examine this accused and since lapse of time is a year, it would be senseless."

Comment: Dr. Liebenberg does not say that she "is not in a position to examine the accused" because of the lapse of time".

There are consequently two distinct parts of her statement.

The first part – “I am not in a position to examine the accused” is not explained and is confusing. Certainly she was entitled to make such examination after examining the alleged victim on 16th May 1999, provided she was requested to do so by the investigating police officer in accordance with section 37(1)(c) read with section 37(2)(a). When she testified, she could still have conducted such an examination in terms of the same sections or alternatively, in accordance with a Court order issued in terms of section 37(3)(a).

Again, no one can say that there would be or would not be symptoms. As pointed out before, the gonorrhea may in the meantime have led to other diseases, that would probably be identifiable on a proper examination.

Dr. Liebenberg’s statement that it would be senseless at that stage to examine because of the lapse of time, should, like her other statements above-quoted, have been further examined or elucidated by questions from the Court, if the State advocate left the matter without clarification.

This is an instance where the Court had to decide whether or not an examination would be valuable or valueless, not the medical practitioner. Particularly whether or not an examination would

give certainty about a relevant fact constituting circumstantial evidence, is the function of the Court.

I must also point out that the State advocate or other prosecutor, must always regard the establishment of the truth its main objective and not only to ensure that the accused is convicted and sentenced. When an accused is not represented by a legal representative, there is a greater responsibility on the prosecution, as well as the Court, to ensure that the accused is not prejudiced by the fact that he/she has no legal representation. This duty extends to the disclosure of an important fact or factor known to the State which is consistent with an accused's innocence. The Court shall in such cases, use its powers to facilitate the discovery or disclosure of such fact or factor.

Ms. Lategan did not at the trial put any questions to Dr. Liebenberg to clear up some of her ambiguous statements referred to above. Ms. Lategan's written submissions on appeal as contained in her heads of argument is introduced by the following words: "In respect of the accused's allegation that he was not suffering from gonorrhea…". The State therefore clearly concedes that the accused had alleged that he was not suffering from gonorrhea.

Ms. Lategan referred to Dr. Liebenberg's evidence that "men are capable of having gonorrhea without having symptoms" did not

say why that, even if a fact, was justification for not examining the accused.

She continued: "And more importantly since the lapse of time is a year it would be senseless to examine the accused… furthermore as the complainant could not give dates in the respect of the incidents, had the accused tested positive for gonorrhea at the time of his arrest, it could not be ruled out that he had contracted it through sexual contact with another person, similarly had the accused tested negative, the possibility could not be ruled out that he had received treatment since his last contact with the complainant."

Surely, the possibility of such explanations, does not mean that a finding that the accused was or was not suffering from gonorrhea, would not be a factor of considerable weight corroborating either the state case or the defence case. So e.g. if at the time the accused showed no symptoms of gonorrhea and/or was diagnosed as not having gonorrhea, the State's ability to prove its case beyond reasonable doubt would obviously have been severely weakened.

That, consequently as I have shown *supra,* would also have applied if at the trial, 12 months later, the accused on examination was shown to have no symptoms whatever of gonorrhea or a disease caused by gonorrhea. What is important

and completely ignored by Dr. Liebenberg, Ms. Lategan and the Court, was the fact that the accused was apparently in detention in the Windhoek Prison for the whole of the 12 months from the time that the complaint was lodged to the time when Dr. Liebenberg testified. He was thus under State control during this whole period.

It is furthermore a notorious fact amongst knowledgeable people, that prisoners cannot receive medical treatment in prison without consent of the prison authorities and without some records being kept and available. If the accused therefore had gonorrhea when he was first detained and he did not receive proper treatment during this 12 months period since then, he would probably have been in a very serious diseased state when he raised the issue in Court of being examined for gonorrhea and asserted that he did not have and never had gonorrhea. On the other hand, if he, on examination during his trial, was found not to have gonorrhea or any disease arising from or caused by gonorrhea, it would have been an easy matter to establish whether he nevertheless had gonorrhea whilst in prison and/or whether he had received treatment for such condition which could explain why he had no gonorrhea at the time of trial.

In my respectful view the trial Court erred in the following respects:

(a) Its failure to put questions to Dr. Liebenberg to clear up the ambiguities in her evidence on this aspect.

(b) Its failure not to allow or order a proper medical examination of the accused in May 2000 during the trial after the accused had pertinently raised the issue.

c) Its failure to consider and give weight to the failure of the investigating police officers and/or the prosecution in arranging for a thorough medical examination of the accused after it was established that the victim suffered or probably suffered from gonorrhea.

As pointed out *supra*, the Court had the power to act in terms of sections 167 and 37(3), read with section 37(1)(a) and Art. 12(1)(e) of the Namibian Constitution. In the circumstances of this case the Court had a duty to do so.[11]

This failure constituted an irregularity in the trial. The irregularity prejudiced the accused because his assertion in Court that he did not suffer from gonorrhea at the time of trial and also did not suffer from the disease at the time when he was first detained 12 months earlier was not

11 See the discussion of the statutory provisions and the decided cases referred to Section B of this judgment, *supra*.

considered and assessed as a factor supporting his denial of guilt and detracting from the State case against him.

The only manner in which this prejudice could have been avoided by the Court, was if the Court had accepted the accused's above-stated assertion as an important factor detracting from the State case and supporting his plea of "Not Guilty". This, the Court also failed to do.

It is also necessary to emphasize here that even before the Namibian Constitution became the Supreme Law of Namibia in 1990, and Art. 12 became part of this Supreme Law, the basic and fundamental principles of a fair trial were laid down in the authoritative Court decisions in South Africa and Namibia. These fundamental principles included the requirements and principles in regard to the investigation of the crime or offence preceding the actual trial.

In the Namibian decision of State v Burger and Van der Merwe, a decision by Berker, J.P., as he then was, who became Namibia's first Chief Justice in 1990, the irregularities in question were irregularities in respect of the investigation of the case.[12] He referred to these irregularities as follows:

12 High Court of S.W.A., 11/5/1989, not reported.

> "Basically it means that the whole investigation was so interwoven with irregularities, many of which were not of much importance. … It is however, the cumulative effect of these irregularities which the Court must, in my view, consider in order to come to a conclusion whether it is of such a nature that justice was not in fact done … After much serious consideration I however, came to the conclusion that in the specific circumstances of this case, there were so many irregularities, that justice, in the sense as it is explained in the cases referred to, will not be accomplished if the accused are found guilty."
> (My free translation from the Afrikaans.)

the decisions referred to by the learned judge was *inter alia* the decision of the South African Appellate Division in S v Xaba[13], where Botha, J.A. said:

> "Generally speaking, an irregularity or illegality in the proceedings at a criminal trial occurs whenever there is a departure from those formalities, rules and principles of procedure with which the law requires such a trial to be initiated or conducted (See R. v Thielke 1918 AD 373 at 376; S v Mofokeng 1962(3) SA 551(A) at 557G). The basic concept underlying s 317(1) is that an accused must be fairly tried (see S v Alexander and Others (1) 1965(2) SA 796(A) at 809C – D; and cf S v Mushimba and Others 1977(2) SA 829(A) at 844H)."

In the Mushimba case, which originated in Namibia, the irregularity referred to had its beginning in the investigation by the Security Police but which was continued into the trial itself. The accused Mushimba, had been convicted in the High Court of SWA on charges of contravening the Terrorism

13 1983(3) SA 717 at 728

Act and sentenced to death.

The decision on appeal was in regard to a special entry by a judge *a quo* formulated as follows:

> "Whether in connection with or during the proceedings there were irregular and/or illegal departures from and infringements of the formalities, rules and procedures which the law requires to be observed for a fair trial, and which resulted in a failure of justice."

It appeared from the evidence, which was tendered in support of the application for the special entry, that one Mrs. E, a member of the staff of the firm of attorneys who defended the accuseds at the trial, had given copies of statements by the accuseds and defence witnesses and other confidential and privileged documents to the Security Branch of the Police whilst the investigating officer in charge of the case was a member of the Security Police. Thereafter the statements and documents were given to the investigating officer who gave instructions to the State counsel. The State counsel was however, unaware of these irregularities which had occurred.

In an appeal on the special entry it was contended on behalf of the State that no irregularity had taken place, that if an irregularity had taken place, it did not affect the proceedings and that, in any event, the irregularity was not

of such a nature that a failure of justice had occurred.

The Appellate Division of the South African Supreme Court, upheld the appeal and set aside the conviction and sentence.

In its judgment the Court per Rumpff, C.J., held:

> "That the privilege which had existed between the accuseds and their attorney had been breached in a particular manner: from the date upon which the instruction to defend had been received to the end of the case the Security Police, through Captain N (to whom the documents had been given by Mrs. E, had completely penetrated the defence and the privilege had simply been eliminated.
>
> Further, that the complete elimination of the privilege was not only an irregularity, but was extremely gross irregularity which, as far as it concerned privilege, could scarcely have been surpassed.
>
> That it could not be doubted that the breach of the privilege affected the proceedings: a channel had been created which proceeded from the offices of the defence right up to the prosecutor in the case. The prosecutor himself was unaware of the channel, but that channel was directly linked to the proceedings, and had been interspersed during the entire period thereof, could not be doubted.
>
> That, from before the trial to the end thereof, by the action of the Security Police, there was a complete elimination of the privilege of the accused: that the Security Police had to fulfil its task of ensuring that law and order was maintained with every lawful means at its disposal could not be doubted, but public policy demanded, however, that an accused in a case ought no to be subjected to what had occurred in the present case.

> That accordingly, by reason of the nature and extent o the breach of the privilege of the accuseds, that it had to be found that their protection by the privilege before and during the trial had disappeared totally through the action of the Security Police, that thereby the trial did not comply with what justice required in this respect and that a failure of justice had occurred."

Berker, C.J., in his aforesaid decision in the State v Burger and Van der Merwe, also referred to and followed S v Mangcola & Ors, 1987(1) SA 512(B) where it was held:

> "It is abundantly clear from a consideration (of the cases quoted) that a value judgment has to be made as to the nature and extent of the prejudice to which the accused has been subjected..."

He also referred to and followed the decision in Mushimba, *supra*, and in S v de Lange, 1983(4) SA 621, where it was decided that the onus is on the State to prove that there was no failure of justice as a result of the irregularity.

The failure of the Court in the instant case to act as herein set out above, constituted an irregularity in that the principles, procedures and rules in connection with a fair trial were not complied with and that it caused prejudice to the accused. Furthermore, the State had failed to prove that the above-stated irregularities by the State and by the Court, did not constitute a failure of justice.

It could therefore be argued that the aforesaid irregularities constitute sufficient ground for setting aside the conviction and sentence, but any doubt that may exist are removed by the further misdirections in the judgment, dealt with hereunder.

SECTION C: MISDIRECTIONS

1. The apparent failure by the Court to apply the cautionary rule to the witness Ms. L. the victim, and her sister L1.:

At the time of the alleged incident or incidents, Ms. L. was only eight (8) years old and her sister L1. seven (7) years old. When they testified they were still very young, Ms. L. nine (9) years old and L1. eight (8) years.

The Court did not examine Ms. L. at the outset of her evidence to establish whether she understood the nature of the oath and the requirement to speak the truth. This enquiry was necessary to establish whether she was a competent witness, and *inter alia* competent to take the oath.

In the case of L1., the learned trial judge did however, make some enquiry at the outset to establish whether or not L1. understood the need to tell the truth. But both Ms. L. and L1. were not asked whether

they understood the meaning of taking the oath before they were sworn in as witnesses.

There is no indication in the record that the Court, in assessing their evidence applied the cautionary rule relating to witnesses of their age in considering their testimony. This Court has ruled in a recent decision that the cautionary rule in regard to complainants in sexual offences is outdated and should no longer be applied in Namibian Courts.[14]

However, it pointed out that the cautionary rule in regard to single witnesses and in regard to very young witnesses remained.

Ms. Lategan contended: "The past 20 years, however, have seen a greatly increased interest in cognitive psychology and child development, consequent research has resulted in a reappraisal of earlier beliefs and a realization that children's ability to give reliable evidence has been greatly underestimated... The explosion of information and research on the child witness has not to date impacted on the South African Courts...".

Ms. Lategan referred us to the work of Spencer and Flin as contained in their book: The Evidence of Children: The Law of Psychology (1993 at 334) and the manner in which the views and finding of the said authors were referred to and applied by Ebrahim, J.A., in the Zimbabwean case of

14 S v K, 2000(4) BCLR (NmS) 405 AT 418 I – 419 B.
For a further discussion of this cautionary rule see The South African Law of Evidence, 4th ed. by Hoffmann & Zeffert, p. 581/582.

S v S.[15] The learned judge, apparently relied heavily on the said work by Spencer and Flin in identifying the six main objections to relying on children's evidence. These objections were set out as follows:

a) Children's memories are unreliable;

b) Children are egocentric;

c) Children are highly suggestible;

d) Children have difficulty in distinguishing fact from fantasy;

e) Children make false allegations particularly of sexual assault;

f) Children do not understand the duty to tell the truth.

Ms. Lategan relies on the examination by Ebrahim, J.A., in his judgment of the "traditional objections in the light of research findings on children's cognitive ability" and where Ebrahim, J.A. held:

> "In respect of (a), research has shown that children generally have a good recall of central events but a poorer memory for detail and evidence of surrounding circumstances, in respect of (b), it would appear that only very small children are so egocentric that they are unable to be objective concerning the truth and in respect of (c), research has shown that children like adults are suggestible, in respect of (d), although a child's existence is more centered around his/her imagination than an adult, children do not fantasies about things that are beyond their own direct or indirect experience, and in respect of (f), the contention that children do not understand the duty to tell the truth is a gross generalization that does not acknowledge the difference in age, intelligence and morality between children."

Ms. Lategan has not placed the said book of Spencer and Flin, or any

15 1995(1) SACR 50 ZC

extracts from it before this Court. Ms. Lategan was silent on whether or not the learned authors were experts themselves or have merely accumulated the work of alleged experts and/or other alleged investigators in their book. It is also obvious that neither the authors or any other experts testified in the Trial Court on this issue and the accused was in no position to deal with such issue. Neither the Trial Court nor this Court was therefore placed in a position to properly consider and evaluate the alleged "explosion of information and research" and in particular the reliability of and the weight to be attached to the information and opinions, contained in the aforesaid work of Spencer and Flin.

I have already expressed caution in a previous decision of this Court to the tendency of legal practitioners to refer the Courts in argument to the opinions of alleged experts and/or other knowledgeable people contained in publication, and some Courts then relying on such opinions, without such opinions having been placed before Court in accordance with the traditional rules of evidence applicable in the Namibian and South African Courts relating to the admissibility of opinion evidence.[16]

I reiterate what I said in regard to the acceptance of opinions contained in papers where the authors did not testify before the Court as experts on the issue of the percentage of complaints in sexual cases which were found to be false, compared with complaints in other crimes:

16 S v K, 2000(4) BCLR 405 (NmS) at 413 F –414 D.

“Although both the Namibian decision in S v D and the South African decision in S v Jackson (supra) amount to strong persuasive opinion for this Court on this issue, the following reservation must be made.

In S v D it was accepted as a fact at 145i that:

> 'There is no empirical data to support the contention that in cases of this nature more false charges are laid than in any other category of crimes. Indeed, the evidence that is available indicates the contrary. D Hubbard, *A Critical Discussion of the Law of Rape in Namibia* states at 34 of her discussion that ‘a US study found that the incidence of false reports for rape is exactly the same as that for other felonies - about two per cent’.'
> (My emphasis added.)

In S v Jackson Olivier JA said at 474-5:

> '...what proof is there of the assumptions underlying the rule?
> The fact is that such empirical research as has been done refutes the notion that women lie more easily or frequently than men, or that they are intrinsically unreliable witnesses.'

As authority for this statement the learned Judge refers inter alia to S v D and the aforesaid paper by Dianne Hubbard referred to above and the LLAMA thesis, University of Cape Town, of one Collean Helen Hall.

Olivier JA further relies for the same alleged statistic on a publication by DJ Birch '*Corroboration in Criminal Trial: A Review of the proposals of the Law Commission's Workshop Paper*' for the alleged fact that the New York Sex Crimes Analysis Unit has 'carefully analyzed all allegations made to them over a period of two years' and that 'they found that the rate of false allegations for rape and sexual offences was around two per cent, which was comparable to the rate for unfounded complaints of other criminal offences'.
The ease with which the courts have accepted in their judgments, statements of fact regarding the statistics involved, contained in 'papers' by authors, without having heard testimony of such authors in the course of the trial, surprises me.

This tendency is seen mostly in cases dealing with alleged breaches of fundamental human rights and freedoms and where the issue in question has become an emotional issue.

> I do not suggest for a moment that the 'authors' relied on are not credible and that the alleged facts of statistics are not the truth. The problem is rather that if the Courts relax their rules as to the requirements for the admission of hearsay evidence or of the opinions of experts in such cases, it will be difficult, if not impossible, to draw the line when the Courts deal with any other issue of fact or opinion. Such a tendency will not strengthen the search for the truth, but will frustrate it.
>
> I will consequently assume for the purpose of this judgment that there is no empirical evidence properly placed before this Court to support the contention that in cases of this nature more false charges are laid than in any other category of crime but will on the other hand not assume 'that the evidence available, indicates the contrary'."

It is significant that, as conceded by Ms Lategan, that the said information and research "has not to date impacted on the South African Courts."

I see no good reason why the so-called "traditional approaches stated by Schreiner, J.A. in R v Manda,[17] and by Diemont, J.A. IN Woji v Santam Insurance Co. Ltd.[18] and Wigmore in his "Code of Evidence"[19] and "Wigmore on Evidence" and referred to by Ms. Lategan, should now be abandoned.

I also have difficulty in discerning any substantial or fundamental difference between the so-called "traditional" guidelines and those now put forward by Spencer and Flin and those summarized and applied in S v S, *supra*. Furthermore, most of the suggested new guidelines above-quoted as points (a) – (f), are not very helpful in any case. I need only

17 R v Manda 1951(3) SA 158(A)

18 Woji v Santam Ins. Co. Ltd, 1981(1) SA 1020A at 1028 A - E

19 Wigmore, Code of Evidence, par 568 at 128; Wigmore on Evidence, Vol. II, par. 506 at 596

refer to the suggested new guideline (f) where it is stated:

> "the contention that children do not understand the duty to tell the truth is a gross generalization that does not acknowledge the difference in age, intelligence and morality".

Surely, one cannot generalize about children. It would always depend on age, intelligence, education, the home and school environment, and to what extent the child has been taught in his home environment the need for moral values, in particular the meaning of the "truth" and the need to tell the truth. The traditional cautionary rules, properly understood, does certainly not exclude these considerations.

Children are generally more vulnerable than adults. That is also one of the reasons why e.g. it is an offence to have sexual intercourse with a female under the age of 16 years and why a person is guilty of the crime of Rape if you have intercourse with a child under the age of 12 years, notwithstanding the consent of such females.

Children are mostly also dependant on adults, particularly on their parents and consequently they are more vulnerable than adults to coercion and other forms of undue influence by such parents or adults.

The Court should have identified a danger sign when the testimony showed that the alleged victim, Ms. L. never complained on her own initiative until she was repeatedly coerced "to tell the truth", failing which she will be beaten.

The Court failed to refer to and consider this coercion and its possible impact on the "complainant" and the veracity of the story eventually told in Court. Consequently I hold that Courts must still abide by the cautionary rule relating to the testimony of young children as contained in our existing law of evidence and laid down and implemented in authoritative decisions of the South African and Namibian Courts.

To return now to the question whether or not the Trial Court applied the cautionary rule. The Learned trial judge did not state anywhere in his judgment, that he was aware of the cautionary rule; that the child witnesses were very young; and that he must consequently approach their evidence with the necessary caution contemplated by the rule.[20]

The nearest the Court came to the special consideration required by the rule was when it said:

> "L1. and the complainant gave their evidence in an honest and frank manner despite their tender ages. They were very intelligent young girls."

I conclude that the learned Court did not apply the cautionary rule and consequently misdirected itself in this regard.

2. <u>The Court misdirected itself in regard to whether or not there was corroboration of the evidence of the victim</u>

20 S v Makhanya, 1991(1) PH H9 (B) at 23
R v J, 1966(1) SA 88 (RAD) at 91 - 93

Corroboration was required not only because of the youth of the victim Ms. L., but because she was essentially a single witness in regard to the question whether or not it was the accused who had sexual intercourse with her.

At the outset of deciding this question, it must be conceded that it was proved beyond reasonable doubt that at some stage or other, a male person had sexual intercourse with the victim Ms. L, during which intercourse her hymen was perforated.

The issue was whether or not the accused was the person who had intercourse with her and who was responsible for the fact that she was suffering from a sexually transmitted disease, namely gonorrhea.

The rule already dealt with in the preceding subsection, that corroboration would normally be required to satisfy the cautionary rule relating to the youth of the victim. Such corroboration is however, also required where the complainant is a single witness on the issue of the identity of the person who had intercourse with her, unless the evidence of the single witness is satisfactory in all material respects.[21]

The Court again did not warn itself of the single witness rule and did not apply the rule, probably because it found that the complainant was “in some material respects corroborated by that of L1. and their mother,

21 R v Mokoena, 1956(3) SA 81(A) at 85 – 86.

Mrs. D".

The Court however, misdirected itself in its finding that there was such corroboration. I say so for the following reasons:

(i) Corroboration by the mother of the victim:

The Court did not state in what respects the mother corroborated the complainant. The "complaint" by the complainant did not amount to a complaint admissible in law.

The evidence of the complainant was elicited by the trial judge wrongly and irregularly during the cross-examination by the accused of the Mother, Mrs. D., as indicated under Section B, *supra.*

Although Ms. L. was the victim, she was not really a complainant because she had never complained. According to the evidence of the mother, Mrs. D., when Ms. L., was confronted by her because of the discharge on her panty, she on two occasions declined to say what happened to her. Then after she came home late from school on the 14th May and when asked, she said she came from uncle Albertos' house. (i.e. from the house of the accused.) Nevertheless Mrs. D. apparently did not believe her, because she continued to insist that Ms. L. must tell her where she came from. She even threatened that she will beat Ms. L. to force Ms. L. to say

where she was coming from.

Then Christine, the cousin of Ms. L. who was allegedly present in the house but not called as a witness, also intervened and repeatedly asked Ms. L. to tell the truth in order to prevent a beating by Mrs. D. Ms. L. however, continued to decline to "tell the truth" until at some later stage, she related "the story" to Mrs. D. When and where that happened and what the story was, was not disclosed in the examination in chief of Ms. Lategan. It was only when the learned trial judge elicited this evidence, that Mrs. D. told the Court what Ms. L. had allegedly told her.

The reliability of the testimony is further diminished by the evidence of Dr. Liebenberg when asked about the information given to her when the complainant was brought to her. Dr. Liebenberg was pertinently asked by the Court: "When was she sexually molested or assaulted?" The answer was: "What I have written there is that the alleged incident would have been around two weeks before my examination. No specific date was given. The mother was doing most of the talking. The child just agreed. So it was difficult to establish what, when, where, how, etc but two weeks was more or less the working information…"

The State's case was that there were three occasions of rape, and not only one incident; also not only approximately two weeks before the examination, but during the period "from November

1998, until and including May 1999".

In the aforesaid circumstances, the mother D. could not possibly be regarded as having corroborated the complainant, as found by the trial Court, at least not in regard to the issue of whether or not the accused had sexual intercourse with her.

(ii) Corroboration by the sister of the victim

The sister L1., was only 7 years old when the incidents took place and 8 years when she testified.

The Court found that L1. "in essence corroborated the evidence of the complainant whenever she was present". The "corroboration" was set out by the Court as follows:

> "She testified that their mother would send them to the accused's house to ask for food and that he would always give them food and money. She corroborated the incident where the accused gave her 50 cents to go and buy sweets and upon returning she called for the complainant but did not received any reply but later the complainant emerged from the accused's bedroom. Another aspect of her testimony corroborating the complainant is that when they arrived at the accused's house they found him seated outside, drinking beer. She further testified that the complainant told her that the accused ' did it to her', a phrase which has a sexual connotation to the witness. However, the complainant told her not to report the incident to the mother. She also observed that the complainant couldn't walk properly something also testified to by the complainant."

Unfortunately the Court never considered whether or not Mrs. D, could have influenced L1., just as she had influenced Ms. L. The phrase that Ms. L. told her that the accused “did it to her” was particularly suspicious because when the Court questioned her during the cross-examination by the accused, she used the same phrase to describe the report which the complainant had made to her. She said: “When I asked her where she was coming from she told me that she was coming from Uncle Albertos’ home and when I asked her why her panty is looking like that, where the discharge is coming from and then she told me that Uncle Albertos did it to her.”

The evidence of L1. regarding the report allegedly made to her by Ms. L., was at any event elicited by Ms. Lategan by means of a leading question and should consequently carry little weight if any. The first question was: “Did Ms. L. ever tell you anything that uncle Albertos did to her? (my emphasis added.) Although this was a leading question, L1. answered unambiguously “No”. The learned prosecutor was not satisfied and now put it even more leading. She asked: “Did Ms. L. ever tell you anything that uncle Albertos did to her? (My emphasis added.) She now answered: “Yes another time.” The next question was: “What did she say?” And now she said: “She told me that uncle Albertos did it to her.”

The court furthermore completely ignored the contradictions between the aforesaid evidence of L1. in Court and her statement

to the police. In her evidence in Court she referred to an occasion when she had been given 50 cent by the accused to buy sweets, and when she returned to accused's house, accused and complainant were in accused's house somewhere. In her police statement she said however, that when she returned to accused's house, the complainant and accused were still outside. She further said: "According to my observation my sister was calm and normal."

In her police statement she also said in regard to the second and last incident, that her sister was "calm and normal". The witness also did not mention at all that complainant had told her that Uncle Albertos "did it to her". In her said statement she mentions that the accused gave her 50 cent on one occasion, but in her evidence in Court she mentions an amount of N$3,00 given to her on one occasion and 50 cent on another occasion.

The Court also held that the words "did it to her" was a phrase which had a sexual connotation to the witness. This is another misdirection because the witness clearly testified that she did not know the meaning of the words that Ms. L. used in saying "Albertos did it to her". The learned judge then questioned the interpreter and the latter explained that the connotation of the words: "I did it to her" in the native language had the special connotation "it is like you use it usually if you are trying to say that he sleep with her but not in a direct way".

L1. was now asked by Ms. Lategan whether she told her mother about what Ms. L. had said to her. L1. answered – “No”. She was then asked why not and L1. answered: “Ms. L. said that I mustn’t tell my mother”. None of this evidence was contained in L1.’s police statement.

The aforesaid allegation by L1. about Ms. L.’s statement to her was inadmissible evidence and for that reason alone, the Court was not entitled to use it as evidence corroborating the complainant. L1.’s evidence in Court that she noticed unusual behaviour of Ms. L. in that she couldn’t walk well was also never mentioned in her statement to the police and in fact completely inconsistent with that statement where she only talked of her sister Ms. L. being “calm and normal” after the alleged incidents at his house.

When L1. was referred to the occasion when she was given 50 cent and then asked whether on another occasion, when she and Ms. L. was at the home of the accused, that she saw Ms. L. disappear or that Ms. L. was no longer there. She answered – “No”. This answer meant that she does not know about such an occasion.

Ms. Lategan however, was not satisfied and pressed the witness once more and referred her to a day when the witness allegedly

went out to a toilet and then asked: "Was there a day that you were inside the house of the accused and you went to the inside toilet?" The answer now was "Yes" and on further questioning the witness now said that when she returned, Ms. L. and the accused was not in the sitting room. When L1. was asked by Ms. Lategan what she did with the money given to her by the accused, she said: "I cannot remember".

In the circumstances, the corroboration if any, was not worth mentioning. The Court had consequently misdirected itself in finding corroboration in the evidence of L1. for the evidence of Ms. L.

3. Although the Court was justified in observing that the evidence of the victim had "a ring of truth about it, it failed to consider other defects in the testimony of the two witnesses Ms. L and L1.. So e.g. the fact that none of them, notwithstanding their purported intelligence and veracity as found by the Court, could give any indication of the days or even the months during which the alleged incidents took place. The last incident, according to the "information" given to Dr. Liebenberg took place about 14 days before the medical examination. At best, it was an inference from the mother's discovery of the late arrival of Ms. L. from school and her observation that there was some discharge on the panties of Ms. L., but why were the two witnesses not able to give any indication of the month or day on which the alleged incriminating

events took place. Alternatively, why did the Court not elicit evidence from the witnesses in this regard not only as a concrete test of their intelligence and veracity, but because those facts were of great importance to an accused who had to defend himself on serious charges of Rape, purportedly committed on "diverse" occasions. Even if the witness Ms. L. could not remember the date and month of the first two occasions, there could be no reason for being unable to remember the last occasion, if her story was true. It could be understood if the Court considered this issue and found that the two child witnesses, because of their youth, could not be blamed for being unable to give reasonable particulars of dates and times, even if only approximately. But the Court had not done so and relied on their intelligence and veracity as witnesses instead.

4. The Court had failed to consider the significance of the apparent inability of the state witnesses to provide dates and times, or even approximate dates and times of the alleged incriminating events and that such inability may be consistent with and indicative of possible fabrication.

The Court had also failed to consider that the effect of the failure by the State to provide approximate dates and times, even if sufficient for the purposes of the validity of the indictment, was prejudicial to the defence. More so, when the accused has no legal representation, and indicates that he was probably at work when some of the alleged incidents took place or that there were other people staying at his home during various

periods which would have made it impossible to commit the acts alleged during those periods.

5. The Court allowed the interpreters, who were casual interpreters, to convey the questions put by the accused to the State witnesses in the “third person” and convey the answer to the Court also in the third person.

The accused could not speak English and his questions as well as his answers when questioned had to be translated from the Ombundu language into English and vice versa.

The Court failed to direct the casual interpreters to translate the questions and answers directly and to convey it in the first person, and not the third person.

This form of translation was not only a wrong procedure, but was prejudicial to the accused, particularly when he cross-examined, because it impeded the flow of the questioning and made mistakes in the transmission more likely.

6. The Court misdirected itself by first accepting the evidence of the state witnesses “as the truth” and only thereafter giving some brief consideration to the accused’s version and then rejecting it “as a lie”.

What is required before evidence of an accused can be rejected as a lie,

is first a consideration of all the evidence, its strengths and weaknesses and the probabilities and thereafter the finding of who tells the truth and who tells the lies.

7. The Court rejected the version of the accused as “a lie”, and stated as a reason: “He lied and changed his version as he went along, improvising his defence”.

The Court would have acted more in consonance with the correct approach, if it first set out how the accused “changed his version as he went along, improvising his defence” and then using that as a reason for concluding that he was lying. Unfortunately the Court failed to set out where, when and in what manner or in what respect the accused had “changed his version as he went along, improvising his defence”.

The Court then gave the further reason for its finding as follows: “He tried to give the reason for the alleged false incrimination as the love relationship between him and the complainant’s mother which went sour and that she had a grudge against him and instigated false charges against him”.

The statement then follows that “The accused’s version is rejected as a lie”. Up to this stage, not one reason is given for rejecting this part of the accused’s defence as a lie. The Court did not test this part of the defence against the requirement of whether or not it can be reasonably possibly true.

The Court preferred to designate the accused's evidence as a lie and in doing so ignored the fact that the accused's evidence in regard to the relationship with the mother of the victim stand uncontradicted. The mere fact that the accused had not put this allegation to the mother in cross-examination is no ground for summarily rejecting his allegation in the circumstances set out in Section B, *supra*. I need only reiterate that the accused in fact put this issue to Ms. L. when she testified and the Court then prevented an answer by the witness by interrupting with the following words: "Yes, any other question?" This interference was a clear indication by the Court that the accused should not raise this issue. No wonder that when he later cross-examined Mrs. D., the mother of Ms. L., he did not raise the issue with her in cross-examination. In any case, as shown in the aforesaid Section B, the cross-examination by the accused was interfered with and disrupted to such an extent, that he was not to blame for not putting the issue to the mother.

In the result, the Court should have accepted the evidence of the accused in regard to his relationship with the mother and then considered how that fact impacts on his defence that the mother concocted the charges to take revenge.

SECTION D:

CONCLUDING OBSERVATIONS AND FINDINGS

There is no doubt that some person had sexual intercourse with Ms. L. and has gravely abused her notwithstanding the fact that she probably was a consenting party.

The crucial factual question for the Court *a quo* was to determine whether the accused was the male person responsible.

It is not inconceivable that a child of tender years, who may be a victim or even a consenting sexual partner, may in response to coercion by a person or persons in authority such as parents, or in response to other forms of undue influence, point out an innocent person in order to protect the identity of the real culprit who is her sexual partner, if in her judgment, such allegation will be acceptable to the aforesaid persons in authority. Such cases have in fact come before the High Court in the past.

The Court's duty was, as pointed out repeatedly in this Court and in the High Court of Namibia, to act as an administrator of justice with the main aim being to establish the truth. In exercising this function, the Court must conduct a fair trial in accordance with Article 12 of the Namibian Constitution and in accordance with those procedures and principles laid down and applied in our case law. More specifically, the Court must consider and balance the fundamental rights and interests of the accused with that of the State and the prosecution, but also with the fundamental rights and interests of the victim. The aforesaid balancing function must however, always be carried out subject

to the specific constitutional principle that an accused is presumed to be innocent until proved guilty beyond all reasonable doubt, in a fair trial.

In my respectful view, the irregularities and misdirections in this case, are not merely of a technical nature which did not prejudice the accused in his defence. The cumulative effect of all the irregularities and misdirections are such that the conclusion is inevitable that a failure of justice has occurred and that the conviction and sentence must therefore be set aside, notwithstanding the reasonable possibility – or even probability that the accused had committed this heinous crime.

It is unfortunate that in the circumstances justice is not done or seen to be done to the victim and her mother. But this result could have been avoided if there was a proper investigation of the case by e.g. having had the accused medically examined at the appropriate time and if the Court ensured that the accused had legal representation or at least had a reasonable opportunity to obtain the services of a legal practitioner and if the further procedures and principles of a fair trial were adhered to.

This case once again underlines the need for proper legal representation of accused persons charged with serious crimes and why the right to legal representation is entrenched in the Namibian Constitution. Even very competent judges may err. Without appropriate legal representation, the risk of error is so much greater.

In conclusion I wish to express the Court’s appreciation of the thorough

argument put before it by counsel. In particular, the Court appreciates the contribution made by Mr. Cohrssen in appearing for the accused *amicus curiae* – i.e. at the request of the Court.

In the result I make the following order:

1. The appeal succeeds.

2. The conviction and sentence of accused are set aside.

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

I agree.

(signed) STRYDOM, C.J.

I agree.

(signed) CHOMBA, A.J.A.

/mv

COUNSEL ON BEHALF OF THE ACCUSED: Adv. R.D. Cohrssen
(*Amicus Curiae)*

COUNSEL ON BEHALF OF THE RESPONDENT: Adv. A. Lategan
(Prosecutor-General)