

THE STATE versus IPINGF SHIMI

CASE NO. CC 3/99

Silungwe. J.

2000.05.05

**CRIMINAL PROCEDURE**

**CAUTIONARY RULE:**

Complainant single witness - a young girl aged 5 years - susceptible to suggestions by adults - evidence to be approached with caution.

**CORROBORATION**

injury suffered by victim of a sexual crime and emotional stress shortly after crime committed may furnish corroboration.

**RECENT COMPLAINT -**

Trite law that a complaint induced by intimidation is inadmissible - but where e.g. a child victim has been subjected to threats by the accused, an induced complaint devoid of physical violence may be treated as an exception to the rule.

CASE NO. CC3/98

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

IPINGF SHIMI

CORAM: SILUNGWE, J.

Heard on: 1999-03-18

Delivered on: 1999-03-19

JUDGMENT:

SILUNGWE, J.: The accused, who is now aged 24 years, faces a rape charge, it being alleged that on November 23, 1996, at Elim Village, in the District of Oshakati, he unlawfully and intentionally had sexual intercourse with Princess Vicky Shikamba, a girl under the age of consent, namely: 5 years old. He has pleaded not guilty and denied any knowledge of the crime.

The State's case rests on the evidence of three witnesses, namely: Princess Vicky Shikamba, alias Tulipo John Vicky Ndeyapo Princess (hereafter referred to as the

complainant) who is now 8 years old, Raima Mukwiilongo, the complainant's grandmother, and Dr Anni-Liina Hatutale, a medical practitioner stationed at Oshakati Regional Hospital.

On the other hand, the case for the defence hinges on the evidence given by the accused himself and on that of two defence witnesses, to wit: Sam Charles, a cousin who is a 14 year old grade 7 school boy, and Martin Utoni, also known as Shanika, a 14 years old grade 8 school boy.

The following evidence does not appear to be in dispute and is thus found as a fact. The complainant lives with her grandmother in a house belonging to the latter (hereafter conveniently referred to as the complainant's house) which is located in Elim Village within the District of Oshakati. The accused is a next door neighbour of the complainant and lives in a house belonging to his mother (hereafter conveniently referred to as the accused's house). These two houses are separated by a distance of about 4 metres. The accused's mother and that of the complainant are sisters but his mother is apparently resident in Oshakati. The accused and the complainant are, therefore, cousins. The accused works in Oshakati but normally returns to his house at weekends. A sister of the accused, Nashiumbu, has a child and lives at the accused's residence together with her child. The complainant, apparently, sometimes looks after that child.

The complainant attends school and is in grade 3. She is a baptised christian of the Evangelical Lutheran Church of Namibia who has, after examination in terms of sections 192 and 193 of the Criminal Procedure Act 51 of 1977, been found to be

sufficiently intelligent, an effective communicator and appreciates the nature of an oath and the duty of speaking the truth. Accordingly, she has been declared a competent witness and so her sworn testimony has accordingly been received. In point of fact, the complainant is clearly an above average schoolgirl who is not only intelligent but also sharp.

On Friday November 22. 1996, the complainant's grandmother left home on church business and only returned to Elim Village in the evening of Sunday November 24.

On the day of departure of the complainant's grandmother, the accused returned to Elim Village in the company of Charles, the father of Sam, one of the defence witnesses, and for one reason or another, spent that night at the complainant's house but nothing amiss occurred.

On Saturday November 23, the accused and Charles went to Oshakati and upon their return to Elim Village, they found that all, save the complainant, had had lunch. Extra lunch was, however, prepared for, and partaken by, the accused, Charles and the complainant. This was followed by television watching.

Subsequently, the complainant left her house for the purpose of visiting the accused's sister, Nashiumbu; that was at the accused's house but Nashiumbu was not there as she had reportedly gone for a hairdo. In the meantime, the accused went to his house to have a bath. At some stage thereafter, the complainant returned to her house but made no complaint to anybody.

Later that Saturday, the accused and Charles went back to Oshakati but the accused returned to Elim Village again on Monday November 25.

In the meantime, the complainant's grandmother returned home in the evening of Sunday November 24 and apparently noticed something amiss with the complainant whereupon she enquired what had happened to her during her absence, but the complainant would not say; the complainant maintained her silence until she was threatened by the grandmother when she reported that she had been raped. Upon inspection of the complainant's genitalia, the grandmother could not believe what she saw inside the complainant's private part: there was some foam. The grandmother asked who had raped the complainant whereupon she implicated the accused as the culprit. The grandmother immediately caused some water to be wanned but when this was applied on the complaint, the grandmother was not satisfied with the result. She then dispatched a young man named Velomina Kabele to take the complainant to Oshakati Hospital. The complainant was taken to the police, to the Woman and Child Abuse Centre and to the hospital where Dr Hatutale examined her and compiled a medical report, exhibit B. The complainant complained of abdominal pain. On examination, the doctor observed that the complainant had yellowish virginal discharge and her underwear was stained; there was also a 1-2cm superficial wound on labia majora and a swelling thereunder. There was no bleeding but redness, which was present, was associated with the vaginal discharge. The complainant found the examination painful. The hymen was open but the Doctor could not assess whether it was torn. The vagina had no membrane. The swelling could have been caused by an external object. The Doctor took some samples, namely: a vaginal swab and urine which were then sent to a laboratory. She later saw the result: the vaginal swab had

organism bacteria.

The bone of contention in this matter is as to what allegedly transpired between the accused and the complainant. The accused maintains that nothing improper happened between the two. He asserts that he has no knowledge of the crime of rape alleged against him. But the complainant vigorously asserts that the accused did rape her. Her story is that when she visited the accused's house and found that Nashimbu whom she had gone to see was not there, the accused arrived and asked her whether she would like to sleep there or return to her house. The complainant, not knowing the accused's motive, said that she would sleep there. The accused then asked her to lie down on his bed. The complainant obliged. The accused also lay on the bed, undressed the complainant and had sexual intercourse with her by inserting his penis in her vagina. The accused lay on top of the complainant's belly and made forward and backward movements in a rocking manner. During the intercourse, the complainant testifies she experienced pain.

When the accused finished, he allegedly threatened the complainant not to tell anyone about what had happened and that should she do so, she would be beaten and killed. The complainant got up, dressed and returned to her house. There she made no complaint to anyone for fear of the accused's threat and even when her grandmother returned home she refused to tell her her story because of the accused's threat. But when she was threatened by the grandmother, she revealed what had happened to her.

In considering this case, I am mindful of the need for the cautionary rule to be applied by reason of the fact that the complainant is not only a single witness in relation to the

essence of the allegation but she is also a young child who is susceptible to suggestions by adults and she is thus liable to embellish what allegedly transpired. In such circumstances, her evidence must be treated with the utmost caution. **See:** *R v W* 1949 (3) SA 772 (A); *R v Monda* 1951 (3) SA 163; *R v j* 1958 (3) SA 699; and *R v S* 1984 (4) SA419(GW).

In such circumstances there is need to look for corroboration which I do. Having thus warned myself, I am firmly of the opinion that the complainant, as Ms Nakanyala has correctly submitted, gave her testimony in a forthright and sincere manner and without hesitation. As previously stated, she is well above average. I am very impressed with her demeanour; her testimony, her candidness and I believe her to be a credible witness, notwithstanding her youthful age.

In regard to corroboration with reference to emotional stress, the injury suffered by the victim of a sexual crime may furnish corroboration of his or her testimony. **See:** *R v Trigg* (1963) 1 All ER 490. And so, emotional stress shortly after the incident may also provide corroboration: *R v Redpath* 1962 46 Cr. App. R 319; *Rv Knight* (1966) 1 WLR 230. But much depends on the facts of each case and the nature of the defence advanced by the accused. The facts in issue may require the Court to consider certain risks, for instance, were the injuries self-inflicted? was the emotional stress genuine or simulated. Even if the emotional state be genuine, the court must nevertheless be satisfied that the emotional stress was indeed the result of the fact that the witness was the victim.

In the instant case, the condition of stress relates to the pain that the complainant experienced and expressed to her grandmother and to the doctor. The injuries observed by the doctor are corroborative of her story. The complainant could not confide her traumatic experience to anyone else but her grandmother, whom she trusted.

Mr Potgieter strongly submits that the complaint, which was induced by the grandmother's threats, is in any advent inadmissible on the ground that it is trite law that a complainant induced by intimidation is inadmissible: *SvT* 1963 (1) SA 484(A).

It seems to me that in the light of the rampant cases of sexual abuse and the necessity to safeguard the interests of society in curbing of such abuse, where the victim is a child or any other complainant who has been subjected to threats either by the accused or by a third party, an induced complaint which, for instance, is devoid of physical violence, may be treated as an exception to the general rule. It would be idle to expect that such a complainant in such circumstances would readily be volunteer the complaint in the face of the threat dangling over her head, as the present case demonstrates.

The case of *S v T* (supra) is distinguishable from the present one on the basis that here the complainant was threatened not to tell her story to anyone.

In any event, even if the complaint were excluded, there is sufficient corroborative evidence of the grandmother's observations and the doctor's findings in material respects.

What the complainant's grandmother and the doctor observed confirmed the complainant's allegation of having been raped.

As regards penetration, this is amply covered by the doctor's evidence which I accept. In any case, even the slightest penetration suffices. See *R v V* 1960(1) SA 117 (T); *R v E* 1960 (2) SA 691 at 692; and *S v F* 1990 (1) SACR 239 (A). The complainant maintains that she was raped. The hymen was open and there was abrasion on the labia majora coupled with swelling thereunder. I am satisfied beyond a reasonable doubt that penetration has been established.

I have given careful consideration to the evidence adduced by the accused and his witnesses. He does not get much support from the evidence of his witnesses which, if anything, goes to support the prosecution case. I do not believe the accused's evidence as I find it to be false and as such, cannot possibly be reasonably true. Accordingly the accused's defence is rejected.

I am satisfied that the crime of rape has been proved beyond a reasonable doubt and I convict the accused as charged.

A handwritten signature in black ink, appearing to be 'J. Silungwe', written in a cursive style.

**SILUNGWE, J.**

**ON BEHALF OF THE STATE**

**Instructed by:**

**ADV NAKANYALA**

**Office of the Prosecutor-General**

**ON BEHALF OF THE DEFENCE**

**Instructed by:**

**ADV K POTGIETER**

**Directorate of Legal Aid**