

THE STATE versus FRANS HAMUTENYA

CASE NO. CC 46/99

Silungwe, J.

2000.05.03

CRIMINAL PROCEDURE

CAUTIONARY RULE:

Complainant a child of tender years - imaginativeness and suggestibility of children - application of cautionary rule.

CASE NO. 46/99

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

FRANS HAMUTENYA

CORAM: SILUNGWE, J.

Heard on: 1999.03.18-19, 1999.10.19-20, 1999.11.09

Delivered on: 1999.12.02

JUDGMENT

SILUNGWE, J.: The accused, who is now aged about 31 years, is arraigned for the crime of rape, read with section 94 of the Criminal Procedure Act 51 of 1977 (hereafter referred to as the Act). It is alleged that during the period July 1996 and November 9, 1997 at Farm Rente, in the District of Gobabis, the accused unlawfully and intentionally had sexual intercourse with Amanda Kativa, a girl under the age of consent, namely: 4

years old. In pleading not guilty, he states, in terms of section 115(1) of the Act: "I do not know these people and I have never been at the farm Rente." During the section 119 proceedings, he told the Gobabis Magistrate's Court (omitting a disputed sentence): "I do not know the complainant at all. . . . I deny that I had sexual intercourse with an 8 year old whatsoever during July 1996. I know nothing about these allegations."

Amanda Kativa (hereafter referred to as the complainant) does not understand the nature and import of the oath but she has, on being admonished to speak the truth, been allowed to give evidence without taking the oath, in terms of section 164(1) of the Act. As neither she nor her mother, Paulina Samcao, knows her age, she has been X-rayed by Dr J.A. Van Rooyen and found to be 6 years old, as is evidenced by exhibit "B". This confirms that when this matter came to light in 1997, the complainant was 4 years old.

A summary of substantial facts in terms of section 144(3)(a) of the Act reads:

From July 1996 until 9 November 1997 at Farm Rente, in the District of Gobabis, the accused regularly took the complainant, Amanda, out of the house at night, informing the mother that he was taking her out to urinate. The accused however was having sexual intercourse with the complainant. One morning, Paulina, the mother of the complainant, checked the panties of the complainant and found blood and semen on it. She thereafter took the complainant to the hospital at Otjinene for treatment.

Ms Verhoef of the Prosecutor General's office appears for the State and Mr Potgieter, who is briefed by the Directorate of Legal Aid, is for the accused. Six witnesses have been called by the State and one - the accused himself- by the defence.

The State's case is that one Johannes Marthinus du Plessis runs Farm Rente which is otherwise known in Herero as Ongava. He employed the accused as a full time general farm labourer with effect from October 2, 1993, until November 8, 1997 - a period of 4 years. The accused is, therefore, well known to him; he knows him as Muliki Kapumburo but he is commonly known by his nick name, to wit, Frans.

According to Paulina Samcao, she and the complainant's father used to live together, apparently at Farm Rente, but when their relationship ended, she became the accused's lover and the couple started to live together in a one-roomed house at Farm Rente. The complainant and her young sister called Tjikoko also lived with the couple. Paulina confirms the evidence of Johannes that the accused was employed at Farm Rente as a general farm labourer.

Paulina lived with the accused for two years and together had a son born to them. The house they occupied did not have a toilet inside it.

Despite her tender age, the complainant is an intelligent and articulate grade 2 school girl. She tells the Court that she used to get on well with the accused. Both the complainant and her mother, Pauline, maintain that the accused did not allow the complainant to visit

her biological father who lived in another house, also at Farm Rente, together with State female witness Muvatere Matuka who had since become his girl friend.

The gist of the complainant's account is that the accused, whom she names as Frans, used to have sexual intercourse with her on several occasions at night. The *modus operandi* was that he would awaken her up at night on the pretext that he was taking her outside so that she could pass water as there were no toilet facilities inside the house. Sometimes he would wake up the complainant's young sister, Tjikoko, as well but who, after urinating outside, was sent back into the house so that the accused could have the opportunity of taking advantage of the complainant's company, which opportunity he used to satisfy his own sexual gratification. At the accused's behest, she took off her panties and lay on her back. The accused then took off his trousers and underwear and inserted his penis into her vagina as he lay on top of her with her legs kept apart. She felt pain and sustained injuries in her vagina which bled.

Paulina confirms the complainant's story to the effect that the accused often used to take the complainant outside to urinate but, rather naively, she did not suspect that the accused was up to mischief until she started to observe blood and a white mucous-like substance on the complainant's vagina. She then took the complainant to Otjinene Clinic for examination. As a result of information received, and upon their return home, Paulina kept the accused under surveillance.

Within about two to three weeks thereafter, Paulina heard the accused telling the complainant to be taken outside to wee-wee whereupon both went out of the house. According to the complainant, Tjikoko also went outside but she was subsequently sent back into the house by the accused. At the accused's behest, the complainant took off her panties and lay down on her back with legs apart. The accused took off his trousers and underwear and lay on top of her. While the accused was busy having sex with the complainant, her mother came out with a torch. The accused jumped up and put on his trousers. They all then went back into the house to sleep. Under cross-examination, the complainant dismisses any suggestion of mistaken identity and maintains that she has known the accused for a long time and that she is sure he is the one who sexually molested her.

The complainant, like her mother, says that the accused was working at Ongava, which means Farm Rente. She concedes that she does not know what rape means but she is able to explain what she alleges the accused did to her, not once, but on several occasions.

Pauline confirms having caught the accused red-handed when she shone a torch at him and the complainant. She was shocked to see the accused on top of the complainant. The accused jumped up and put on his pants.

Upon their entry into the house, the accused took a walking stick and attempted to assault Paulina when she asked him why he had done that to the complainant. She asked him

what he would do if she laid a charge against him. When she asked him why he was having sexual intercourse with the child, he made no reply. Thereafter, they slept.

The following morning, after the accused had left for work, Paulina called the complainant and asked her if the accused had been having sex with her and she answered in the affirmative. The complainant told her mother that the accused had been doing that often.

Paulina then went to Muvatere's house, which was separated from hers by another house, and reported the matter to her. Paulina was in need of some money to enable her to take the complainant to the clinic which money was supplied by the complainant's father.

As the accused had threatened to kill Paulina, the latter left Farm Rente, taking the complainant with her, and proceeded to another farm where her brother lived. Since the telephone there was out of order, she sent a message to the complainant's father to alert the police. Subsequently, the police arrived and conveyed Paulina and the complainant to Gobabis Hospital.

When cross-examined, Pauline testifies that the accused was employed at Farm Rente for four years. This is in line with the testimony given by Johannes who is adamant that the accused was his employee for the period of time aforesaid. She states that if the accused says that he does not know her and that they have no child together, he would be telling lies.

Muvatere Matuka supports Paulina's evidence. She testifies that the man she lives with is the complainant's biological father and that when his relationship with Paulina ended, the later became the accused's girl friend; that the couple lived together in the same township with her at Farm Rente; that the couple had a son; that the couple resided with the complainant; that the complainant did not often visit her biological father; and that the accused, whom she knows as Frans, was employed at Farm Rente.

Following a report received from Paulina, Muvatere examined the complainant and noticed that her panties were blood-stained. Later on, Muvatere confronted the accused with Paulina's report to the effect that he had been found on top of the complainant. The accused dismissed the report saying: "It was only a lie." The accused then told Muvatere that his wife, Paulina, had gone away without telling him. Muvatere was present when the accused was subsequently arrested at Farm Rente.

In cross-examination, Muvatere categorically states that she knows the accused very well; that he lived at Farm Rente for about 4 years; and that she witnessed his arrest there. Johannes testifies that the accused lived on the farm during the 4 year period of employment, and that when the police visited Farm Rente on November 8, 1997, he was at the farm and witnessed the accused's arrest near his (ie. Johannes') homestead. During cross-examination, Johannes is resolute that he knows the accused; and that the latter was employed by him on a full time basis for about 4 years. The accused's last payment was made on October 14, 1998, when he visited the farm, and he signed for it. Johannes maintained record books, exhibits 2 and 3, which his employees, including the accused,

used to sign individually each time any of them received a payment from him. Johannes identifies the accused's signature in both record books. He showed these books to the police but the books never left his custody. He is, after all, the one who has brought both books to Court and produced them as exhibits.

Constable Andries Quim has served in the Namibian Police Force for 6 years and he is the investigating officer in this case. He arrested the accused at Farm Rente but the latter claimed alibi. The accused did not tell him that he was employed at another farm. Constable Quim did not receive any books from Johannes; he merely got a statement from him (ie. Johannes).

The accused told Constable Quim that he could not write and so he was allowed to make a thumb impression.

Under cross-examination, the constable maintains that he arrested the accused at Farm Rente; that before effecting the accused's arrest, he approached Johannes; and that the latter showed him two books - exhibits 2 and 3 - but he (Constable Quim) did not take these books into his custody.

On November 11, 1997, Dr Johan Garoeb examined the complainant and observed that her vagina could allow one finger. The examination was painful to the complainant. Dr Garoeb observed that the complainant had a yellowish discharge caused by bacteria whose incubation takes 42-72 hours. Although the discharge was not normal, it was not

serious and was treatable. The complainant's hymen was torn and there were blood clots. The injury she suffered had been caused by a blunt object. She must have come into direct contact with a blunt object for the hymen to be torn in that manner. Both labia majora and labia minora are reached before the hymen. Dr Garoeb could not exclude the possibility that the complainant had been a victim of a number of sexual harassments. *In casit*, there might have been no ejaculation. In any event, bleeding might have reduced the presence of spermatozoa, so testifies the Doctor.

In his defence, the accused testifies that he was arrested at Nooipan Farm where he had been employed for 7 years during the period 1991-1997.

He denies knowledge of Farm Rente; of Amanda Kativa and of Paulina Samcao. He further denies having had any relationship with Paulina Samcao or having ever been with her. He had his girl friend who passed away.

He does not know Muvatere Matuka neither did he know Mr Johannes Du Plessis whom he claims to have seen for the last time when he (the accused) visited his farm but as this was at night, he could not see him properly. The second time he saw Johannes was on October 19, 1999, when the latter testified as a state witness.

The accused states that he attended school up to Grade 1 but that he neither can read nor write.

Having examined the record book, exhibit 3, the accused recognises his signature and he identifies therein other signatures too as his. He explains that during his stint in police cells for **H2** years, Constable Quim used to tell him to go and sign exhibit 3. He was handed a pen and he signed the book.

The accused asserts that he knows nothing about the rape perpetrated upon Amanda Kativa. When cross-examined, he explains that when constable Quim brought the record books for him to sign, he initially thumb-printed them but that he subsequently signed both books. He had told the constable that he could not read or write. The accused was allegedly forced to sign; he was beaten by the constable which led to him to open a case against the said constable but this was withdrawn by the Station Commander. As the accused could not hold the pen properly, he was slapped by the constable several times until he finished signing. During his period in the cells, Constable Quim called him 15 times to sign.

The accused concedes that Constable Quim has not been cross-examined about the alleged assaults on him or about having been forced to sign the record books as these things have not been brought to his legal representative's attention.

The accused reiterates that he has never been an employee of Johannes Du Plessis and that he has not worked at his farm. He further reiterates that he was not found by Paulina on top of the complainant; that he has no child with Paulina; that he has not met or lived with her; that he has never met or told Muvetere anything; and that these witnesses came

to know him as Frans when they travelled together in a Police vehicle from Gobabis to Windhoek to attend Court.

The sentence in respect of which an objection has been raised as regards the section 119 proceedings reads:

"All I know is that I am employed at that farm, Farm Rente."

The onus of proving any disputed point of the section 119 proceedings rests upon the State. The state may discharge this onus by calling the presiding magistrate and, where necessary, the court interpreter as well. Although this has not been done in *casu*, I will reserve my comments on the matter for the time being.

The main issue that clearly arises in this case is one of credibility: if the defence case is accepted or found to be reasonably possibly true, or if there is a reasonable doubt in my mind on the totality of the evidence, the accused must inevitably be acquitted of the crime charged; if, on the other hand, the State's version is accepted and the defence version is not found to be reasonably possibly true and is thus rejected as false, then the accused will be found guilty and convicted as charged.

It is common cause that the complainant is a child of tender years and, for this reason, it is necessary to invoke the cautionary rule with regard to the evidence of such a witness. It was observed in *R v Manda* 1951(3) SA 158(A) 163 that the imaginativeness and

suggestibility of children are only two of a number of reasons why the evidence of children should be "scrutinized with care amounting, perhaps to suspicion". See also *S v S* 1995(1) SACR 50(ZS) where Ebrahim J felt that a "new and more specific approach to cases involving children" was necessary.

I am mindful of the cautionary rule and, as previously indicated, the complainant is simply outstanding as witness, notwithstanding the fact that she is a child of tender years. She has been steadfast, unwavering, sincere, intelligent, articulate and credible. One does not usually come across such a witness of a comparable age. It is true that the complainant, does not appreciate the term "rape" although she has freely used it in her testimony. Her saving grace, however, is that she has explained in detail what she claims the accused did to her, namely, that he had sex with her on several occasions before he was caught red-handed by Paulina. I would, therefore, not hold the complainant's reference to "rape" against her in the light of her elucidation of what transpired on such occasions. Otherwise her evidence may fairly be described as cogent and credit-worthy.

In so far as the cautionary rule in sexual offences is concerned, I would abide by the guidance given by the full bench of this Court in *S v D of Another* 1992 (1) SACR 143 (Nm) 146(b) where it was stated (per Frank, J.) at 146 f-g) that the rule is discriminatory against females.

It is trite law that, in sexual cases, evidence may be given of a complaint made by the victim within a reasonable time after the commission of the alleged sexual offence. The

complaint must have been made voluntarily, not induced by threats. Leading or intimidating questions should not have been asked. See *S v T* 1963 (1) SA 484 (A).

Although there is no evidence in the present case of threats or intimidation against the accused, I accept that he stopped the complainant from visiting her biological father possibly because of the relationship between him and the complainant and fear that she might spill the beans. As what she told her mother was neither induced by threats nor intimidation, I would not hold against her any answers to leading questions.

I believe the supporting evidence of Paulina when she testifies that she saw blood and white mucous - like substance on the complainants private parts in consequence of which she took her for medical examinations; that she thereafter kept the accused under surveillance, and that she later caught him red-handed, lying on top of the complainant. I further accept the evidence that when Paulina confronted him with a sexual abuse allegation, he attempted to assault her with a stick and thereafter threatened to kill her. As the matrimonial home had obviously become unsafe not only for the complainant, but also for Paulina, the latter, together with the complainant, decamped to a place of safety, and Paulina was instrumental in causing the accused's arrest.

I accept the State's evidence to the effect that the accused lived with Paulina and the complainant in a single-roomed house at Farm Rente; that he and Paulina have a son from their relationship; that he was employed at Farm Rente by Johannes for about 4

years as a general farm labourer; and that he was very well known by Paulina, the complainant, Muvetere and Johannes.

Dr Garoeb's evidence that the complainant's vagina admitted one finger and that her hymen was ruptured is consistent with the evidence of the complainant and of Paulina. Furthermore, the medical evidence shows that penetration had taken place because of the rupture of the hymen.

Equally credible is the evidence of Johannes who asserts, *inter alia*, that he never parted with the custody of the two exhibited record books and, in this, he is amply supported by Constable Quim, whose evidence I find credible, too. In the light of this evidence by Johannes and Constable Quim, I am satisfied that the accused's claim that Constable Quim compelled him to append his signature in the record books is no more and no less than a figment of his own imagination. As such, the accused's claim cannot reasonably possibly be true. In fact, it is entirely false and it is rejected as such.

Reverting to the section 119 proceedings, it is evident that the sentence:

"All I know is that I am employed at that farm, farm Rente."

bears a ring of truth and it is consistent with the State's case which I believe as true. There are a few discrepancies here and there in the State's version but these are minor and immaterial.

This case is a classic example not only of a betrayal of trust but also of sexual abuse involving a small and very young defenceless girl. Although the period alleged in the indictment has fallen short of proof by the State to the requisite standard, this does not detract from the fact that the accused had sexual intercourse with the complainant several times before he was found out.

Subject to the preceding paragraph, the State has discharged its burden of proof against the accused beyond a reasonable doubt.

Inevitably, therefore, the accused is found guilty of the crime of rape as read with section 94 of the Act and he is convicted accordingly.

A handwritten signature in black ink, appearing to be 'J. Silungwe', written over a horizontal line. The signature is stylized with several vertical strokes and a long horizontal stroke extending to the right.

SILUNGWE, J.

December 1, 1999

ON BEHALF OF THE STATE

ADV VERHOEF

Instructed by:

Office of the Prosecutor-General

ON BEHALF OF THE ACCUSED

ADV POTGIETER

Instructed by:

Directorate of Legal Aid