



CASE NO.: CC 28/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

AND

WILLEM NARUSEB

CORAM: SHIVUTE, J

Heard on: 16 January-01February 2012

Delivered on: 07 March 2012

JUDGMENT

SHIVUTE, J: [1] The accused person appeared on an indictment containing a count of murder, two counts of rape in contravention of section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) and three counts of assault with

intent to do grievous bodily harm read with the Combating of Domestic Violence Act, 2003, (Act 4 of 2003).

[2] The particulars of the charges are as follows:

1st Count: Murder

It was alleged that on 10 June 2007 at or near Karibib in the district of Karibib the accused unlawfully and intentionally assaulted WS, a five month old baby boy, by shaking his body and head, or throwing him onto the ground, and/or hitting him on the body as a result of which the said WS died on 18 June 2007 at the Usakos State Hospital in the district of Usakos.

2nd Count: Rape contravening section 2(1)(a) read with sections 1, 2, (2) 3, 5 of the Combating of Rape Act, 8 of 2000 read with Act 4 of 2003.

The allegations are that the accused did unlawfully and intentionally commit or continued to commit a sexual act with a male baby (the deceased in the first count) by inserting his penis and/or other part of his body and/or object into the anus and/or mouth of the said minor baby under the following coercive circumstances:

- (a) By the application of physical force to the baby.
- (b) Where the said baby was under the age of fourteen years and the accused more than three years older than the victim.

3rd Count: Rape contravening the above mentioned Acts.

It is alleged that on the date and place as mentioned above the accused unlawfully and intentionally committed or continued to commit a sexual act with his minor female child by inserting his penis and/or other part of his body and/or an object into the vagina and/or anus and/or mouth of the victim under coercive circumstances, namely:

- (a) By the application of physical force to the victim.
- (b) Where the victim was under age of fourteen years and the accused more than three years older than the victim.

4th Count: Assault with intent to do grievous bodily harm read with the Combating of Domestic Violence Act, 2003

During the period March 2006 – 10 June 2007 in the district of Karibib the accused did unlawfully and intentionally and on divers occasions assault AS by beating her and/or kicking her over the body with the intent to do her grievous bodily harm.

5th Count: Assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act, 2003

It is alleged that during March 2007 to 10 June 2007 and at Karibib the accused unlawfully and intentionally and on divers occasions assaulted WS by throwing him on the ground and/or biting him and/or shaking him and/or kicking him over his body and/or beating him over his body and head and/or twisting his limbs with intent to do him grievous bodily harm.

6th Count: Assault with intent to do grievous bodily harm read with the provisions of the Combating of the Domestic Violence Act, 2003

The allegation are that during the period March 2007 – 10 June 2007 in the district of Karibib the accused did unlawfully and intentionally and on diverse occasions assault WS (a girl) by throwing her on the ground and biting her and/or shaking her and/or kicking her over her body and/or hitting her over her body and head with the intent to do the said victim grievous bodily harm.

[3] The accused is represented by Mr Uanivi on the instructions of the Directorate of Legal Aid and Ms Ndlovu appears on behalf of the State.

[4] The accused person pleaded not guilty to all the charges and the State proceeded to lead evidence, which may be summarized as follows:

[5] The accused and AS, the complainant in the third count, were in an intimate domestic relationship which started during 2006 until 10 June 2007 as a result of which twin babies, a boy and a girl (whose first names and surname start with letters “W” and “S” respectively hence reference herein to each one of them as “WS”), were born on 18 January 2007. At the time these offences were allegedly committed the twins were about five months old. AS testified that the accused person started to abuse her physically when she was pregnant with the twins. He assaulted her when she was pregnant during 2006 and after she delivered during 2007. He assaulted her with fists and kicked her all over the body as a result of which the complainant sustained *inter alia* a blue eye. He also assaulted her with a whip locally known as

'sjambok' and the sjambok marks were still visible on her body. Complainant did not receive medical treatment for this assault. However, during 2006 when she could no more endure the pain of abuse, she went to report to the authorities that she wanted the police to accompany her to the place where she was residing with the accused to collect her belongings. She did not open a criminal case against the accused. After she had removed her property from the place where she was living with the accused person, she went to stay at her place.

[6] The accused followed her and asked for forgiveness. She forgave him and they stayed together again. AS came to Windhoek to give birth to her babies, which was done by Caesarean section. After she was discharged from hospital, she went to stay with her aunt in Windhoek. Whilst she was staying with her aunt the accused telephoned her frequently, inquiring when she was going back. AS went to Usakos on 31 March 2007 and stayed with her younger sister M. When the accused heard that she was in Usakos, he came to join her at M's place.

[7] Whilst at Usakos, the accused wanted to have sexual intercourse with her despite the fact that she had not healed from the Caesarean section operation. She refused and the accused's response was to assault her by beating her with fists and biting her on the left cheek. She sustained injuries on her chest and on the cheek as a result of the assault. Thereafter he had sexual intercourse with her against her will. Nobody witnessed the assault, but M saw the bite marks. AS did not report this assault to the police nor did she

go for medical treatment at that time. The accused told AS to collect her belongings from M's room so that they could move to Otjimbingwe. The complainant complied with the accused's instructions. She stated, however, that she did not go to Otjimbingwe out of her own free will; she was forced by the accused to do so.

[8] Towards the end of May 2007 the accused was employed as a cattle herder at post Urikhob by the late LT. The accused person and AS went to stay at the cattle post. During their stay at Urikhob post one evening the baby girl was crying constantly. The accused was complaining that he was very tired and he needed to rest. He slapped the baby girl because of the constant crying. He slapped her once. He further twisted the baby's left arm. The baby sustained superficial injuries on the face where she was slapped and the arm that was twisted got swollen. The following morning the accused left for work. The witness went to call 'Ou Namas' Tsuses who stayed at the post to tell her what happened the previous night. When the witness picked up the baby girl to breastfeed her she observed bruises on the area around the baby's nipples and back which looked like bite marks.

[9] The bite marks appear to be fresh and to be that of a human. The last time she checked on the baby was the night of the 09 June 2007 and those marks were not present. She only noticed the bite marks on the baby on 10 June 2007 and showed them to Ou Namas. AS picked up the baby boy to breastfeed him. She removed the baby's shirt and observed human bite marks on the boy's back and on the area around the nipples. The marks of teeth were

clearly visible. The boy was last changed on the night of 09 June 2007 but he had no bite marks. The witness testified further that whenever the baby girl was alone with his father (the accused) she was always crying. On 10 June 2007 AS confronted the accused about the bite marks on the babies' bodies; the accused did not answer her. The witness recalled that during June 2007 the accused said to her that one day he would make the baby girl pregnant. After the witness observed bite marks on the babies she confronted the accused about the statement he had allegedly made that he would impregnate the baby girl one day and the accused slapped her. AS testified that she was staying in the homestead with the accused and the babies and no one else was staying with them. Their closest neighbour was Ou Namas who had no access to the children. Other people who were staying at that post had their homesteads far away from them and none of them had access to the babies either. When the accused and AS argued about the injuries on the babies and the fact that AS was dressing the baby girl with baby boys' socks, they were pulling socks from each other. When the accused pulled the socks from her, she kicked the accused.

[10] At that stage the accused was lying on the bed on his back. The baby boy was lying on the accused's chest. The accused sat up and yelled at the witness: "Get your fucking child," and threw the baby boy in the direction of the witness. The baby boy landed his head and back on the concrete floor and cried. The witness picked up the baby and silenced him. She decided to leave the accused and the babies alone to seek help. She went half way and

returned to collect the key to her house. This happened at about 18h00. When she arrived at her residence with the accused, she found the accused in the yard holding the baby girl. The baby was still dressed up. The witness went back to look for assistance. Whilst she was running going back she heard the accused calling her. She ran into the bush. She went to Mr G's house; Mr G took her to Otjimbingwe to the house of the lady who took them to the post. They picked up the late LT and went to Mr GK's house. From there they went to the house of LT's sister and picked up an old lady. Thereafter they proceeded to a cattle post Urikhob around midnight. There they found the accused inside the house with the twin babies.

[11] Mr K knocked at the door; the accused opened the door. Mr K asked the accused why he assaulted the babies and the accused replied that nothing had happened to them. The accused was standing at the door way. The witness and the people who accompanied her entered the house. The babies were lying. The girl was naked, the boy was dressed up. They saw the babies after the lamp was lit. The baby girl's nappies had bloodstains and she had dry blood on her nose. When they went outside the house the accused was nowhere to be seen. He disappeared without telling them where he was going. They then drove to Otjimbingwe.

[12] In the morning of 11 June 2007 during day light, the witness looked at the babies and observed that the baby girl had a swollen face, bite marks on her left foot and on her wrist. There were more abrasions on her private parts which appeared to have been caused, in her own understanding, by the friction

of human hair. There were spots around her private parts i.e. around her outer side of the vagina, covering the buttocks. She did not check on the baby boy. On 11 June 2007 she went to report the matter to the police station at Otjimbingwe. She was given a form to take to the clinic at Otjimbingwe. There she was referred to Karibib. On 12 June 2007 police officer Hannes drove AS and the twin babies to Karibib Hospital. The babies were examined in her absence whilst she was waiting in a certain room. At Karibib she met with a Social Worker who counselled her. Thereafter they were transferred to Usakos Hospital. At the hospital the baby girl appeared to be in a very weak condition comparing to the baby boy. On 16 June the baby boy became weak and died on 18 June 2007.

[13] It was put to AS through cross-examination that each time the accused inquired about the injuries on the babies the witness could not explain what had happened to the babies. The witness replied that in fact it was her who asked the accused concerning the bite marks because she is the one who discovered the injuries in the morning of 10 June 2007. By then the accused had just left for work. It was also suggested to her through cross-examination that the injuries on the babies could have been caused by unknown persons when she left the babies unattended to go and empty the “night pot”. The witness replied that, that would not be possible because where she emptied the “night pot” was not very far from their residence and she would always be in a position to observe if a person was coming to the house. Furthermore, she never stayed long at the place where she dumps the content of the “night pot”.

It was further put to the witness that the babies slept on the side of their mother and the witness responded that the babies slept in the middle between the accused and the witness. It was again put to the witness that the accused had disappeared from the house because the people who came with the witness threatened the accused. The witness replied that nobody threatened the accused.

[14] It was put to the witness that the accused was at the shack waiting for the witness to come back so that they could take the babies to the clinic but instead the complainant came with the people accusing the accused of causing injuries to the babies. Complainant replied that she left the house to look for assistance and the accused was not waiting for her because there was no such arrangement. Lastly it was put to the witness that she was the one who caused injuries to the babies which she vehemently denied.

[15] RT gave evidence that she saw bite marks on the babies. The accused suggested that they were going to take the children to the clinic that evening. However, since it was very late for someone to walk a long distance to the clinic, she proposed that she was going to look for a donkey cart. Whilst she was leaving, the accused stopped her and asked her to pray so that God could reveal the culprit who caused injuries to the babies.

[16] Mr GK gave evidence to the effect that he was one of the people who had accompanied AS to the place where she was residing with the accused. There he observed blood on the fingertips and chin on the baby girl. The blood on the

fingertips was fresh and the one on the chin was dry. He turned and looked at the entrance of the room but the accused was nowhere to be seen.

[17] Mr DG testified that when he had accompanied AS to the place where she was residing with the accused Mr GK knocked at the door and the person who is said to be the father of the babies opened the door. Mr DG entered the door and observed blood on the cheek of the baby girl when Ms T lifted the boy GK wanted to ask the accused what had happened to the baby, the accused was nowhere to be seen and nobody threatened him.

[18] Constable Bernard Uirab, now retired, testified that he arrested the accused on 14 June 2007 at Ms PG's house. When he arrived at the house PG was outside and the accused was inside the room. The accused was arrested in the room standing. The witness knew the accused before because he worked at his farm before he got employed at Urikhob post. He estimated the distance between Otjimbingwe and Urikhob post to be 9km. Mr Uirab was asked in cross-examination whether he did not arrest the accused whilst the accused was hiding on top of the box, which he denied. He was again asked whether he did not find PG chasing or removing the accused from the box and he replied that he never witnessed such a thing.

[19] MS, sister to AS, testified that during June 2007 she stayed with the accused and AS at her place. On a certain Sunday she observed AS with bite marks on her cheek. She did not have the bite marks on a previous Saturday. She also had no bite marks when she arrived from the hospital. The bite

marks were on the right cheek. Her face was also swollen. AS did not have a swollen face or bite marks the previous day when she went to sleep. She could have suffered those injuries only when she went to bed between Saturday night and Sunday night. The accused, AS and their babies left MS's place on a Sunday the day she observed bite marks on AS. She did not ask AS how she sustained those injuries and AS did not tell her how she sustained them either.

[20] PG testified that the accused was arrested at her house. The day he came there he told her that he had gone to Otjimbingwe to buy groceries and that the babies were doing fine. He spent a night at her place. The accused was sitting outside when the police came to her house. However, when she told the accused that the police were looking for him he jumped and went into her bedroom. He hid on top of the box covering himself with the clothes. PG removed the accused from the box. It was put to the witness that the accused never slept at her place and he never hid himself on top of the box. The witness was adamant that the accused spent a night at her place and he went into her room and covered himself with the clothes.

[21] Hannes Goagoseb, a Detective Inspector in the Namibian Police Force, testified that during 2006 AS came to the police station whilst she was pregnant. She complained about the abusive relationship between her and accused. She did not open a case but she requested the police to accompany her to the place where she cohabited with the accused so that she could remove her belongings from there. He accompanied AS to remove her goods and thereafter he dropped her to Otjimbingwe. On 11 June 2007 AS reported a

case of assault on her and on the babies. The witness observed injuries on both babies. He took the witness and the babies to Otjimbingwe clinic. After he took AS to the clinic, he received a telephone call from Karibib that the babies were sexually assaulted and that the accused should therefore be arrested. After the accused was arrested a warning statement was taken from him. The Inspector thereafter took the accused to the hospital for examination. After examination a rape kit was handed over to Inspector Goagoseb which he in return handed over to Inspector Mwatongwe to take it for analysis. Through cross-examination, it was put to the witness that the accused told the witness that he saw a boy on a donkey back in the area where the offence took place to which the witness responded that is was not correct.

[22] Inspector John Mwatongwe testified that on 12 June 2007 he had received a rape kit from Inspector Goagoseb that was properly sealed. He kept it in a safe and forwarded it to Walvisbay for onward transmission to the laboratory for forensic examination. Paulus Nambala who was a constable at the time the offences were allegedly committed, took photographs depicting the injuries on the twin babies. He also compiled a photo plan. He explained the injuries he observed in the key to the photo plan. Apart from taking the photographs, he caused the doctor to compile a J88, i.e. medical report.

[23] Doctor Leirvy Pineiro Gonzales examined the baby girl and found that she had abrasions around her vagina. Her hymen was broken, and had an infectious discharge with a foul smell. She further observed human bite marks on the left foot; 2 haematomas on the chest; multiple haematomas on the left

arm, and human bite marks on the left hand. The left hand was also swollen. A haematoma in the right elbow, multiple hematomas on the face, one big on the left eye in the forehead, two human bites in the left side of the back and 1 on the right side were also observed. She arrived at the conclusion that the injuries on her vagina had been caused by the insertion therein of a round blunt object such as a thick finger or a penis. The same object could have been rubbed against the baby girl's private parts and as a consequence had left abrasions thereon.

[24] Dr Gonzales further examined the baby boy and observed that there were abrasions on the anus; haematoma on the left side of the chest; human bite marks on the right hand; haematoma on the left elbow with abrasion, and abrasion on the lower lip. He concluded that the injuries fit with the time and circumstances of the alleged incident.

[25] Apart from Dr Gonzales who examined the babies, Dr Ilunga Musasa examined the baby boy and observed haematoma on the lower lip; multiples ecchymoses on the chest, bruises on both left and right elbows. Human bites with teeth marks on the right hand affecting all fingers; and scratch marks on the left thigh were also observed. On genito-urinary tract, there were hyperaemia on scrotum; and hyperaemia on peri-anal area with multiple small wounds. The anus of the baby boy was dilated compared to the anus of a normal baby of his age. Dr Musasa explained that haematoma is caused by a trauma or force applied on the skin or body or tissue produced by a blunt object. The baby boy's anus had redness and small wounds. His opinion is

that the cause of the redness and multiple abrasions was sexual abuse. The baby boy was given treatment from the 12 to 16 June 2007 and was responding well to medical treatment. It is worth mentioning that the baby boy was not treated for head injuries, because according to Dr Musasa, there were no external signs of head injuries. However, on 17 June 2007 the baby developed diarrhoea and did not want to eat. The baby's condition deteriorated and ultimately died on 18 June 2007.

[26] Vistorine Nuunyango, a registered nurse at Karibib Health Centre, testified that she examined the babies and she was also present when the babies were examined by Dr Gonzalez. She confirmed that she saw the injuries that were testified about by Dr Conzalez.

[27] Maria Elizabeth McIntyre Richter, a social worker, testified that she was present when the babies were examined at Karibib Health Centre. Her testimony concerning the injuries on the babies corroborated the testimonies of Drs Gonzales and Musasa and Ms Nuunyango. Ms Richter stated furthermore that she counselled the babies' mother who appeared to be traumatized.

[28] Dr Gonzales added in his testimony that he took specimens from the accused namely, blood, saliva, pubic hair and finger nail scrapings for special examination to be sent to the laboratory.

[29] Maryn Swart, a forensic analyst, testified that on 14 July 2007 she received two rape kits and one rape case kit with reference numbers 663/2007 and 659/2007. The exhibits were sealed in three brown envelopes and a

forensic evidence bag No. NFE-02304. Upon examination, no spermatozoa were microscopically observed on the vaginal smears of the baby girl or the anal smear of the baby boy. No semen was chemically detected on the vaginal swabs of the baby girl or the anal swabs of the baby boy. The saliva swabs of both babies and the accused characterised the donors as that of non-secretors. The blood samples of the baby boy and accused were found to be ABO blood group 'B' while the blood sample of the baby girl was found to be ABO blood group 'O'. According to the exhibits in bag No. NFE – 02304, no spermatozoa on the peri-anal and rectal smears were observed. No semen was chemically detected on the peri-anal and rectal swabs either. The saliva swab of the deceased characterised the donor as a 'B' secretor. Ms Swart explained that the "EDTA vacutainer" was not used by the doctor who took the specimens, resulting in inconclusive findings. The deceased's nappies were mouldy as a result tests could not be done to detect semen. In short the forensic tests could not reveal who the culprit was.

[30] Dr Simasiku Kabanje explained the report on a medico-legal post mortem examination which was done by Dr Mihaylova–Petrova Mariela Histrova who had left the country. The chief post-mortem findings were: brain oedema – congested blood vessels of brain tissue scattered petechial haemorrhages over surfaces of both hemispheres; and pulmonary congestion. Dr Kabanje concluded that the cause of death was brain death due to intracranial haemorrhage.

The report also disclosed that the deceased's anal ring was dilated with a diameter of $\pm 1.5 - 2\text{cm}$. That concludes the summary of the evidence by the State.

[31] Turning to the evidence by the defence, the accused gave evidence under oath and called no witnesses. His evidence may be summarized as follows: During 2006 when AS (mother of the babies) was pregnant, she used to drink too much. The accused did not like her drinking habits and advised her to leave. On an unknown date but during 2006 AS came with police officers Hannes and /Uiseb to collect her belongings from the place where she was staying with the accused. After she had left with the police she came back and begged him to take her back because she had no one to support her. The accused forgave her because he was responsible for her pregnancy. The accused further confirmed that he and the babies' mother stayed at MS's house after his girlfriend gave birth. He denied having assaulted AS whilst they were staying at MS's house. The accused testified that when he was employed, he had no problem with MS, his girlfriend's sister. Their relationship only became sour after the accused lost his job.

[32] On 27 May 2007 the accused, his girlfriend and the twin babies went to stay at Urikhob cattle post. About 8 people used to live at the post in different homesteads. The house where the accused was staying was made of corrugated iron sheets. The floor was made of sand mixed with cow dung. When the accused went for work AS remained at home with the twins. If someone wished to answer a call of nature, he or she had to go to the bushes

that were far from the shack. When the accused was at work and AS is at home with the babies and if nature had called, it meant that she had to leave the babies alone. On 09 June 2007 when the accused came back from work, he found his two babies that he loved very much with injuries; they had bite marks. He inquired from his girlfriend how the babies sustained those injuries but she could not explain. On 09 June 2007 the babies were lying on the sides on the mother's side. The accused was lying behind the mother. The accused observed the babies crying. Their mother would wake up and ask the accused to assist with the babies. According to the accused, each time the lamp went off the babies would cry.

[33] On 09 June 2007 when the accused came back from work, his girlfriend showed him the bite marks on the babies. The accused did not see the bite marks when he left for work at 7 o'clock. Again on 08 June 2007 nothing happened to the babies except that the babies were crying whenever the lamp light went off. According to the accused, their sleeping arrangement was that the babies' mother would sleep in the middle. The babies would sleep on their mother's side and the accused would sleep behind their mother.

[34] When the accused learnt about the injuries on the babies on 09 June 2007, he called Ou Namas to witness the injuries and to take the babies to the hospital, but she said there were no donkeys to pull the donkey cart. The accused decided that he and the mother should take the babies to the house of his employer to overnight there and to go to the clinic the following morning. The babies' mother said that it was late to go to Otjimbingwe. She allegedly

suggested that they should rather wait to go on 11 June 2007, because that was the day the babies were allegedly supposed to go back to the clinic in any event. At that stage Ou Namas was on the way to look for transport. Because the accused's girlfriend refused to go to Otjimbingwe that evening, the accused called Ou Namas and told her not to go and look for transport. Instead, Ou Namas should pray for them so that it could be revealed what caused the injuries to the babies.

[35] On 10 June 2007, the accused gave instructions for the babies to be taken to the hospital, because the babies had injuries which he had observed on 09 June 2007, plus further fresh injuries which he observed on 10 June 2007. The baby girl was swollen on the face. The accused inquired about the injuries on the baby girl. The mother of the babies became angry. She allegedly threw the baby girl on the ground. The baby girl cried. Her mother picked her up and breastfed her. The accused was lying on his back with a baby boy on his chest. The mother of the babies kicked the accused in his groin area. The accused put the baby boy on the bed. He threatened to beat up the babies' mother but he never beat her up and so she left. During the night she came in the company of people. The accused stood at the door. One of the people known to the accused as Mr "Axarob" asked the accused why he was beating the babies and their mother. The accused told the people to go inside the room to check if the babies were beaten as he knew he never beat them up. Mr "Axarob" remarked that young people of nowadays were always causing trouble. After Mr Axarob uttered those words, the accused left and went to the goats'

kraal. The reason for him to leave was because he did not want to disrespect the old man. This is contrary to the accused's version that was put to AS through cross examination that the accused ran away because he was threatened.. The people called the accused but he ignored them.

[36] The accused denied having murdered the deceased, having raped the babies and having assaulted them and their mother. According to the accused, he spent the night of 10 June 2007 at Ou Namas place and disputed that he had run away. He slept at Ou Namas' house because their shack was locked by the people who had arrived with his girlfriend. The accused disputed having spent a night at the house where he was arrested. He disputed that he was arrested whilst he was hiding on top of the box.

[37] Ms Ndlovu, counsel for the State, submitted that the mother of the twins, although a single witness, her evidence is satisfactory in all material respects and she had no reason to lie against the accused person. She further submitted that according to medical evidence, the head injury was the direct cause of the baby's death. The deceased suffered the fatal head injuries after the accused threw him on the floor. She further argued that by throwing a 5 month old baby on the ground, the accused foresaw the possibility that the assault might cause the baby's death but he proceeded with the assault reckless of whether death could ensue or not. The State further submitted that the state has proved beyond a reasonable doubt that the accused caused the deceased's death and should be convicted of murder with *dolus eventualis*.

[38] Concerning the assault on the twins there is evidence that the accused slapped the baby girl on the face and twisted her left arm. There is also evidence of bite marks on both babies. Although the mother of the babies only saw the accused slapping and twisting the baby girl there is circumstantial evidence that the accused is the one who bit the babies. Therefore the accused should be found guilty of those assaults.

[39] With regard to the rape on both babies, counsel argued that the baby girl's hymen was broken. There were abrasions on the baby girl's vagina and a white infectious discharge with a foul smell. Concerning the baby boy, he also had abrasions around the anus. His anus was enlarged an indication that the baby boy was sexually abused. Thus, so counsel submitted, the State had proved its case that the babies were sexually abused. Although there is no direct evidence, there is circumstantial evidence. Counsel continued to contend that the fact that no semen or sperm was observed does not mean that sexual intercourse did not take place.

[40] Counsel for the State further argued that there is overwhelming evidence concerning the assault by the accused on the mother of the babies which took place in Usakos. This was testified to by the victim herself and she was corroborated by her sister that she had a swollen face when she woke up. There is circumstantial evidence that this assault could only have been inflicted by the accused during the night. Therefore the Court should find the accused guilty.

[41] On the other hand Mr Uanivi, counsel for the accused argued that although the cause of death of the baby boy was head injuries, the accused testified that it was AS who threw the baby boy on the floor. I should mention immediately in respect of this submission that counsel appears to have misunderstood the accused's evidence in this regard. According to the accused's testimony, AS allegedly threw the baby girl on the floor. Counsel continued to argue that the baby boy died days after he was thrown on the floor. Therefore, so the argument proceeds, who ever threw the baby down had no intention to kill it. Counsel for the accused further argued that there are no indicators for the Court to draw an inference of murder. The babies' mother testified as an afterthought when she said the baby landed on his back. It was the baby's mother who threw it on the floor. The Court should also consider that AS is a single witness.

[42] Concerning counts 2 – 3 counsel for the accused argued that no direct evidence that the accused raped the babies. Although some of the State witnesses testified that there was a smell of semen and a white discharge, no medical evidence proving that the semen belonged to the accused was adduced. It is also not proved how the sexual intercourse was committed. The State is speculating that a blunt instrument was used. The mother to the children could have used other objects to insert in the children's private parts and caused the infection of the white discharge.

[43] As regards the assault with intent to do grievous bodily harm on the mother of the babies, the State alleged that these assaults took place in

Otjimbingwe and Karibib. If the complainant was assaulted in Otjimbingwe she could have reported the case to the police. The fact that the complainant did not lay a charge is an indication that such assault never took place. Although the complainant testified that she was assaulted with a “sjambok” nobody saw the injuries inflicted with a “sjambok”. During May 2007, the complainant’s sister only observed a black eye and bite marks but she did not see who caused those injuries. If the complainant was assaulted by the accused, the complainant’s sister could have heard because they were sleeping in the shacks which were close to each other.

[44] Counsel for the accused argued that the accused normally leaves the house about 8 o’clock in the morning and comes back about 17h00. When the accused is at work the babies are with their mother. The accused is always informed about the injuries on the babies or they are discovered in his absence. The mother to the babies fabricated the story that the babies were assaulted by the accused. An inference could be drawn that the mother is the one who inflicted the injuries on the babies because she is the one who stays with the children when the accused is at work. There is also a possibility that someone else could have inflicted injuries to the babies when their mother went to empty the “night pot”.

[45] Having summarized the evidence and submission by both counsel, I will now proceed to consider whether the State has proved beyond a reasonable doubt its case in respect of all the counts. I propose first to deal with the first count of murder.

On 10 June 2007 when the mother of the twins and their father were arguing concerning the socks, the mother of the babies testified that the accused threw the deceased and he landed on the concrete floor. The deceased landed on his back with his head on the floor as he could not support himself. The accused denied this version. The baby died as a result of head injuries 8 days later. As far as this count is concerned the mother to the babies is a single witness.

Diemont JA in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G stated as follows in respect of the evidence of a single witness:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in S v Weber 1971 (3) SA 754A at 758). The trial judge will weigh his evidence, will consider its merits and demerits, and having done so, will decide whether it is trustworthy and whether, despite the fact that there are short comings or defects or contradictions in the testimony he is satisfied that the truth has been told.”

[46] Having weighed the complainant’s testimony and having considered her evidence in its totality, I have come to the conclusion that her version that the accused threw the deceased on the floor is reliable than the version of the accused who instructed his counsel through cross-examination that the witness is the one who threw the baby boy down. However, when he testified in his defence he changed his version and said it was the baby girl who was thrown by the witness on the floor. The version of the mother of the babies appears to be more probable than the version of the accused. Her version was corroborated by medical evidence which confirms that it was the baby boy who

suffered head injuries and not the baby girl. I found the mother of the babies to be a credible witness as far as this count is concerned and I therefore accept her version and reject the version of the accused.

[47] Another issue to be determined is whether the accused had an intention to kill the deceased when he threw him on a concrete floor. By throwing a 5 months old baby on the floor, the accused foresaw the possibility that his assault upon the baby might result in the baby's death but he proceeded and reconciled himself to this possibility, regardless whether death would ensue or not. The accused as an adult knows that a 5 months old baby is very fragile as he is not fully grown. Therefore, he foresaw that there must be a substantial or reasonable possibility that death may ensue but he decided to go ahead with his actions. Although the deceased died some days after the assault, counsel for the State correctly argued that a later event can be deemed to have broken the causal link only if it is a completely independent act, having nothing to do with and bearing no relationship to the accused's act. *S v Grotjohn* 1970 (2) SA (A) at 364.

There is no evidence or suggestion of *actus novus interveniens*. Counsel for the State nevertheless cited the *dictum* in *S v Tembani* 2007 (1) SACR 355 at pages 366 – 367 where it was stated that an assailant who deliberately inflicted intrinsically fatal wounds consciously embraced the risk that death might ensue. The fact that others might fail, even culpably, to intervene to save the injured person did not, while the wound remained mortal, diminish the moral culpability of the perpetrator. Improper medical treatment was neither

abnormal nor extraordinary and the supervision of negligent treatment did not constitute an intervening cause that exculpated the accused.

[48] The fact that the doctors who treated the deceased did not pick up the head injuries when they treated the deceased was not negligence as the deceased did not exhibit external head injury. It is therefore my findings that the accused did assault the deceased and killed him. He is therefore found guilty of murder with intent in the form of *dolus eventualis*.

[49] I will proceed to deal with the counts of rape in respect of the babies. When the mother of the babies left the twins with their father, they were fully dressed. When the mother came back with the people who helped her, they found the baby girl stark naked. Her nappies had bloodstains on them. She also had blood on some parts of her body. Medical evidence confirmed that the baby girl's hymen was broken. It also confirmed that she had abrasions around her private parts and an infectious white discharge which is abnormal for a baby. Nobody saw the accused committing a sexual act with the babies. The baby boy had abrasions around the anus area and the anus was dilated or enlarged. The doctor who made these findings concluded that both babies were sexually abused by a person who put a blunt object, or finger or penis into the vagina and anus. The evidence of Dr Gonzalez concerning the abrasions on the babies' private parts was corroborated by the evidence of the police officer who took photographs depicting the deceased and his twin sister. This evidence was also corroborated by the nurse, the social worker as well as Dr Musasa and by findings of Dr Petrova as explained by Dr Kabanje.

[50] As I earlier stated, there is no witness who saw the accused committing sexual acts with the babies. The State rests its case entirely on circumstantial evidence. In assessing circumstantial evidence it has been said that the Court should not approach the evidence on a piecemeal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. What is required is to consider the evidence in its totality from which the court would then be able to draw certain inferences if (a) the inference sought to be drawn is consistent with all the proven facts and (b) the proven facts are such that they exclude every reasonable inference from them, save the one sought to be drawn *R v Blom* 1939 AD 188 at 202 -3.

Having assessed the evidence in its totality and having considered the circumstances and probabilities pertaining to the case that the baby girl was found stark naked with her nappies having blood stains and injuries on both babies and given the fact that there is no evidence that someone else had access to the babies, I reject the version of the accused that he did not commit sexual acts with the babies and that someone else might have done so, because it could not reasonably possibly be true. I therefore conclude that the State has proved that the accused had sexual intercourse with the deceased and his twin sister under coercive circumstances. The coercive circumstances being that the accused is more than three years old than his victims. The victims were 5 months old. Since the accused is also the father of those babies, he

contravened the Combating of Domestic Violence Act. The accused is found guilty on the 2nd and 3rd counts of rape as charged.

[51] Concerning the 4th count of assault with intent to do grievous bodily harm on the mother of the babies, there is overwhelming evidence that during May 2007 whilst the complainant and the accused were in Karibib district on a certain Saturday when she went to sleep, the complainant had no injuries. However, when she woke up on a Sunday she had bite marks on her cheek and her eye was black. Complainant testified that the injuries were inflicted by the accused. The evidence of the complainant concerning her injuries was corroborated by the evidence of her sister MS. The accused denied having assaulted the complainant. Again complainant is a single witness concerning who inflicted the injuries on her. Having considered the legal principles concerning evidence of single witness as stated in *S v Sauls, supra*, I found that the complainant is a credible witness who gave her evidence in a straight forward manner and had no reason to falsely incriminate the accused. An inference could also be drawn in the light of *R v Blom, supra*, that the accused is the one who assaulted the complainant since they were the only two adults in the room where they spent the night. I therefore reject his version because it could not reasonably possibly be true in the circumstances. I therefore find the accused guilty as charged on this count as well.

[52] Lastly, I proceed to the 5th and 6th counts concerning the assaults on the two babies. There is evidence that the two babies had human bite marks as well as scratches on their bodies. The baby girl was slapped on the face and

her arm twisted. This evidence was confirmed by medical evidence. There is no dispute that the children did not sustain those injuries. The only dispute is who caused them. The mother to the babies testified that the babies were crying at night when the lamp was off. This was also confirmed by the accused. In the morning of 10 June 2007 after the accused had left for work, the mother observed bite marks on the babies. The babies, according to her, slept between their parents. This assertion was denied by the accused. The accused denied having assaulted the babies and suggested that the mother or someone else could have assaulted them. Again considering the circumstances of the case as well as the manner in which the assault was done an inference could be drawn that the accused is the one who assaulted the babies. I therefore reject his version as indicated above, because it cannot reasonably possibly be true. I accept the version of the mother to the babies that before they went to bed on 09 June 2007 the babies did not have bite marks on their bodies and those injuries could have only be caused by the accused at night when the babies were crying. I find her version to be more credible. In view of this, I find the accused guilty on counts 5 and 6 of assaulting the babies with intent to do grievous harm.

[53] In the result the accused is found guilty as follows:

1st Count: Guilty of murder in the form of *dolus eventualis* read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003).

2nd Count: Guilty of rape contravening section 2(1)(a) read with sections 1, 2 (2), 3, 5 and 6 of the Combating of Rape Act, 2000, (Act 8 of 2000) – read with the provisions of the Combating of the Domestic Violence Act, 2003 (Act 4 of 2003).

3rd Count: Guilty of rape contravening section 2(1)(a) read with sections 1, 2 (2), 3, 5 and 6 of the Combating of Rape Act, 2000, (Act 8 of 2000) – read with the provisions of the Combating of the Domestic Violence Act, 2003 (Act 4 of 2003).

4th Count: Guilty of assault with intent to do grievous bodily harm read with the provisions of the Combating of the Domestic Violence Act, 2003 (Act 4 of 2003).

5th Count: Guilty of assault with intent to do grievous bodily harm read with the provisions of the Combating of the Domestic Violence Act, 2003 (Act 4 of 2003).

6th Count: Guilty of assault with intent to do grievous bodily harm read with the provisions of the Combating of the Domestic Violence Act, 2003 (Act 4 of 2003).

ON BEHALF OF THE STATE

Ms Ndlovu

Instructed by:

Office of the Prosecutor-General

ON BEHALF OF DEFENCE

Mr Uanivi

Instructed by:

Directorate: Legal Aid