

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: CA 51/2016

In the matter between:

**ANDREAS LUMAYI EINO**

**APPELLANT**

v

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Eino v S* (CA 51/2016) [2018] NAHCMD 6 (26 January 2018)

**Coram:** NDAUENDAPO J and USIKU J

**Heard:** 30 October 2017

**Delivered:** 26 January 2018

**Flynote:** Criminal law & Procedure – rape –single witness evidence to be treated with caution but common sense must prevail - two mutually conflicting versions – the most probable version to be accepted - medical evidence corroborates rape having occurred – accused guilty as charged.

**Summary:** The appellant was tried and convicted for rape in terms of contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000. The appellant was sentenced to 15 years imprisonment with one year wholly suspended for a period of 5 years on the condition that the appellant is not convicted of rape under the Combatting of Rape Act 8 of 2000 during the period of suspension. The conviction of the appellant follows after two mutually destructive versions were placed before court. The respondent called 4 witnesses to testify whereas 2 statements were read into the record by agreement between the parties. The complainant's version was that the appellant asked her to come to his room and when she arrived there, the appellant raped her. The appellant called no witnesses and was the only witness in his defence. He denied raping the complainant. A disputed J88 medico-legal report was submitted into evidence. No DNA evidence nor text messages exchanged between the appellant and the complainant were tendered as evidence. The consistent statements made by the complainant as well as the circumstantial evidence placed before court are what culminated in the court a quo convicting the appellant of rape. There was no misdirection on the part of the magistrate in convicting the appellant. Appeal dismissed.

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### **ORDER**

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The appeal against conviction and sentence is dismissed.

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### **JUDGMENT**

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NDAUENDAPO J (USIKU J concurring):

#### Introduction

[1] After evidence was heard the appellant was convicted and sentenced in the Regional Court for the district of Otjiwarongo on 13 March 2015 on a charge of rape under the Combatting of Rape Act 8 of 2000. This is an appeal against both conviction and

sentence. Although the appellant listed 13 grounds of appeal in his notice of appeal in respect of the conviction and 11 grounds in respect of the sentence imposed, The grounds can be summarised as follows: (a) that the learned magistrate erred in finding that the State had proven beyond a reasonable doubt that the Appellant had indeed inserted his penis into the complainant's vagina; (b) the evidence of the state witnesses was riddled with material multiple contradictions; (c) the learned magistrate erred in admitting the *viva voce* evidence of the doctor which contradicted his own written J88 report; (d) a further ground of appeal raised that goes to the heart of this appeal is that the evidence led on behalf of the State was riddled with material multiple contradictions especially as it relates to the Medical Doctor in respect of the J88 Medical Report.

[2] As regards the sentence, the appellant in sum raised the fact the learned magistrate erred in failing to give adequate consideration to the accused person's substantial and compelling circumstances that justified a departure from the minimum sentence prescribed by the Act to a lesser sentence and that the magistrate erred in over emphasizing the serious nature of the offence to the exclusion of other factors that ought to have been considered judiciously when sentencing the appellant.

### The State's Case

[3] The State in the *court a quo* called 4 witnesses to testify and 2 witness statements were read into the record by agreement between the parties. The first witness to testify was the complainant, who testified that the appellant had contacted her via text message at 22h00. She further testified that she went to the room of the appellant and upon entering, the appellant locked the door, pushed her onto the bed, removed her trouser and underwear until her knees, removed his trousers until his knees and proceeded to put his penis into her vagina and made up and down movements- the whole encounter lasting approximately 10 minutes. She further testified that he stopped when she began to cry. She testified that he pushed her out of the room after they were dressed and she proceeded to her sister's room, (her sister being a colleague of the appellant) where she continued crying and told her sister via sms that the appellant had raped her. She further

testified that she changed clothes in her sister's room, save for her underwear, before having been taken to Otjiwarongo state hospital for a medical check-up approximately 8 hours after the incident occurred.

[4] The second witness called by the respondent in the court *a quo* was doctor Bulaya who examined the complainant and compiled the J88 medico-legal report. He testified that he observed that there was no scarring, tears, bleeding or bruising around the vagina of the complainant. His clinical findings were 'that there was destruction of the hymen due to forced penetration as the fresh remaining part of the hymen was present.' The Doctor further explained that the detail on the J88 indicating the number of consensual sexual partners during the last seven days being 1 was information that he obtained from the complainant herself with the assistance of hospital staff in terms of interpreting from English to the language spoken by the complainant. The doctor testified on his findings in respect of the medical examination and maintained that there was a recent perforation, although he could not say how recent such perforation could have been and that there was a laceration as well as a red clitoris. The Doctor further testified that it is possible that this was the complainant's first sexual encounter based on his observations of her hymen and that there does not necessarily have to be any bleeding. In cross-examination on his evidence in chief, the doctor conceded that there must be some sign of blood even on the clothes of the complainant at the time that the laceration indicated on the J88 was created.

[5] Sergeant Rachel Shiningayamwe's evidence corroborated the evidence of the complainant in all material respects save for minor immaterial differences in their testimony. She testified that she received two text messages, one saying 'come and take me to the hospital' and the other one stating that 'the appellant had raped me.' She further testified that she received these texts from the complainant after the complainant had come to her crying and after she, the complainant, could not verbally communicate what had happened. She further testified that she called Simeon Evo to her room and that when he came he saw the complainant crying. She further testified that she saw further communications on the cell phone of the complainant where the complainant wrote to the

appellant saying 'you raped me' to which the appellant replied 'No please we can talk tomorrow. I will do anything'. She also showed these messages to Ivo. This witness also confirmed that when the complainant came to her room she changed into other clothes but did not remove or change her underwear.

[6] Constable Simeon Ivo, did not testify and his statement was not disputed by the defence and was read into the record. He corroborated the evidence of Sergeant Rachel. In the statement he also narrated the version of the appellant as told to him by the appellant. The statement of Ipumbu who was acting Station Commander was also read into the record by agreement. In his statement he confirmed that he was called by Constable Ivo to go to the room of Sergeant Rachel. He confirmed that the complainant narrated to them what had happened to her when she went to the room of the appellant. The two state witnesses whose' evidence went undisputed were that of another police officer and that of the Station Commander who corroborated the evidence of the third state witness in respect of the complainant being raped and on the events that transpired after the incident occurred particularly at the time the complainant had gone to her sister's room.

[7] The final witness called to testify in the court *a quo* was Chief Inspector, Katrina Andreas, who corroborated the third state witness in as far as the text messages exchanged between the complainant and the appellant went. She testified that she too saw the text messages exchanged between the complainant and the appellant, but failed to explain why the cell phones of both the complainant and the appellant were not tendered into evidence in order to garner some perspective on the events precipitating to the incident in question. The only explanation offered was that it was apparently not required at the time for her to have done so.

### The Appellant's Case

[8] The appellant testified and called no witness. He denied having raped the complainant. He testified that on 28 March 2013 at 20h30 he was seated outside the

police barracks when the complainant approached him and asked him whether he was not cooking today, to which he replied that he was lazy to do that and she replied that she was cooking porridge. They sat and continued talking. She then left and went inside the police barracks. Hours later, he texted her and said 'come' she replied 'where' and then she came. The appellant testified that they met at the corridor and she had a plate of porridge. After eating the porridge he went outside the police barracks. He then returned to his room and watched TV and fell asleep. After that he heard the door closing and he woke up and saw her standing next to the bed. She asked him for his phone and he told her that it was on the charger and she then asked why he did not transfer credit to her phone during the day. He testified that she had asked him earlier in the day to transfer credit to her phone, but he did not do that as he needed to use the credit himself. She then told him that if he does not do that she will go with his phone, she took the phone and went outside. After 10 to 20 minutes she brought it back. He stood up and grabbed her and took the phone, she then said 'Eino you touched my breast and that is sexual harassment and I can open a case against you'. She then left. He then locked his room and slept. At 00:04 am he was woken by the police, Sergeants Kauarisa and Ipumbu who then told him that he was under arrest. After that he was examined by a doctor and samples were taken from him. He told the court that he does not know why the complainant was making these allegations against him as they had a good relationship.

#### Submissions of Counsel on behalf of the Appellant

[9] Mr Mukonda, counsel for the appellant contended that according to the complainant, the rape took place for a period of 10 minutes whilst her pyjamas were on her knees i.e. the legs were close together and that the appellant made up and down movements. Counsel for the appellant further indicated that the complainant had indicated that she was a virgin, which allegation was not supported by the J88 medical report handed into evidence in the court *a quo*. Counsel further submitted that the complainant had sexual intercourse in the past with consent as it appeared on the J88 medical report, which contradicts the assertion she made stating that she was indeed a virgin.

[10] Counsel further submitted that the fact that her underwear was not entirely removed and that there was no stain of blood or semen on the panties of the complainant does not corroborate the fact that the complainant was raped for a period of 10 minutes as contended. It was counsel's submission that the learned magistrate incorporated extraneous factors into her assessment of the facts.

[11] As to the contradictions, counsel argued that complainant testified that she was a virgin, but in the J88 she informed the doctor that she had consensual sex on 28 February with one partner within the past seven days, counsel further argued that complainant never testified that after the alleged rape she sent a text message to the appellant stating: 'Eino you raped me', and that the appellant replied 'no please we will talk tomorrow I will do anything please, whereas Rachel Shiningayamwe and Ipumbu testified that such text messages were exchanged between the appellant and the complainant. Although the complainant did not testify about those messages, the witnesses saw it on her cell phone and the appellant did also not deny that he sent such text messages. The fact that she did not testify about those messages may have been an oversight from her side. Counsel further argued that the complainant testified that she left the sister's room at about 23h00 and went to appellant's room and returned at around 23h10 whereas Rachel testified that complainant left the room between 22h00 and 23h00 and returned around 23h00. This is clearly immaterial as Rachel did not check on her watch or cell phone what time exactly the complainant returned and the difference in their testimonies relates to minutes and not hours.

[12] It was further submitted on behalf of the appellant that the appellant was required to prove his innocence, when there exists no such duty on him in light of the lack of forensic and or medical evidence proving his guilt. In addition to this, it was submitted on behalf of the appellant that even in the event of the appellant being convicted, the learned magistrate failed to consider the circumstances around the alleged rape in respect of how violent such rape was or was not, whether a lot of force had been used, which is minimal if one would have regard to the J88 medical report. The learned magistrate considered the totality of the evidence and appellant was not required to prove his innocence. This

submission is baseless. Counsel in closing argument contended that in the event that the appeal on conviction would have failed a sentence between 6 to 12 years, partially suspended, would have been a more appropriate sentence in these circumstances.

#### Submissions of Counsel on behalf of the respondent

[13] Mr Lisulo, counsel for the respondent argued that the court *a quo* was faced with two conflicting versions. He contended that when the court is faced with such a scenario, logic would dictate that, an assessment into which version is more probable would be the correct approach. It was submitted on behalf of the respondent that the absence of medical evidence does not necessarily mean that rape did not occur. However, in this particular instance, the medical report, shows that there was a recent perforation. It was further submitted that the fact that the complainant indicated that she had consensual sex once before shows that the doctor erred in his report. It was further submitted that in light of all the evidence, the possibility of falsely implicating the appellant is very slim. As regards the sentence, the fact that the appellant was a police officer at the time of the incident in itself should be seen as aggravating due to the trust placed by the public in such persons.

#### The law and the merits

[14] The appellant was convicted on a count of contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000 on the basis that the court *a quo* was faced with two mutually destructive versions, one of which upon an application of what would appear more probable in light of the evidence adduced and all surrounding circumstances bearing in mind the burden of proof resting on the state to prove its case beyond a reasonable doubt.

[15] In *S v Snyman*<sup>1</sup> it was held that in determining the guilt or the innocence of an accused person 'the ultimate requirement is proof beyond a reasonable doubt; and this

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<sup>1</sup> In *S v Snyman*<sup>1</sup> 1968 (2) SA 582(A).



depends upon an appraisal of the totality of the facts, including the fact that (the accused) did not give evidence.’ Proof beyond a reasonable doubt does not, however, mean that the state must exclude an unlimited number of preferred possibilities which are imaginary or speculative and for which no factual basis has been laid or established in the evidence.

[16] In *S v HN*<sup>2</sup> the court (per Liebenberg J) held that it was a well-established rule of practice, that where a witness gives evidence as a single witness, that such evidence must be corroborated or approached with caution, although such caution should not be allowed to displace the exercise of common sense.

### The J88 Medical Report

[17] On the pro forma J88 medico-legal report under the heading ‘History in case of alleged sexual offence’ below that under no.10, it states ‘Date and time of last intercourse with consent’ and **28/02/13 around 23h00** is inserted (handwritten). Finally under no.11 of the J88, it states ‘number of consensual sexual partners during last 7 days’ and the number ‘1’ is inserted (handwritten). The issue of ‘intercourse with **consent**’ and the ‘number of **consensual** sexual partners’ are standard questions on the pro forma J88. I must hasten to add that the way the questions are phrased, is confusing as they connote consent, whereas the J88 deals with the history of alleged sexual offences. The answers to those questions by the complainant were consistent with her evidence, that the rape occurred on **28/02/13 at around 23h00** and she only had one sexual encounter, which was consistent with her testimony that she never had a sexual encounter before that incident. She was a virgin. The doctor’s observations and clinical findings also corroborate her evidence that she was raped. I must however pause here to mention that the fact that the J88 medical report indicated that the complainant had consensual sex on 28 February 2013 at around 23h00 and had consensual sexual intercourse with one partner in the past 7 days prior to the alleged rape, should be taken in the context of the evidence of the complainant as well as the medical doctor and the way the questions on the J88 have been phrased. The medical doctor explained that the information inserted into the pro

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<sup>2</sup> In *S v HN* 2010 (2) NR 429 at para 56.

forma J88 was information obtained from the complainant with the assistance of hospital staff, who sometimes assist in translating and interpreting when a doctor examines a patient. It is not impossible for words to be misinterpreted or lost in translation under those circumstances.

[18] The complainant was crying during the ordeal and she went home crying. She was shocked and immediately reported the incident to her sister by way of text messages. The text messages sent to the appellant in which she accused him of rape, were also seen by witnesses for the state. The appellant in his reply to the allegation of rape did not deny that, instead he replied 'No please we can talk tomorrow. I will do anything.' Logic dictates that any innocent person accused of rape, especially a police officer, would immediately deny such allegations.

[19] What is crucial in the evidence of the medical doctor is what his conclusive finding was in respect of the examination which he conducted on the complainant. In his professional opinion, he concluded that there was a recent perforation and that the hymen was destroyed due to forced penetration and that the fresh pieces of the hymen were visible. That clearly corroborates the evidence of the complainant that she was raped.

[20] The doctor further indicated that there was a white discharge in the vagina which was not uncommon in cases where the hymen had been fractured which would indeed corroborate the testimony by the complainant i.e. that she was a virgin. The medical doctor further testified that it is not uncommon for there to be no bleeding when the hymen is fractured, which according to him 'is not meant to be there forever'. He testified that it is normal for a white discharge to be present where the hymen has been fractured.

[21] The medical doctor did however concede that there should have been some bleeding at the time that the laceration came about, however, the medical report indicates that the complainant changed clothes before the medical examination. There is a real possibility that this fact could account for the fact that no bleeding or blood was detected especially if the laceration in question is relatively small as opposed to a larger one.

[22] What one could deduce from the testimony given by the medical doctor is that it is expected that bleeding would occur when the laceration surfaced, but that it would not be uncommon for there to be no bleeding if one takes into account factors such as the size of the penis amongst others. However, it remains unknown, at least in respect of the examination conducted on the appellant what the size of his penis is and how that could or could not have resulted in the complainant bleeding or not. The use of the number 5 in the medical report refers to full growth of the male genitalia, but not necessarily as it relates to the size of the penis.

### Conclusion

[23] This court has in the case of *Joel Kambala v The State*<sup>3</sup>, articulated the approach to the evidence of a single witness as follows:

[24] Because of the inherent danger of relying exclusively on the sincerity of the single witness, this has evoked the judicial practice that such evidence should be approached with caution and only be relied upon where such evidence is clear and satisfactory in material respects. Thus, although the court in terms of s 208 of the Act may convict the accused of any offence on the single evidence of any competent witness, such evidence should be treated with utmost care and may only safely be relied upon where it is supported by some satisfactory indications that it is trustworthy. However, it need not be satisfactory in every respect and it may safely be acted upon even where it has some imperfections – provided that the court at the end is satisfied that the truth has been told. (*S v Sauls and Others* 1981 (3) SA 172 (A); *S v Monday* 2002 NR 167 (SC); *S v Haihambo* 2009 (1) NR 176 (HC)).’

[24] Even though it is a generally accepted principle in our law that single witness evidence should be treated with caution, I think the position in alleged cases of rape is slightly different as opposed to other offences, since the Combatting of Rape Act 8 of 2000 came into effect outlawing the cautionary rule being applied to complainants of

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<sup>3</sup> Case No CA 74/2010, unreported judgment, delivered on 18 January 2011, paras 14 and 15, per Liebenberg, J, Tommasi, J concurring.

rape.<sup>4</sup> Section 6 of the Combatting of Rape Act also provides that previous consistent statements made by a complainant shall be admissible in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature: Provided that no inference may be drawn only from the fact that no such previous statements have been made. It is clear that the statements made by the complainant at the time the incident took place are consistent with those statements as she made them in her evidence before court, which evidence was also corroborated by the J88 medical report.

[25] In the present case the trial Court gave reasons for convicting the appellant and in the reasons the Court does refer to the dangers of relying upon the evidence of a single witness and that such evidence is to be approached with caution. The court *a quo* further stated that the court must thus make a credibility finding and that the evidence of a single witness must be satisfactory and clear in all material aspects. The court also reasoned that there was corroboratory evidence from the state witnesses including the medical doctor. I am satisfied that the court *a quo* was conscious of the inherent dangers of the evidence of a single witness and that it approached that evidence with caution, it therefore did not misdirect itself on this aspect.

[26] Having regard to the totality of the evidence, I am satisfied that the appellant was correctly convicted. In the result, the appeal is dismissed.

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<sup>4</sup> See Section 5 of the Combatting of Rape Act 8 of 2000.

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GN NDAUENDAPO

Judge

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D USIKU

Judge

**APPEARANCES****For the Appellant:**

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