



CASE NO.: CC 23/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

BENEDICTUS DIEDERICKS

THEOPHILUS SALATIEL

FIRST ACCUSED

SECOND ACCUSED

CORAM: MANYARARA, AJ.

Heard on: 2008.07.15 – 2008.07.18

Delivered on: 2008.07.18

JUDGMENT IN TERMS OF S174 APPLICATIONS

MANYARARA, AJ.: [1] At the close of the case for the prosecution each of the accused applied for his acquittal and discharge in terms of s174 of the Criminal Procedure Act.

[2] Each of the accused is charged with one count of rape. The allegation is that on 14 December 2004 in the district of Karasburg each of the

accused wrongfully and intentionally under coercive circumstances committed a sexual act with the complainant by inserting his penis into her vagina while applying physical force or threatening to apply physical force in contravention of the relevant provisions of the Combating of Rape Act 8 of 2000.

[3] The application for discharge is opposed.

[4] All three counsel, Miss Hamutenya for accused no. 1, Mr Christiaans for accused no. 2 and Miss Nyoni for the State among them referred me to several decided cases in this jurisdiction as well as South Africa and Zimbabwe.

[5] The authorities referred to are broadly agreed in their interpretation of s174:

(a) that the Court has a discretion to discharge the accused at the close of the case for the prosecution, if the Court is of the opinion that there is no evidence that the accused committed the offence charged or any offence of which he may be convicted on the charge;

(b) that the expression “*no evidence*”, means “*no evidence on which a reasonable Court acting carefully might properly convict.*”

[6] A comprehensive discussion of the principles/guidelines for applying the legal principles of s174 is contained in *S v Stanley Nakale and two others* Case No. CC 18/2005 to which reference should be made.

[7] When the charge was put, each of the accused pleaded Not Guilty.

[8] Miss Hamutenya for first accused told the Court that her client's defence would unfold as the trial proceeded, while Mr Christiaans for second accused said that his client states that he was not disclosing the basis of his defence. The prosecution led evidence from complainant, aged 20 years, from her boyfriend Lucky Isaacks as well as from the Police details who attended the scene and the doctor who examined the complainant and both accused. And the bare facts may be summarized as follows.

[9] Briefly, the complainant and Lucky said that in the evening of the fateful day they spent some time alone together in second accused's "*Kia*" or room as they called it with his permission. When they emerged from the room, first accused seized complainant and a struggle ensued between herself, first accused and Lucky in the course of which first accused threatened Lucky with a broken bottle or stone or both and Lucky fled. First accused then succeeded in dragging complainant to second accused's room where he forcibly undressed her and had sexual intercourse with her once without her consent and left the scene.

[10] Complainant dressed and emerged from the room only to be confronted by second accused who also molested her in the manner that first accused has done. Throughout this and her previous ordeal complainant screamed aloud but no one came to her rescue.

[11] When Lucky fled, he went and fetched the police, returning in the company of Sgt. Christof Jantjies and W/Cst Ellen Beukes.

[12] According to complainant, on hearing the sound of the police vehicle outside his room, and when the police announced their presence second accused dressed and ordered complainant also to dress and hide under the bed, from where the police fetched her.

[13] According to Cst. Beukes, complainant emerged from under the bed crying. Second accused asked her, "*Do you want to say that we raped you?*" and she replied "Yes".

First accused was nowhere to be seen.

[14] Second accused was violent and refused to get into the police vehicle. So the police left him and, at complainant's request, they took her and Lucky home, and returned on the following day to arrest both accused and take them and complainant to the hospital for medical examination.

[15] Dr Petrus Vermeulen, the District Surgeon, examined complainant and both accused but was unable to determine if any of them had sexual intercourse on the previous night.

[16] If that had been all the evidence placed before me, the issue would be whether sexual intercourse took place as alleged or at all. However, despite the decision of both accused not to disclose their defence, the defence emerged starkly from cross-examination of complainant both by Miss Hamutenya and Mr Christiaans.

[17] My note of Miss Hamutenya's cross-examination is that she put it to complainant that there had been a mutual understanding between her and first accused to have sex in second accused's room; that she had in fact undressed herself; that he had used a condom, nor had she cried or that he put his hand over her mouth to shut her up. Complainant denied all the above suggestions. And Mr Christiaans put it to complainant as fact that she had consensual sexual intercourse three times that night- first with Lucky, secondly with first accused and thirdly with second accused. The statement was rhetorical requiring no comment.

[18] It follows, therefore, that there is an outstanding issue for decision and that is whether the admitted sexual intercourse was rape as complainant alleged or consensual as the accused alleged.

[19] In this regard, three of the guidelines set out in the Nakale case are relevant. These are:

- a) that every case should be considered on its own merits.
- b) that at this stage the credibility of the State witnesses plays a very limited role; and
- c) that among the factors that may have an impact on a consideration of these are whether the accused may provide evidence to substitute that of the State, and the possibility of common purpose.

[20] In my view, at this stage, the evidence for the prosecution, after being tested in cross-examination, tends to support the charges against the accused, bearing in mind that the accused may be regarded as accomplices and the State is entitled to rely on the evidence of an accomplice. See Commentary on the Criminal Procedure Act by du Toit *et al* Revision Service 36 of 2006 on the comparable position under S.A Law

[21] Accordingly, there is evidence from which a reasonable person acting carefully, may draw the inference that there is *prima facie* proof of rape.

[22] In the result, the applications in terms of section 174 for discharge of the accused at this stage are dismissed.

MANYARARA, J.

ON BEHALF OF THE STATE

ADV. NYONI

Instructed by:

THE OFFICE OF THE PROSECUTOR-GENERAL

ON BEHALF OF FIRST ACCUSED

ADV. HAMUTENYA

Instructed by:

DIRECTORATE OF LEGAL AID

ON BEHALF OF SECOND ACCUSED

MR CHRISTIAANS

Instructed by

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