



CASE NO.: CC 31/2008

IN THE HIGH COURT OF NAMIBIA

HELD IN WINDHOEK

In the matter

between: **THE STATE**

AND

COLLEN KAVEZEMBURUKA TJIKUZU

CORAM: SHIVUTE, J

Heard on: 2010 March 23 - 2010 March 31

2010 April 06 - 2010 April 07

2010 April 12 and 14 2010

June 08

2010 December 01 - 2010 December

15

Delivered on: 2011 March 01

JUDGMENT

SHIVUTE, J: [1] The accused is charged with (7) seven counts namely:

- 1. Kidnapping**
- 2. Contravening section 2(1)(a) read with sections 1, 2(2), 3, 5,6 and 7 of the Combating of Rape Act, 8 of 2000 - Rape. Alternatively contravening section 14(1)(a) read with sections 1, 12 and 14(2) of Act 21 of 1980 as amended by Act 7 of 2000 - Committing an unlawful sexual act with a girl under the age of sixteen.**
- 3. Contravening section 2(1)(a) read with sections 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act, 2000 (Act No. 8 of 2000) - Rape. Alternatively contravening section 14 (1)(a) read with sections 1, 12 and 14 (2) and 14(2) of Act 21 of 1980 as amended by Act 7 of 2000 - Committing an unlawful sexual act with a girl under the age of sixteen.**
- 4. Contravening section 2(1)(a) read with sections 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act, 2000 (Act No. 8 of 2000) - Rape. Alternatively contravening section 14(1)(a) read with sections 1, 12 and 14 (2) of Act 21 of the 1980 as amended by Act 7 of 2000 - Committing an unlawfull sexual act with a girl under the age of sixteen.**
- 5. Kidnapping**
- 6. Contravening section 2(1)(a) read with sections 1, 2(2), 3, 5,6 and 7 of the Combating of Rape Act, 2000 (Act No. 8 of 2000) - Rape**
- 7. Contravening section 2(1)(a) read with sections 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act, 2000 (Act No. 8 of 2000)-Rape.**

[2] I now proceed to summarize the allegations in each of the counts.

Count 1: Kidnapping

The allegation is that on or about 05 May 2006 in the district of Okakarara, the accused did wrongfully, unlawfully and intentionally deprive a 14 year old female of her liberty of movement by carrying her to and detaining her at a soccer field against her will.

Count 2: Contravening section 2(1) (a) read with sections 1, 2(2), 3, 5 and 6 of the Combating of Rape Act, 8 of 2000 - Rape.

It is alleged that on or about 05 May 2006 in the district of Okakarara, the accused did wrongfully, unlawfully and intentionally commit a sexual act with the complainant by inserting his penis into her vagina under the following coercive circumstances:

1. by the application of physical force to the complainant; and /or
2. threatening by word or conduct to apply physical force against the complainant; and /or
3. threatening by word or conduct to cause harm to the complainant under the circumstances where it was not reasonable for the complainant to disregard the threats, and /or
4. where the complainant is unlawfully detained.

Alternative charge to count 2: Contravening section 14 (1)(a) read with sections 1, 12 and 14(2) of Act 21 of 1980 as amended by Act 7 of 2000 - Unlawful sexual act with a girl under the age of sixteen.

Particulars of the offence being that on or about 05 May 2006 and at or near Okakarara in the district of Okakarara the accused did wrongfully, unlawfully and intentionally commit a sexual act with a girl under the age of sixteen years, to wit, the complainant aged 14 years old.

Count 3: Contravening section 2(1) (a) read with sections 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act, No. 8 of 2000 - Rape.

It is alleged that on or about 5th May 2006 and at or near Okakarara in the district of Okakarara the perpetrator did wrongfully, unlawfully and intentionally commit a sexual act with the complainant by inserting his penis into the vagina of the complainant under the following coercive circumstances:

1. by the application of physical force to the complainant; and/or
2. threatening by word or conduct to apply physical force against the complainant; and/or
3. the complainant is under the age of 14 years and the perpetrator being more than three years older than the complainant, to wit, 28 years old, and/or
4. where the complainant is unlawfully detained.

Alternative Count to Count 3: Contravening Section 14(1)(1)(a) read with sections 1, 12 and 14(2) of Act 21 of 1980 as Amended by Act of 2000 - unlawful sexual act with a girl under the age of sixteen.

In that upon or about 5th May 2006 and at or near Okakarara in the district of Okakarara the accused did wrongfully, unlawfully and intentionally commit a sexual act with a girl under the age of sixteen years, to wit, complainant aged 14 years old.

Count 4: Contravening section 2 1(a) read with sections 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act, 8 of 2000 - Rape.

It is alleged that on or about 05 May 2006 at Okakarara in the district of Okakarara the accused did wrongly, unlawfully and intentionally commit or continue to commit a sexual act with the complainant by inserting his penis into her vagina under the following coercive circumstances.

1. by the application of physical force to the complainant; and or
2. threatening by word or conduct to apply physical force against the complainant; and/or
3. the complainant is under the age of 14 and the perpetrator being more than three years older than the complainant, and/or

4. where the complainant is unlawfully detained

Alternative charge to count 4:

Contravening section 14(1)(a) read with sections 1, 12, and 14(2) of Act 21 of 1980 as amended by Act 7 of 2000 - unlawful sexual act with a girl under the age of sixteen.

It is alleged that in that upon or about 05 May 2006 in the district of Okakarara the accused did wrongfully, unlawfully and intentionally commit a sexual act with a girl under the age of sixteen years, to wit, the complainant aged 14 years old.

Count 5: Kidnapping

It is alleged that on or about 20 September 2007 and at or near Okakarara in the district of Okakarara the accused did wrongfully unlawfully and intentionally deprive Frieda Hengari, a 32 year old female of her liberty of movement by detaining her against her will behind the Okakarara Old Age Home.

Count 6: Contravening section 2(1) read with sections 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act, 8 of 2000 - Rape.

It is alleged that on or about 20 September 2007 and at or near Okakarara in the district of Okakarara the accused did wrongfully, unlawfully and intentionally commit or continue to commit a sexual act with the complainant by inserting his penis into her vagina under the following coercive circumstances:

1. by the application of physical force to the complainant; and/or
2. threatening by word or conduct to apply physical force against the complainant; and/or
3. threatening by word or conduct to cause harm to the complainant under

circumstances where it was not reasonable for the complainant to disregard the threats, and/or

4. where the complainant is unlawfully detained

Count 7: Contravening section 2(1)(a read with sections 1, 2(2), 3, 5,6 and 7 of the Combating of Rape Act, Act no, 8 Of 2000 - Rape

It is alleged that on or about 20 September 2007 and or near Okakarara in the district of Okakarara the accused did wrongfully, unlawfully and intentionally commit or continue to commit a sexual act with the complainant by inserting his penis into her vagina under the following coercive circumstances:

1. by the application of physical force to the complainant; and/or
2. threatening by word or conduct to apply physical force against the complainant; and/or
3. threatening by word or conduct to cause harm to the complainant under circumstances where it was not reasonable for the complainant to disregard the threats; and/or
4. where the complainant is unlawfully detained.

[3] The accused pleaded not guilty to all the counts and he declined to disclose the basis of his defence. However, in his reply to the pre-trial memorandum, the accused stated that he had sexual intercourse with the 1st complainant but it was consensual and that the complainant at all relevant times misrepresented her age by being in a bar/nightclub and requesting the accused to buy her a beer.

[4] The Accused is represented by Mr. Basson on the instructions of the Legal Aid Directorate and Mr. Lisulo represents the State.

[5] I propose first to summarise the evidence concerning the 1st complainant in counts 1 - 4 who is a minor.

The 1st complainant testified that she was born on 02 June 1992. However, her mother Samueline testified that the complainant was born on 13 June 1992.

However, a certified copy of the complainant's full birth certificate was produced before this court and the complainant's date of birth there is recorded as being the 2nd of June 1992. From the evidence before me it appears that at the time of the offences were allegedly committed the complainant was about 14 years old and at the time she testified she was 17 years old.

[6] Complainant testified that on 05 May 2006 she met the accused at a drinking place known as Lee's Bar at around 21h00. She was in the company of her friend Ndjesee Magdalena Katukundu. Whilst she and her friend were busy dancing the accused approached her and told her that he wanted her but she declined the proposal. After the bar closed at about 02h00, complainant and her friend Katukundu left. A certain man escorted them. Before they approached Garisa's place the accused emerged from one of the yards. The accused offered to escort the complainant but she refused. The accused grabbed the complainant on the arm; he also wanted to grab Katukundu but could not get hold of her.

[7] The accused pulled the complainant and placed his hand on her mouth. He then continued to pull her up to the soccer field. Then he dropped her to the ground and took off her underpants. The accused pushed the complainant on the chest, lifted her skirt up and put his penis into her vagina and started to have sexual intercourse with her. The accused ejaculated inside her. He did not withdraw. He continued to have sexual intercourse with her until he ejaculated again. He never withdrew. Instead he continued to have sexual intercourse with her until he ejaculated for the third time. Thereafter the complainant and the accused stood up. The complainant informed the accused she wanted to urinate.

The accused took off the complainant's jersey and a T-shirt which she was wearing. The complainant ran to the police station without her T-shirt and a jersey. She was half naked at the top part of her body. When she arrived at the police station she was still half naked with her breasts exposed.

The complainant could not remember the name of the police officer she found at

the police station. However, she went back to the scene in the company of police officers. At the scene she recovered the T-shirt, cap, underpants, shoes and a jersey. The complainant did not know the accused before. However, she was able to identify him because there were lights at the bar where they first met and there were also lights at the yard where the accused found them for the second time. The complainant denied having consensual sexual intercourse with the accused.

[8] It was put to the complainant through cross-examination that according to her statement dated 08 May 2006 which she gave to the police she stated that she was born on 24 March 1992. The complainant denied to have told the police that she was born on 24 March 1992. The complainant was asked whether she consumed alcohol at Lee's bar and replied that she did not take any alcohol. The complainant was further questioned as to which violence the accused committed at the time he was allegedly raping her and she responded that the accused twisted her finger. The complainant was asked to demonstrate how the accused was holding her by the neck as she indicated in her statement to the police. The witness demonstrated by touching the area around her face and not the neck. It was put to the complainant that the accused never grabbed her by the arm but that he only put his hand over her shoulders. This was disputed by the complainant.

[9] Antony Gurirab testified that on 5 May 2006 he was a constable in the Namibian Police and he was on standby duty when he received a report concerning this matter around 03h00 early in the morning. He went to the police station and the complainant was identified to him by constable

Karuhumba as a complainant in a rape case that took place at the soccer field. Mr Gurirab and Mr. Karuhumba accompanied the complainant to the scene but they could not see anything at the scene because it was dark. However, they went back to the scene the following day and they found the complainant's underpants. At the scene he also observed footprints of people and saw marks which looked like people who were struggling. He could not remember what the complainant was wearing

when he found her at the charge office.

[10] Mr. Gurirab further testified that the complainant told them she could identify the person who raped her. He and sergeant Isaaks went to look for the accused and arrested him.

[11] Through cross-examination Mr. Gurirab was asked if the complainant was half naked when he found her at the police station. He replied that he could not remember what she was wearing, but that if she was half naked he could have included it in his statement.

[12] Magdalena Jesse Katukundu who was with the complainant testified that she and the complainant went to Lee's Bar at around 15h00. The complainant had some money and she bought some liquor which they drank together. At around 20h00 they started to dance. Whilst they were dancing they were approached by the accused. The accused called the complainant; he and the complainant went outside where they remained for about two hours. After two hours they went back in the bar and the accused bought a beer. He poured some of it in a glass for himself and the rest of the beer he gave it to the complainant to drink. The version of Katukundu contradicts the version of the complainant when she said she was talking to the accused at the dance floor and that they did not go outside. It also contradicts the complainant's evidence that she never drank alcohol.

It was Katukundu's further testimony that whilst they were on the way home from the bar the accused followed them and found them near Garisa's place. The accused told them to stop. He came and held the complainant by the neck. This version again is in contradistinction to the complainant's testimony that the accused grabbed the complainant by the arm. When the accused held the complainant by the neck Katukundu went to stand 6-7 meters away from them. The complainant and the accused were discussing. After some time she observed them walking together. The complainant called her so that they could go together with the accused, the offer which Katukundu declined. Thereafter the accused and the

complainant walked in the direction of the soccer field.

[13] Through cross-examination Katukundu stated that when she and the complainant used to go to the bars the police used to chase them away because they were minors. Even that day before the incident, the police had chased them away but they returned to the bar. Katukundu was asked whether the accused person wanted to grab her and she responded that it was not correct. She denied that the accused person ever attempted to grab her. She was further asked whether she saw the accused pulling the complainant and she replied that the complainant was never pulled; she walked freely with the accused.

[14] Ms Samueline Menjengua testified that she was the complainant's biological mother. She testified that the complainant was born on 13 June 1992. She obtained a birth certificate for the complainant and it appeared that complainant misplaced it. She admitted through cross-examination that she applied for a full birth certificate of the complainant and that she is the one who gave the information contained in the full birth certificate which was handed in evidence by the defence with the State's consent.

[15] It appears to me that it is not very clear as to which date the complainant was born. What is clear though is that she was born in 1992 and as previously mentioned, at the time of the alleged offence she was about 14 years old.

[16] Having dealt with the summary of the evidence pertaining to charges in respect of the minor complainant, I will now proceed to deal with the evidence in respect of charges laid by the remaining complainant namely, Frieda Hengari.

Sergeant Robert Karondere testified that he took photographs and compiled a photo plan of the scene of crime after the complainant Frieda Hengari pointed out the scene. According to his testimony he could not make out which footprints belonged to the suspect since there were many footprints around the scene, some of them were on top of each other. He also did not observe any footprints indicating that someone was being pulled.

[17] Doctor Noel Siame testified that on 20 September 2007 he conducted a medical examination in respect of Frieda Hengari and recorded his findings as follows:

The breasts were normal; the labia majora were normal; the labia minora were normal; fourchette was normal. He noticed a bruise on a vestibule which was about two to three centimeters. The bruise was fresh. No findings on the state of the hymen were recorded on the form. He examined the vagina with two fingers; the examination was easy and not painful.

[18] Again on the same date the doctor examined the accused person and his findings were as follows: The accused had old genital warts on the shaft of the penis.

[19] It appears from the medical report that specimen was taken from the accused and his underpants were taken for forensic investigation but unfortunately no results of the investigation were produced before this Court.

[20] The doctor admitted under cross-examination that although the medical reports for Hengari and the accused indicated that they were commissioned before a commissioner of oath in Otjiwarongo, he was not in Otjiwarongo. He also did not sign in the presence of a commissioner of oath as stated in the report. He further admitted under cross-examination that although he testified that the complainant had fresh bruises on the vestibule, the medical report does not indicate that the bruises were fresh. The doctor stated that there was no sign of haemorrhage and he was not in a position to explain why he stated in evidence that the bruises were fresh. I pause to observe that the medical report compiled by the learned doctor was not of much assistance to the Court.

[21] Warrant officer Nabot Amakali testified that on 20 September 2007 at about 07h00 he went to Okakarara Police station after he received a report of a rape case. At the Police Station, he found two ladies one of whom was Frieda Hengari who was identified to him as the complainant. Warrant Officer Amakali, Constables Metjavi

and Mumbala were led to the scene of crime by the complainant. She took them to an anthill near a riverbed. She showed them some shoeprints of a person who allegedly raped her. The shoeprints were visible as the sand was soft. They were able to follow the shoeprints from the anthill up to a certain house. Warrant Officer Amakali together with some police officer entered the house. The complainant remained outside but before they entered the house the complainant had given a description of her assailant, namely that it was "a man of light brown complexion with a sharp nose".

[22] When the police entered the house they found more than two people. The person who matched the complainant's description was lying on a bed. The complainant came from behind and pointed at the accused. Next to the accused there were shoes with similar prints to the one they were following and he described the shoeprints of a shoe with worn out sole. The "Grasshoppers" brand shoes which they found in the accused's home were also worn out.

Apart from Constables Mumbala, Metjavi and Sergeant Amakali who followed the shoeprints, there were other police officers including a Sergeant Shigwedha. The accused was arrested and the shoes were also seized. The black pair of shoes was produced before court as Exhibit 1.

[23] Through cross-examination Warrant Officer Amakali testified that he observed struggling marks at the scene of crime, like a person lying on the back being pulled. As to the question how the complainant looked like at the time he found her at the Police Station he said that the complainant had some sand on her hair but she was stable. He also said she appeared to be shocked. It was further put to Warrant Officer Amakali that the complainant never gave a description of the accused to the police. The description the Warrant Officer gave to the Court was because he knew the accused before this incident and he was aware that the accused was charged with another case of rape. Warrant Officer Amakali responded that although he was aware that the accused was charged previously the accused's description was given

to him by the complainant. Amakali was further asked as to how the complainant was dressed when he found her at the police station and he replied that the complainant was dressed in a disorderly manner; and her shirt looked as if it was pulled. However, on the photos which were produced before this Court depicting the complainant, no evidence of a shirt that looked as if it had been pulled was visible.

[24] Complainant Frieda Hengari testified that on 20 September 2007 between 02h00 and 03h00 in the morning she and her friend Ueripunisa were coming from Lee's Bar. Whilst they were walking, they were stopped by a man who came from behind. The man grabbed her on the right arm. He pulled her. It was the first time for Hengari to see this person. The person identified himself as Collen Ngozu who stays at Pamue. This man happened to be the accused. The accused started to twist the complainant's arm and fingers. The complainant's friend told the accused to leave the complainant alone. The accused person responded by asking whether they knew Mbakondja Katjuongua and that he was like Mbakondja Katjuongua and he was not afraid of anything, even if they ran to the police. At that stage the accused was allegedly carrying a stick. He threatened to beat the complainant or kill her should she scream.

[25] The accused pulled the complainant; at the same time he was also twisting her arm up to the place where she was raped. Ueripunisa ran to the police station. When the complainant and the accused reached an anthill, the accused instructed the complainant to hold onto the anthill. She held onto it with her left arm as he was still holding her right arm busy twisting it. The accused undressed the complainant and he also undressed himself. He took out his penis and put it inside the complainant's vagina and started to have sexual intercourse with her. At that stage the complainant was in a standing position holding onto the anthill.

[26] After he had sexual intercourse with her he said he was going to rest a bit before he continued the second time. He withdrew but later he again resumed having sexual intercourse with her. Whilst he was busy he saw the lights of a

vehicle. He inquired from the complainant whether it was a police vehicle and the complainant responded that she did not know. From there the accused got dressed and ran away. The complainant also got dressed and ran to the direction where the lights of the vehicle were coming from. It was a police vehicle and a police officer by the name Bonnie told her to get into the vehicle. Bonnie was with Ueripunisa, the complainant's friend. The complainant took the police officer and Ueripunisa to the anthill where the incident took place. They did not see any person there and they all went to the police station.

[27] The complainant further testified that because where they met there were street lights, she was able to see the accused clearly from the time he grabbed her and when he was twisting her arm. However, where the alleged rape took place there were no lights. The complainant in the company of the police went to the police station between 04h00 and 05h00. At about 07h00 the Warrant Officer who testified and other police officers accompanied the complainant and her friend to the scene. The complainant showed the shoe prints to the police and these prints were followed from the anthill up to the house where the accused was found. The police first entered the house and the complainant was later called by Warrant Officer Amakali to point out the suspect. There were about three young boys in the room and the complainant pointed out the accused as a person who raped her.

[28] When the complainant pointed at the accused, the accused allegedly cried and asked why the complainant did that to him. He even allegedly told the complainant that his father would pay her. The complainant further testified that before she identified the accused, she gave his description to the police as a "young man light in complexion with thick eyebrows wearing a maroon T-shirt (vest), black trousers and black shoes".

The complainant looked at Exhibit 1 and said it was similar to the shoes with prints they followed from the scene to the house where they found the accused. On the front side the shoe the sole appeared to be cut or worn out and those marks also

appeared on the shoe prints which were followed. In the middle of the sole the shoes appeared to have some lines or cuts.

[29] Ms Hengari disputed through cross-examination that she was lying on the ground, that her hair was full of sand or that there was sand on her clothes. This version is contrary to Warrant Officer Amakali's version that he observed sand on the complainant's hair. Hengari was asked whether the accused grabbed her on the arm or on the shoulder. She replied that she forgot where she was grabbed since a long time had passed. It could be that she was grabbed by the shoulder as indicated in her statement which she gave to the police. The witness was asked why she did not tell the Court that the accused ejaculated on both rounds as she stated in her statement to the police. Her response was that she heard it from the doctor that the accused had ejaculated. She did not notice that he ejaculated in her. It was further put to the witness that the accused never offered to pay her; she is the one who demanded N\$3000.00 from the accused. The complainant replied that the accused offered to pay her. The complainant was asked to describe the accused and she said he was dark brown. According to the witness now that the accused is in custody he appeared to be dark. She disputed that she gave a description of the accused to the police that he had a sharp nose.

[30] Through cross-examination, the complainant testified that when she went to the scene between 06h00 - 07h00 she showed the accused's shoe prints to the police, she then went back to the vehicle. She followed the shoeprints whilst she was in the vehicle. Upon further cross-examination the complainant stated that when the accused said he was going to rest a bit he did not remove his penis from the complainant's vagina. He just said he would rest for a while and then continued to have intercourse with her.

[31] Johannes Shigwedha, a Sergeant in the Namibian Police, testified that on 20 September 2007 he received a report that Ms Hengari was raped. Hengari described the person who raped her as a brown in complexion with a sharp nose. Hengari

directed Shigwedha and his colleagues to an anthill where the incident took place. At the anthill she pointed out to the police the tracks of the shoes which were allegedly worn by the suspect. Thereafter Shigwedha and his colleagues followed the shoe prints, which led them to a certain house in Okakarara. Whilst Shigwedha and Amakali were at the door of the house talking to one of the people who were in the house, the complainant came from behind and pointed at the accused as the person who allegedly raped her.

[32] The shoes with prints similar to the tracks they were following were lying on the floor. The shoes were old. The pattern of the shoeprints had some marks on the sole. It looked as if it had a cut. The prints were clearly visible on the ground surface and they did not lose sight of the tracks they were following. The witness identified Exhibit 1 and pointed out the marks he testified about. Sergeant Shigwedha further testified that the complainant identified the accused on her own and none of the police officers pointed the accused to the witness. The accused was arrested and taken to the police station. From the police station Sergeant Shigwedha went back to the scene and cordoned off the scene of crime.

[33] Shigwedha denied through cross-examination that the complainant gave the name of her assailant. He further stated that although he was aware that the accused was once in custody he only arrested him because he was identified to him by the complainant. Sergeant Shigwedha during cross-examination insisted that the complainant described her assailant as a brown guy with a sharp nose. It was again his testimony that when he went back to the scene with Karondere who took photos of the scene of crime, photos depicting the tracks that were followed could not be taken as they were destroyed by the wind.

[34] Upon further cross-examination, Shigwedha stated that he did not recall seeing the accused crying or offering to pay money to the complainant. He could not recall whether he saw the complainant's tracks at the place from where they followed the suspect's shoeprints. He did not follow the tracks from the place where the accused met with the complainant and her friend to the place where the alleged rape took

place. He further stated that although the sole of the shoes in Exhibit 1 appeared to have something missing or worn out, he could not recall whether he saw a mark which looked like a cut on the shoe prints when it stepped on the soil.

[35] Ueripunisa Aline Tjamburo testified that on 20 September 2007 she was with Frieda Hengari when they met the accused. The accused started to propose love to Hengari; the time was around 03h00. Hengari declined and told him to leave her alone. The accused started to struggle or twist Hengari's arm. She observed the accused taking a knife. I must mention that the version of the knife is contrary to what Hengari testified about on this aspect. It will be recalled that she stated that the accused had a stick. After Tjamburo observed the knife she ran to report to the police station. From the police station she went with the police to the place where she left Hengari and the accused but they were not there.

[36] They searched for Hengari and later on saw her running towards the police car. Hengari got into the police car and reported that she was raped. From there they went to the police station. They did not stay long and the police took her and Hengari where she was allegedly raped. They again went back to the scene around 06h00. The police cordoned off the place. They also traced footprints of the person who allegedly raped Hengari. They followed them up to a certain house. At the house she, Tjamburo, got out of the vehicle, but remained outside the house and the police emerged from the house with the accused. It is further her testimony that when the accused was grabbing Hengari she was able to look at him, and she observed that the accused was wearing black shoes; he had a maroon T-shirt, and a black pair of trousers. She also observed his appearance; he "was light in complexion with beautiful hair and a sharp nose". The evidence about the alleged description of the accused by this witness contradicts the version of Hengari who said Tjamburo was unable to identify the accused or to describe him to the police. Tjamburo proceeded to testify that the tracks they followed from the scene appeared to have a cut in front of the sole. The shoes appeared to be old and they

matched the shoeprints of the shoes that were found at the accused's house. When the accused came out with the police he was wearing the clothes he allegedly had on the night of the incident. It was further Tjamburo's testimony that whilst she was outside the house Hengari was with the police inside.

[37] Tjamburo was asked through cross-examination whether she saw the accused with a stick and she replied that she only saw him with a knife. She also said the accused at one stage released Hengari when he was taking out a knife. This version is contrary to what Hengari said, namely that at no stage did the accused let go of her except when he saw what turned to be a police vehicle coming. Hengari also testified that she did not see the knife. Tjamburo furthermore stated that she did not hear the accused telling them that he was like Bakondja Katjuongua or saying that his name was Collen Ngozu. She also stated that the complainant reported to her that she was raped whilst standing or leaning against the anthill. When asked how the accused was dressed, Tjamburo replied that the accused was wearing a maroon T-shirt with short sleeves whilst on the other hand Hengari said it was a maroon T-shirt or vest.

[38] Tjamburo further stated through cross-examination that when the police came with the accused from the house, they asked her whether the accused was the one whom she saw and she answered in the affirmative. Tjamburo was asked when she saw Exhibit 1 for the first time and she said she first saw the shoes when the accused was wearing them at the house where he was found contrary to what she stated earlier that she observed the accused's shoes when he approached her and Hengari. Again during cross-examination Tjamburo stated that when Hengari was showing the tracks of the person who raped her at the place where she was raped, Tjamburo was in the vehicle. She never came out of the vehicle. When she was confronted with the question how she saw the shoeprints, she changed her version and said she saw the footprints at the place where she left the accused and Hengari. The witness was further asked how the visibility was at the place where she left the accused and Hengari. She answered that she was able to see the

shoeprints because the lights of the vehicle were on. She was further asked whether she was able to see if there were no vehicle lights. She replied that if the vehicle's lights were off she was not able to see because it was at a turn away from the street lights. The place where they were was not electrified.

[39] At the close of the State case the defence applied for a discharge in terms of section 174 of the Criminal Procedure Act, 1977 in respect of counts 1, 2, 3 and 4. The State did not oppose the application for the accused to be discharged in respect of counts 3 and 4. The Court placed the accused on his defence on counts 1, 2, 5, 6 and 7 and discharged him on counts 3 and 4.

[40] The accused Collen Kavezemburuka Tjikuzu testified under oath and called no witnesses. In his testimony the accused said he did not rape the complainant in the first count, because she agreed to have sexual intercourse with him. He denied to have kidnapped her and said that the complainant freely walked together with him to the soccer field. He further testified that whilst he was at Lee's Bar he met with the complainant and her friend. He requested the complainant to go outside with him so that they could talk. They discussed and returned to the bar. The complainant requested the accused to buy her beer, which he did. He poured some beer in the glass and the complainant drank it. He went to the complainant and from what he demonstrated in court, he put his arm around her shoulders. I noticed that this action was interpreted into the record as "holding her neck." The accused continued to testify that he and the complainant walked together to the soccer field where they had sexual intercourse. After they had sexual intercourse the complainant told him that she was afraid of getting pregnant and that that could be the reason for her to run to the police station.

[41] He disputed the evidence that the complainant ran to the police station half naked. When they had sexual intercourse she had her clothes on. She only took off her underpants. After they had intercourse, she told him that she was going to urinate. She left the place where they were, leaving behind only her underpants.

The accused proceeded to say that the complainant never told him that she was under sixteen years of age. She appeared to him to be older than twenty years. If he knew that the complainant was 14 years old, he was not going to buy her beer and he was not going to have sexual intercourse with her. He did not expect a 14 year old girl to be in a bar and that was the reason he did not ask for her age. He further disputed that there were struggle marks at the scene, because they were not struggling.

[42] As far as the charges concerning complainant Hengari are concerned, the accused testified that he never met Hengari and her friend. He never dragged her to the anthill or twisted her arm. He denied having had sexual intercourse with her as he only met Hengari for the first time at his place when she went there in the company of the police. He never told the complainant that he was Collen Ngozu. Regarding the shoe prints, the accused said he knew nothing about them. What he knew is that, the police came to his house with the complainant. The police pointed at him and asked the complainant whether the accused was the one and the lady said it was him. The police never paraded him at the identification parade for the complainant to do a proper identification. The accused further stated that he knew nothing about the description given by Hengari that it was a young man light in complexion with thick eyebrows who was wearing a maroon T-shirt, black trousers and black shoes. However, he stated that the police asked him to identify his shoes and he identified the shoes that were produced before this Court as Exhibit 1. He stated further that although the shoes belonged to him he is not the only person who had such a pair of shoes and the police did not show him the tracks of the shoes they were following to compare them with the prints of his shoes.

[43] The accused further denied that he ever offered to pay the complainant N\$3000.00. In fact she was the one who demanded four heads of cattle from him in order for her to withdraw the case. It was the accused's further testimony that he is not related to Bakondja Katjioungua and he never told the complainant that he was a brother to Bakondja. He disputed that his nose is not that sharp and he has not

thick eyebrows. The complainant said she was raped by a young man. The accused said he was 25 years at the time and was not the only young man in Namibia. He was of the opinion that the police brought the complainant to his place because he had been previously charged with a rape case involving the other complainant in this case. It was further the testimony of the accused that he never told the complainant that his father will pay her.

[45] The accused was asked during cross-examination to explain why he was saying that the complainant misrepresented her age. He answered that she misrepresented her age because she was in a bar and young girls were not supposed to be in bars.

[46] At the close of the defence case the State asked for the accused to be convicted and the defence asked for the accused's acquittal. This Court is called upon to determine whether the State had proved its case beyond reasonable doubt against the accused person. I propose to deal with the 1st count of kidnapping.

As already pointed out the complainant and Katukundu gave conflicting evidence regarding how the complainant associated herself with the accused at the bar and how they were approached by the accused. Complainant testified that she was dragged from the place she was found walking with her friend by the accused while her friend Katukundu, on the other hand, testified that the complainant went with the accused out of her own free will. Katukundu's evidence corroborated the evidence of the accused. It is trite law that the State bears the *onus* to prove beyond reasonable doubt that the accused is guilty of the offence he is charged with.

[47] Where the Court is faced with two mutually destructive versions in a criminal trial the Court must be satisfied that the guilt of the accused has been proved beyond a reasonable doubt. This Court had the benefit to observe the witnesses testifying. Witness Katukundu gave her testimony in a straight forward manner. She did not hesitate to answer questions whilst the complainant on the other hand was

hesitating to answer questions and she was unable to demonstrate how the accused allegedly grabbed her by the arm. Instead she touched her face more in the direction of the mouth. The complainant's evidence did not appear to be convincing as far as the charge of kidnapping is concerned. I am of the opinion that Katukundu was a truthful witness and I have no doubt to accept her version as the correct one. I am not convinced that the State had proved its case beyond reasonable doubt on this count. I therefore give the benefit of doubt to the accused.

[48] I will now proceed to consider whether the State had proved its case in respect of the rape charge preferred as count 2. As already observed, the complainant testified that the accused raped her. She had to run half naked to the police station to report the matter. However, the officer who attended to the complainant could not remember what the complainant was wearing. He did indicate though that if she had entered the police station half naked, he could have noticed it. Although the accused admitted to have had sexual intercourse with the complainant, he claimed that such intercourse was consensual. The accused testified furthermore that with the exception of her underpants, complainant had her clothes on when he had intercourse with her. He argued that there was no need to undress the complainant after he already had intercourse with her. The accused admitted that the complainant left her underpants when she went to the police station and this was the only item found by the police when they went to the scene.

It is highly unlikely that the complainant went to the police station half naked. Moreover, it is equally unlikely that he would take off her clothes after he had already had sexual intercourse with her.

[49] As far as this count is concerned the complainant is a single witness. Diemont JA in *S v Sauls and Others* 1981(3) SA 172 A at 180 E-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 754 A 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."

[50] Having weighed the complainant's testimony and having considered her evidence in its totality, I have come to the conclusion that she is not a reliable witness. I therefore accept the accused's version that he had sexual intercourse with her by consent. As stated earlier, although the exact date of the complainant's birth does not appear to have been firmly established, the complainant's mother testified that she was born during 1992. It is trite that she is in a better position to state when the complainant was born. I have no evidence contradicting her evidence that the complainant was born in 1992. I therefore come to the conclusion that the complainant was about 14 years old when the sexual intercourse between her and the accused took place. The sexual intercourse between the accused and the complainant having been admitted, the only question to be decided is whether the complainant being under the age of 16 was able to consent legally to a sexual act.

[51] The accused testified that the complainant allegedly misrepresented her age by being in a bar and by virtue of her alleged appearance to be older than her age. It was further submitted on behalf of the accused that it shall be sufficient defence if it appears to the court that the person deceived the person so charged into believing that she was over the age of sixteen years at the said time. Counsel relied for this proposition on the defences which were created by section 14(2) Act 21 of 1980 which reads as follows:

"It shall be a sufficient defence to any charge in terms of this section if it appears to the court:

(a)...

(b).....

(c) that the girl or person in whose charge she was, deceived the person so charged

into believing that she was over the age of sixteen years at the said time."

[52] As indicated earlier the alternative charge to count 2 is that the accused contravened section 14 (1)(a) read with sections 1, 12 and 14(2) of Act 21 of 1980 as amended by Act, 2000 (Act No. 7 of 2000).

Section 2 of Act No. 7 of 2000 reads as follows:

"The following section is hereby substituted for section 14 of the Combating of Immoral Practices Act, 1980"

This obviously means that section 14 of the Combating of Immoral Practices Act has been repealed and substituted by section 2 of Act 7 of 2000.

Section 2 of that Act further reads as follows:

"Any person who-

- a) *commits or attempts to commit a sexual act with a child under the age of sixteen years; or*
- b) *commits or attempts to commit an indecent or immoral act with such a child; or*
- c) *solicits or entices such a child to the commission of a sexual act or an indecent or immoral act,*

and who

- (i) is more than three years older than such a child; and*
- (ii) is not married to such a child (whether under the general law or customary law), shall be guilty of an offence..."*

Section 2 of Act 7 of 2000 has abolished the defences created by section 14 of Act 21 of 1980. It does not create any defence. Therefore the defence cited by counsel's defence is obsolete. Furthermore the fact that the complainant was in the bar and because of her physique is not a justification for the accused to have sexual intercourse with her. Legally the complainant was not capable to consent to the sexual act and she remains protected by the law.

[53] In the light of the above, I found that the State has failed to prove the charge of

rape in the second count. However, I am satisfied that it has proved its case against the accused in respect of the alternative charge to count 2, that is committing a sexual act with a child under the age of 16 years in contravention of section 14(1) (a) of Act 21 of 1980 as amended.

[54] I will now turn to consider whether the guilty of the accused has been proved in respect of counts 5, 6 and 7. It is convenient to deal with count 7 first. Although the complainant, Frieda Hengari, initially testified that her assailant had had withdrawn from intercourse in order "to rest a bit" in cross examination she indicated that she had made a mistake and that the correct position was that the assailant did not withdraw.

[55] From this explanation it is evident that it has not been proved beyond reasonable doubt that complainant was raped twice to give rise to the preferring of two counts of rape. I therefore give the benefit of doubt to the accused.

[56] I now wish to proceed to counts 5 and 6. Count 5 is that of kidnapping. The complainant testified that when the accused approached them he had a stick. However, her friend Tjamburo, testified that she did not see a stick; she saw the accused taking out a knife. The complainant, on the other hand, stated that she did not see the knife. It will be recalled that the complainant also testified that when the accused grabbed her and twisted her arm and fingers he did not release her until the time when he saw the lights of an oncoming vehicle. However, Tjamburo said when the accused took a knife, he momentarily let go of the complainant. The complainant furthermore indicated that she was able to see the accused clearly because where the accused found them there were street lights. It has already been observed that this evidence was contradicted by Tjamburo who testified in cross-examination that where they were walking there were no street lights. By the same breath Tjamburo stated that she saw the accused clearly and observed that the accused was wearing black shoes. Yet in cross-examination she testified that she saw the accused wearing the black shoes for the first time when she went with the

complainant and the police to the accused's house.

[57] On the question at what stage, if at all Tjamburo saw the accused wearing the black shoes, it should be remembered that Tjamburo testified that she did not enter the house where the accused was found. Sergeant Shigwedha told the Court that the shoes with prints similar to the shoe tracks that led the police to the house where the accused was found were lying on the floor. It follows in my view that the only way in which Tjamburo could have seen the accused wearing the shoes in question was if the police had allowed the accused to wear the very same shoes when he was arrested that in the police's understanding would connect him to the crime. Tjamburo testified after the police witnesses who testified about this aspect of the case had already testified and could not be asked to react on Tjamburo's evidence on this aspect. It seems to me highly unlikely though that the police officers who allegedly found the shoes would allow the suspect to put on the same shoes that are a crucial link in the chain of events.

[58] Warrant Officer Amakali testified that he observed sand on Hengari's hair. Hengari denied his version. Hengari again denied that she never described to the police that the accused had a sharp nose. Hengari further testified that she could not remember whether the accused grabbed her by the arm or by the neck.

[59] The evidence given by the state with regard to counts 5 and 6 concern evidence of identification and shoeprints. It is clear that Tjamburo and Hengari did not know the accused before.

It was stated in *S v Nango* 2006(1) NR 141 headnote as follows:

"Evidence of identification should always be regarded with caution. The Court must take into account the age of the witness, whether there was anything which could have an impact on visibility, and the fact that a long time lapse affects the accuracy of the people's recollection. The Court will also consider other evidence to determine whether the evidence of identification is corroborated by other evidence."

[60] Assessing the reliability of an identification made by a witness is not an easy

matter. This was recognized in *S v Mthetwa* 1972 (3) SA 766 (A) at 768 A - C:

"Because of the fallability of human observation, evidence of identification is approached by the Court with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities ."

[61] The Court should warn itself that although the evidence of shoeprints is admissible, but only in cases where there is other evidence. The Complainant testified that when she met with the police and Tjamburo she took them to the scene but that they did not see anything, they returned to the scene between 06h00 and 07h00. She showed the footprints to the police and went back into the vehicle. The police followed the footprints up to the house where they found the accused. Tjamburo testified in chief that she also saw the shoeprints at the place where the rape took place. However, through cross-examination she stated that when she went to the place where the complainant was allegedly raped she did not get out of the vehicle. She in fact saw the shoe prints at the place where she left the complainant and the accused.

[62] Shigwedha testified that he followed the shoeprints, however, when he was cross-examined he stated that although the sole of the pair of shoes that was produced before this court as Exhibit 1 appeared to be worn out he could not remember seeing a mark representing a cut on the shoeprints.

[63] As I have endeavoured to point out in this judgment, there are many inconsistencies and discrepancies in the evidence of state witnesses. Some of the contradictions are material and others perhaps not so. The material inconsistencies

are in respect of the description of the accused, evidence concerning the shoeprints and the identification of the accused. The complainant testified that she identified the accused whilst he was walking towards her at the door and Sergeant Shigwedha said complainant identified the accused the time he was just standing up.

[64] There was no identification parade held where the witnesses' reliability in the identification of the accused as the perpetrator could have been put to test. If the accused was coming out of the house in the company of the police, there was temptation for the complainant to point at the accused as her assailant. Although the witnesses testified that the shoeprints were very clear and they followed them up to the accused's house without losing any sight of them, I am not convinced by this evidence. If the shoeprints were so clear, why was it not possible for the person who went to take photographs of the scene of crime to see them and to take photographs of them? Shigwedha and the complainant were present but they failed to point out the suspect's shoeprints.

[65] In the light of this evidence I have doubt as to whether the accused was properly identified and whether the State witnesses followed the accused's shoeprints from the scene to the house where the accused was found. The version of the accused that police went to his place because they knew that he was a suspect in another matter of rape which involved one of the complainants in this case could be reasonably possibly true. Therefore the State has not succeeded in discharging the burden of proof as required on the 5th and 6th counts.

[66] In the result, the following order is made:

1st Count: Not guilty and acquitted

2nd Count: Not guilty and acquitted

Alternative charge to count 2: Guilty of committing a sexual act with a child under the age of sixteen years contravening section 14(1)(a) of Act 21 of 1980 as

amended by Act 7 of 2000.

5th Count: Not guilty and acquitted.

6th Count: Not guilty and acquitted.

7th Count: Not guilty and acquitted.

SHIVUTE, J

Appearance for the parties:

For the State:

Mr D Lisulo

Office of the Prosecutor-General

For the accused:

Mr B Basson

BD Basson Inc