



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 15/2008

In the matter between:

**THE STATE**

and

**RALPH MZUVUKILE MTSHIBE**

**Neutral citation:** *The State v Mtshibe* (CC 15/2008) [2012]

NAHCMD 91 (29 November 2012)

**Coram:** SHIVUTE, J

**Heard:** 08 – 16 March 2010, 01 September 2010, 18 – 19 October 2011, 03 November 2011, 16 – 20 July 2012, 23 July 2012 and 26 July 2012

**Delivered:** 29 November 2012

**Flynote:** Delay to report - rape - No adverse inferences to be drawn- Evidence - Evaluation - of – mutually destructive versions state and defence witnesses – Court must properly apply its mind – Court to weigh, probabilities of versions – where doubts exists in court’s mind – No apparent reason why accused’s version should be rejected. Accused to be given a benefit of doubt – Accused not guilty and acquitted.

- **Kidnapping – intention to deprive liberty to facilitate rape – amounts to coercive circumstances – Conviction on kidnapping and rape at same time – duplication of charges – Accused acquitted on kidnapping, guilty on rape – under coercive circumstances.**
- **DNA EVIDENCE – Rape – two counts – vaginal swabs introitus – complainant – when male DNA found in vaginal swabs introitus – complainant – Bucal swabs – accused – DNA analysis – compared with male DNA found in vaginal introitus swab – complainant – matched – DNA of accused. DNA evidence – reliable – conclusive. Accused – convicted – both counts.**

**Summary: Accused was charged with rape – complainant delayed to report. The fact that the complainant delayed to report should not be used as a weapon to draw adverse inference against the complainant.**

- **Evidence – evaluation of two mutually destructive versions from the state and defence witnesses. Where the court is faced with mutually destructive versions, the court must properly apply its mind. This involves inter alia, weighing up the probabilities of each version. Where doubts exists in the court’s mind as to proof of guilty of accused, such accused should be given the benefit of doubt. No apparent reasons why the accused’s version should be rejected. The accused is found not guilty and acquitted.**
- **Kidnapping – rape – intention to deprive liberty to facilitate rape. The accused was charged with kidnapping and rape. He forcibly took the complainant to a place where he raped her. The accused’s intention to deprive the complainant of her liberty was to facilitate rape. The act of kidnapping the complainant amounts to a coercive circumstance. To convict the accused on both charges of kidnapping and that of rape at the same time on the facts of this case would amount to a duplication of charges. The accused is found not guilty on a charge of kidnapping and acquitted. Accused guilty of rape.**

- **DNA EVIDENCE – Rape – two counts.** The accused was charged with two counts of rape. He denied having met the complainant before this incident. Vaginal Swabs introitus collected from the complainant yielded male DNA. Bucal swabs collected from the accused were sent for DNA analysis and compared with the DNA that had been found in the vaginal introitus swab collected from the complainant. The accused's DNA matched the DNA of a male person found in the complainant's vaginal introitus swab. DNA evidence reliable and conclusive. Accused is found guilty on rape counts.

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## JUDGMENT

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### SHIVUTE J:

[1] The accused faces an indictment containing several counts namely: Three counts of rape 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. One count of assault with intent to do grievous bodily harm and two counts of kidnapping. Particulars of offences are that:

#### **1<sup>st</sup> Count Kidnapping**

In that upon or about 13 December 2003 at or near Luderitz in the district of Luderitz the accused did wrongfully, unlawfully and intentionally deprive Paulina Blom, an 18 years old female, of her liberty of movement by carrying her from Simon Pius's place and detained her at the mountain at a certain grave-yard.

#### **2<sup>nd</sup> Count Rape**

In that upon or about 13 December 2003 at or near Luderitz in the district of Luderitz the perpetrator did wrongfully and intentionally commit or continue to commit a sexual act with Paulina Blom (the complainant) by inserting his penis into the vagina of the complainant under the following coercive circumstances:

- (a) By the application of physical force to the complainant; and/or
- (b) Threatening by word or conduct to apply physical force against the complainant; and/or
- (c) 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
- (d) Where the complainant is unlawfully detained.

### **3<sup>rd</sup> Count Assault with intent to do grievous bodily harm**

In that upon or about 23 December 2003 and at or near Luderitz in the district of Luderitz the accused wrongfully, unlawfully and maliciously assaulted Paulina Blom by grabbing her and pulling her on the ground giving her then and thereby certain wounds, bruises or injuries with intent to do the said Paulina Bloom grievous bodily harm.

### **4<sup>th</sup> Count Kidnapping**

In that upon or about 17 December 2005 and at or near Luderitz in the district of Luderitz the accused did wrongfully, unlawfully and intentionally deprive Judith Dora Afrikaner, a 19 years old female, of her liberty of movement by detaining her in the mountains.

### **5<sup>th</sup> Count Rape**

In that upon or about 17 December 2005 and at or near Luderitz in the district of Luderitz the perpetrator did wrongfully and intentionally commit or continue to commit a sexual act with Judith Dora Afrikaner (the complainant) by inserting his penis into the vagina of the complainant under the following coercive circumstances; and

- (a) By the application of physical force to the complainant; and/or
- (b) Threatening by word or conduct to apply physical force against the complainant; and/or
- (c) 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

- (d) Where the complainant is unlawfully detained.

### **6<sup>th</sup> Count Rape**

In that upon or about 17 December 2005 and at or near Luderitz in the district of Luderitz the perpetrator did wrongfully and intentionally commit or continue to commit a sexual act with Judith Dora Afrikaner (the complainant) by inserting his penis into the vagina of the complainant under the following coercive circumstances:

- (a) By the application of physical forces to the complainant; and/or
- (b) Threatening by word or conduct to apply physical force against the complainant; and/or
- (c) 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
- (d) Where the complainant is unlawfully detained.

[2] Ms Mbome represents the accused on the instructions of the Directorate of Legal Aid while Ms Nyoni appears on behalf of the State.

[3] The accused pleaded not guilty to the rest of the counts except the 3<sup>rd</sup> count of assault with intent to do grievous bodily harm to which he pleaded guilty and he was convicted as such.

[4] The accused disclosed the basis of his defence in respect of counts 1 and 2 by stating that he did not kidnap the complainant. The complainant went willingly with the accused on the night of 13 December 2003 from Pius' bar in order for the accused to take her to her sister's home because the complainant was new in town and did not know exactly where she was. He was only playing a role of a good Samaritan. In respect of counts 4 – 6 the accused stated that he had never seen the complainant before. He only came to see her for the first time when the accused was rounded up by the police and the complainant was called by the police to identify the accused whilst he was in a police van.

[5] Pauline Blom the complainant in the 1<sup>st</sup> and the 3<sup>rd</sup> counts gave evidence as follows:

On 13 December 2003 she and her brother went to Simon Pius' place. They stayed there till late. Between 23h00 and 24h00 her brother left her there to check on a friend. Her brother took long to return. The accused approached her and offered to take her home. She accepted the offer. They left the bar. As they were leaving, the accused started to touch her on the shoulder. She told him to leave her, but instead the accused grabbed her and held her hands behind her back. Complainant released herself from the accused's grip. She ran into a certain yard which had a gate open. Whilst she was entering the yard there was a man standing at the doorway and he shut it.

[6] The accused who was running after her got hold of her and held her hands behind her back again. He forced her out of the yard by pushing her. He pulled her to the mountains near the grave-yard. At the grave-yard, the accused allegedly threatened the complainant by saying that if she did not do what he said would kill her. He showed her a red pocket knife and told her to lie down. She was resisting. However, the accused managed to pull her underpants down with his right hand. He laid on top of the complainant and had sexual intercourse with her by inserting his penis into her vagina. After he completed to have sexual intercourse with her he ordered her to stand up. He told her that he knew where she was residing and offered to take her home. He took her up to the gate of the house belonging to the complainant's niece.

[7] When the complainant entered the house, she reported to her niece that she was with a man by the name Ralph. Since it was midnight her niece did not ask further questions. Complainant could not tell her niece that she was raped because she was too embarrassed to say it. The niece's boyfriend was also in the room.

[8] After a week on 23 December 2003, the accused came to the place where the complainant was residing. She was alone in the outside room. The accused came knocking at the door. The owner of the house came from the main house. The complainant and her niece were staying at the outside room. The owner of the house asked what the accused was looking for and he said he was looking for the complainant. The complainant opened the door. By that time she did not know where the accused was. She requested the owner of the house to call her niece's

boyfriend. The owner of the house instructed the complainant to go in his bedroom in the main house. The owner of the house got into his car and drove away.

[9] After he had left the accused reappeared. Complainant went in the main bedroom. She hid behind the wife of the owner of the house who was disabled. The accused came in the bedroom and pulled the complainant out. He dragged her outside the house. Outside, the complainant screamed for help. The accused released her. Complainant jumped over the fence and ran into a certain house. The accused followed her. Complainant jumped over a fence and went into another house. At that house there was a boy and he tried to chase the accused away. Complainant ran to the next house where she found a lady. The lady inquired from the complainant whether she knew the accused and the complainant told her that she did not know the accused. That woman telephoned the police who came to take the complainant to the police station.

[10] At the police station the complainant reported the incident regarding the accused dragging her out of the yard and the rape that took place about a week ago. Complainant was never examined by a doctor in connection with the rape case. Complainant further testified that when the incident happened she did not know Luderitz well because she had just arrived in Luderitz on 1 December 2003.

[11] Karolina Daniels testified that the complainant Blom ran into their house. It was the first time for the witness to see the complainant. The accused was following the complainant. The witness knew the accused before this incident. The witness told the accused to leave. She inquired from the complainant Blom whether she knew the accused. The complainant said that she did not know the accused except that they met at Pius' shebeen and the accused raped her at the grave yard. The complainant told the witness that she did not report the matter to the police because she did not know where the police station was. The witness telephoned the police who came and took the complainant. When the complainant arrived at the witness' place she appeared to be scared and she was barefoot. The accused was carrying the complainant's shoes.

[12] Mr Coleridge Lento testified that on 23 December 2003 he heard a knock at Deborah Mathys' room. It was the accused knocking. The accused told the witness that he was looking for a girl. The complainant jumped through the window and ran

to the witness' room. The accused followed the complainant in the witness' room and grabbed her. The witness left the house and when he returned he found the complainant gone.

[13] Nicolene Daniels testified that on 23 December 2003 she was at home washing clothes. Whilst there she heard a noise. She looked around and saw the accused person wrestling with the complainant. The accused was known to the witness before this incident. The complainant released herself from the accused and ran away. Her shoe fell down and she picked it up. The girl jumped over the fence and ran into the house and locked herself in the room. The accused followed her shouting that the complainant was his girlfriend. The complainant screamed that the accused was not her boyfriend and that he wanted to kill her. The accused was closed out of the house. Whilst he was outside the house he picked up a quarrel with one of the witness' uncle. The witness' aunt called the police. The witness described that when the complainant entered the house, she appeared to be confused, full of dust and was crying.

[14] Francis Deborah Matthys testified that the complainant Blom is her cousin. On 14 December 2003, the complainant came around 02h00 in the witness' room. The witness was in bed with her boyfriend. When the complainant entered she said something terrible happened to her but she will tell her the following day. The witness forced the complainant to tell her and the complainant told her that a certain Ralph wanted to stab her with a knife. Complainant started to cry after she said that. Complainant further said she wanted to run away from the person and she fell on a broken bottle and it cut her on the hand. The witness could not see the wound because it was dark. After that they both slept. On 17 December 2003, the complainant asked the witness to assist her to wring a cloth because the complainant was in pain. It was at that stage that the witness realised that the complainant was injured on her hand. She told the complainant to go to the clinic but she refused.

[15] On 23 December 2003, the witness was renting at Mr Coleridge's house when she received a report from Mr Coleridge that the accused was bothering the complainant. Later on the complainant telephoned her from Woman and Child Protection Unit. When the witness went there that is when she heard for the first

time that the complainant was raped. The complainant was new in Luderitz at the time she was allegedly raped. She (witness) testified that although she knew the accused, she never invited him to her place.

[16] Sgt Petrus Nyaba testified that he was the investigating officer in the matter of complainant Blom. On 23 December 2003 the complainant was brought to his office at Woman and Child Protection Unit by a charge office member. The complainant had also reported the assault that took place on 23 December 2003 and how it happened. The complainant furthermore reported a rape case that took place on 13 December 2003 in a certain room at the graveyard. The accused took her to the graveyard. She stated that the accused threatened to kill her with a knife if she did not comply with his instructions. She further told him how she met the accused, what happened when they left the club in relation to this case and what happened before and after the accused had sexual intercourse with her. Sgt Nyaba's evidence in this regard corroborated the evidence of the complainant in relation to what she had told the police. It was Sgt Nyaba's further evidence that where the complainant was allegedly raped was next to the tarred road or main road and there was street light. The place is also near the prison and the lights from the prison provided lights to the place where the incident took place.

[17] According to Sgt Nyaba, although he informed the scene of crime officers in Keetmanshoop to visit the scene where the alleged rape took place, they did not turn up.

[18] Mina Ntlai was called by the state in respect of counts relating to complainant Dora Judith Afrikaner and her testimony may be summarised as follows:

On 17 December 2005 in the early hours of the morning her friend Jackie and her husband dropped her home. As she was dropped off, she was approached by a certain lady who was looking for the gambling house. The lady stated that she was new in Luderitz. The lady appeared to be frightened and worried. She was shivering. The witness asked her if all was well and she explained to her that there was an uncle who wanted to rape her. She then said she was raped by him. The lady was carrying a bag containing clothes. The lady pointed at a white house next to a double storey and said that she was raped at that house. The incident took place at the outside room of that house.

[19] Ms Ntlai and her companion decided to take the lady to the police station. On the way Ms Ntlai asked the lady whether there was any proof to show that she was raped. The lady stated to her that she cleaned her vagina with a towel. Ms Ntlai advised the lady to give the information to the police. When the lady showed Ms Ntlai the house where she was allegedly raped Ms Ntlai was able to identify the house because, she knew the house before and she was able to see it. The house is in the same street where she was staying and it is the fifth house from her residence. She was also aware that the accused was staying in the said house. Ms Ntlai was aware that behind the white house there was a structure made of planks and zink plates.

[20] The complainant in the 4 – 6 counts Judith Dora Afrikaner testified that on 17 December 2005 she travelled from Windhoek to Luderitz to visit her aunt by the name Susan Brinkman. Her mother gave her instructions that when she arrives in Luderitz she must be dropped off at a place called Photo Fun where her aunt was going to meet her. Unfortunately the complainant did not arrive on time in Luderitz because the vehicle by which she was travelling got a puncture.

[21] The complainant was dropped off at Photo Fun opposite a disco place. It was the first time for the complainant to visit Luderitz. She waited at Photo Fun but her aunt did not turn up. The accused came to the place where she was standing and she asked him whether he knew her aunt Susan Brinkman. She requested him to assist her since it was her first time in Luderitz. The accused agreed to take the complainant to the gambling place where her aunt was supposed to be. The accused took the complainant's bag. As they were walking the accused was asking the complainant's name, how old she was and where she was born. They walked but they did not come across a gambling place although the accused indicated that there were three gambling places in Luderitz. The accused took the complainant to a certain structure behind a house. He told the complainant that she was going to sleep at his house because it was getting late.

[22] The complainant refused and walked away. The accused followed her. He offered to take the complainant to town but instead he led her to a dark side of the town. As they were walking he put the complainant's luggage down, grabbed her on the shoulder and pointed a knife on her neck and made her to lie on the ground.

The complainant screamed, because she was scared of the knife. She pleaded with the accused not to kill her. The accused pulled the complainant and told her to comply with whatever he was telling her to do. He threatened to injure the complainant should she scream. He pulled her to the mountain. The complainant was covering herself with a towel. The accused took the towel and told her to lie down on the towel. He undressed the complainant and had sexual intercourse with her by inserting his penis into her vagina. The accused ejaculated inside the complainant. After he ejaculated, he told the complainant to get dressed.

[23] The accused took the complainant to the room that was behind the house. He closed the room, he undressed her and he again had sexual intercourse with her. After he finished he told her that he was going to fetch some water and that he would be back soon. He locked the complainant inside the room. The complainant got dressed and threw her luggage or bag through the window. She jumped through the window. She ran into the second yard. Whilst she was there, she heard a car coming and people talking. She ran to the people who were in the car. The car had stopped at a certain house. The complainant asked for assistance from these people and they took her to the police station. This piece of evidence corroborates the evidence of Ms Ntlai that she and her friends took the complainant to the police station.

[24] At the police station the complainant was questioned but she was not in a position to respond because she was in pain and tears. She was referred to the office of Woman and Child Protection Unit. The complainant told the people at Woman and Child Protection Unit what happened and that she was helped by people who were in a Pajero vehicle. She and the officers went to the place where the owner of the Pajero stays because when the complainant described the vehicle they recognised it. The lady who owns the Pajero vehicle explained to the officers where they found the complainant and she took the complainant and the officers to the house that was pointed out by the complainant as a place where she was allegedly raped.

[25] The complainant proceeded to testify that at the time she was approached by the accused, there were street lights at Photo Fun. She clearly looked at the accused. She gave a description of the accused as a little bit tall; wearing a black

beret; black jacket, grey trousers and boots. He was also wearing dread locks or Rasta hair style. His complexion was dark brown. At the structure behind the house she was able to see the accused because the light was on. She estimated to have been in the company of the accused for about an hour and half. She confirmed that she pointed out the house to the lady where she was raped because it was clear and the house was in the corner. She showed the house where she was allegedly raped whilst she was at the place where she found the lady who assisted her. The complainant further testified that she indicated the spot where she was allegedly raped at the mountain to the police and the structure where she was allegedly raped at the white house. The police photographed the scene.

[26] It was put to the witness through cross-examination that the accused did not have a Rasta hair style at any stage in his life. The witness responded that he had a Rasta hair style.

[27] Daniel Hange a constable in the Namibian Police testified that on 17 December 2005 at about 04h00 he was on duty when the complainant, Ms Afrikaner, reported that she had been raped by an unknown man. She indicated that she would be able to identify him if she saw him. The complainant was crying; she appeared to be emotional. Her trousers were full of dust. He calmed her down and she narrated the story to him. He referred her to Warrant Officer Rosa Tjihavero of the Woman and Child Protection Unit. The witness, Warrant Officer Tjihavero and the complainant drove to town for the complainant to show them the place where the incident happened. They drove around the area but the complainant was unable to point out the scene of crime. Because of the complainant's failure to point out the scene of crime they decided to look for the people who dropped the complainant at the police station. They traced the vehicle that dropped the complainant at the police station. One of the ladies who dropped the complainant at the police station stated that they found the complainant in Jakkalsdraai street and referred them to Mina Ntlai.

[28] On the way to Ms Ntlai's place the complainant told them to stop the vehicle because she recognised the house where she was taken by the accused. They went to the structure that was in the yard at the house, but they did not find anybody there. The complainant described her assailant to be dark in complexion whose

height was about 1,70 to 1,80 cm tall, who had Rasta hair style and looked like Xhosa speaking people.

[29] Warrant Officer Rosa Tjihavero also testified and her evidence corroborates that of Constable Hange as to what they were told by the complainant and how the complainant identified the house where she was allegedly raped. W/O Tjihavero also testified that the back room where she and Const. Hange were taken by the complainant was not the only place where she was raped. They proceeded to the second scene of crime but the complainant's state of mind started to deteriorate before she pointed out the scene. Complainant was taken to the doctor. The following day the complainant pointed out the second scene of crime which was just a distance from the first scene of crime. The second rape allegedly took place at the only mountain in front of the accused's place. Warrant Officer contacted Constable Hill from the scene of crime unit to come and take photos of the alleged scene of crimes.

[30] Warrant Officer Tjihavero observed that at the time the complainant reported the matter to her she was traumatized. He took custody of a towel which the complainant allegedly used to wipe off sperms from her private parts after the accused allegedly raped her. The towel was forwarded to the laboratory for scientific examination.

[31] Warrant Officer Tjihavero saw the accused at a later stage at the police station. The accused had Rasta hair style, dark brown colour mixed and he is also Xhosa- speaking. Warrant Officer Tjihavero testified that the complainant pointed out the accused as the person who raped her at a certain room at the police station. This is contrary to the evidence of the complainant who testified that she pointed out the accused when he was brought at her aunt's home whilst he was in a police van.

[32] The witness further testified that she took the complainant Afrikaner to the doctor. She also took a rape kit and a J88 form to the doctor who examined the complainant. The witness identified the towel that was used to clean the complainant' and private parts after the accused allegedly had sexual intercourse with the complainant as well as the underpants that were worn by the complainant during the incident. The towel and the underpants appeared to have what looked to her like semen at the time they were given to her. The underpants and the towel

were put in an envelope to prevent contamination. During the examination of the complainant, samples were taken namely blood samples, saliva swabs, vaginal swabs introitus and vaginal swab extroitus. The rape kit of the complainant that was sent for forensic analysis contained the following:

1 x swatch from the complainant's clothing;

3 x swatches from the towel;

Saliva swab from the complainant;

Blood sample (dried) from the complainant;

2 x vaginal swabs from the complainant;

The accused's rape kit contained FTA™ card of accused, and

Saliva swab of accused.

[33] All the above exhibits were put in forensic evidence bags and sealed properly and were forwarded to National Forensic Science Institute by Sergeant Sisamu on 7 July 2006.

[34] Warrant Officer Petrus Nghihepa gave evidence that he took the accused to the doctor after he was arrested in connection with this case. The doctor examined the accused and the samples obtained from the accused were put in a plastic evidence bag and sealed by the doctor. After the doctor had examined the accused and the complainant, he was given forensic bags for the accused and the complainant that were sealed and put in envelopes by the doctor. He was given both rape kits for the accused and the complainant for processing. He sealed the two envelopes with seal numbers. The envelopes were not tampered with whilst they were in his custody until when he took them to Keetmanshoop for them to be forwarded to Windhoek. The witness identified Exhibit 7, the form he completed in respect of the rape kit of the complainant and the accused when he forwarded them to Keetmanshoop Scene of Crime Unit. The envelopes containing the rape kits were marked with seal numbers and CR number.

[35] The witness further testified that apart from taking the accused person to the doctor for the first time, he took the accused for the second time to the doctor after

the court made an order on 10 October 2011 for bucal swabs to be taken from the accused. The accused was taken to the clinic at Israel Patrick Iyambo Police College. The rape kit was opened in the accused's presence by the doctor. Doctors Ludik and Vasin attended to the accused. Doctor Vasin took bucal swabs from the accused. Thereafter it was sealed in his presence and put in a box. The box was sealed as well and put in a laboratory bag that was also sealed. The accused witnessed the whole process. After the bag was sealed it was handed over to the witness who took it personally to the National Forensic Science Institute for forensic examination. Before the witness took the bucal swabs for forensic examination he completed a form and wrote the CR. No, unit contact No, the name of the person handling the exhibits and the laboratory number on it. This form was identified and marked as Exhibit "H". The kit also had a seal number.

[36] Sgt Sisamu testified that on 7 July 2006 he received two rape kits, one for the complainant and another one for the accused with CR. No 38/12/2005 Luderitz from Sgt Goaseb and forwarded them to National Forensic Institute where they were given a reference No. 555/2006. The rape kits were not tampered with because they were still sealed when he received them from Sgt Goaseb and they were not tampered with since they were in his custody.

[37] Doctor Paul Stefan Ludik the Director of the National Forensic Science Laboratory testified that some samples were collected from the complainant Afrikaner and the accused person for DNA analysis. Ten samples were collected. However, only two out of the ten samples yielded sufficient DNA results after their analysis. The purpose of the analysis of the samples was to compare the samples found at the crime scene with regard to its genetic content or the DNA content of the known or reference samples. However, the result could not assist the court in its current status. The known or reference samples did not yield any DNA sufficient for matching purpose.

[38] The introitus vaginal swab from within the vaginal vault of the complainant yielded sufficient DNA for comparison purposes. Amongst others it yielded a full male profile. There was no sample yielded from the known or reference samples. Had there been any, it would have been compared to the introitus vaginal swab sample.

[39] Counsel for the state having considered the above scenario, she moved an application in terms of section 37 (3) read with section 37 (1) of the Criminal Procedure Act 51 of 1977 for the court to make an order for bucal swab samples to be taken from the accused. The bucal swabs from the accused if they are to be compared with the introitus vaginal swab sample which has yielded a male profile could assist the court by excluding or including the accused with certainty.

[40] The accused opposed the application and indicated that samples were already taken from him at the time of his arrest and sent for analysis. His fear was that if samples had to be taken from him again for DNA analysis they would be mixed up with the samples already taken.

[41] The court made an order in terms of section 37 (1) (c) read with subsection (2) (a) of the Criminal Procedure Act for the doctor to take samples of bucal swabs from the accused to ascertain whether the body of the accused has any mark, characteristic or distinguishing feature or shows any condition or appearance after having considered the evidence placed before it.

[42] After the order was made, Dr Ludik testified further that the bucal swab samples were obtained from the accused and they were forwarded to British Columbia Institute of Technology in Canada for analysis and comparisons. The samples were collected from the accused by Dr Vasin in the presence of the witness as he (witness) was responsible for co-ordinating the collection process. He also took photos of the whole process and recorded all the steps taken. He compiled a photoplan after he explained it in court it was admitted in evidence and marked as Exhibit "J".

[43] Doctor Jurie Voisen Vasin confirmed the evidence of Dr Ludik that, he Dr Vasin, indeed took the bucal swabs from the accused person. He explained the procedure he used during the process and the whole process was shown and explained to the accused. The collection kit used was in the sealed box with a seal and the seal was intact. It had a barcode and digital transcription along the barcode. The seal number on the kit he used was 11NAAA0271. Dr Vasin had also compiled a medical report form concerning the steps taken during the collection process. The medical report by Dr Vasin was identified during evidence and admitted as part of evidence and marked as Exhibit "L". He further identified the photo-plan compiled by

Dr Ludik that was admitted in evidence and marked as Exhibit "M". According to the witness, the sealed kit that was sent to Canada was the same kit he used when he was collecting samples from the accused.

[44] Warrant Officer Michael Goaseb testified that he attended to the scene of crime in respect of complainant Afrikaner of which he took photographs. He also received exhibits from Sgt Nghihepa. He received two rape kits in respect of Afrikaner and the accused. The exhibits were sealed in plastic bags and were not tampered with. He recorded the exhibits in the exhibit register and forwarded them to Windhoek Scene of Crime office. In Windhoek, he handed the exhibits to one of the sergeants. He and that sergeant took the exhibits to the laboratory for further investigation.

[45] Maryn Swart who was employed as a Chief Forensic Scientist at Forensic Science Institute in Windhoek testified that exhibits pertaining to CR No 38/12/2005 were submitted to National Forensic Science Institute by Sergeant Sisamu. The report No. was 555/2006 - R1. A rape kit in respect of the complainant and a rape kit in respect of the accused were received. Exhibits were sealed upon examination. Exhibit "A", ABA card p 30 confirmed the presence of semen on the introitus vaginal swabs. The ABA card p 30 confirmed the presence of semen on the panties of the complainant and the ABA card p 30 confirmed the presence of semen on the towel. (See page 392 of the record for the explanation of the terms 'ABA card and p 30'). According to Ms Swart, when exhibits are received at the laboratory, the standard procedure is that photographs depicting the exhibits are taken in order to indicate the condition in which the exhibits were received and later to show it to the court. She identified photographs of the rape kits before they were opened and the contents of the rape kits. The report compiled by Ms Swarts was admitted in evidence as Exhibit 'R'.

[46] After Ms Swarts compiled a report on 16 March 2010, she received a request for DNA examination. The exhibits were reprocessed and packed according to standard procedures and sent for DNA analysis to British Columbia Institute of Technology (BCIT) in Canada. On 14 December 2010, the exhibits were subjected to further examinations. She referred the court to report 555/2006 R 2. The rape kit of the complainant and that of the accused were sent for DNA analysis. During the

analysis, a comparative sample to compare the evidence is needed to see whether the accused is excluded or included. The blood sample from the accused's rape kit was transferred to the FTA card and sealed in a forensic evidence bag number NFB12540. (For explanation of FTA card see page 375 of the record). The FTA card of the accused was sealed in evidence bag. The saliva swab of the accused was sealed in forensic evidence bag No. NFB12539. Both evidence plastic bags were sealed in NFB12541. The piece from the underpants of the complainant was sealed in evidence plastic bag NFB125337. Three swatches of the towel were sealed in evidence plastic bag NFB12536. The saliva swab from the complainant's rape kit was sealed in NFB12534. The vaginal swab from the complainant's rape kit was sealed in NFB12533. On 16 December 2010 the exhibits pertaining to this case were sent to the BCIT for DNA analysis. The exhibits were sealed in an overall forensic evidence bag NFE09387. When the exhibits are in the bag mentioned above there is no evidence for them to be mixed and contaminated.

The exhibits that were in the forensic evidence bag NFB 12537, one swatch from the complainant's panty, NFB 12536 three swatches from the complainant's towel, and NFB 12535 a saliva swab from the complainant's rape kit, NFB 12534 blood sample (dried) from the complainant's rape kit; NFB 12533 - 2 vaginal swabs from the complainant. Exhibit's NFB 12540 which was an FTA card from the accused there was blood on it, NFB 12539 saliva swab from the accused. The report 555/2006 was marked as Exhibit "R". After the samples were sent to BCIT and examined, the accused's samples submitted for DNA analysis yielded insufficient result for DNA comparisons and samples from the accused were collected and resubmitted. These further samples were received from Warrant Officer Nghihepa, namely one rape kit for the accused on 25 October 2011. The exhibits were sealed upon examination in the tamper proof forensic evidence collection bag marked NFM 01406. There were two seals one was broken because when the medical officer receives the rape kit it was normally sealed and he should break it. After the collection of samples the rape kit has to be sealed with a new seal. This was the reason why there were two seals in the forensic bag. There was also an easy collect device and number 11NAAA0271EC within the box in a sealed tamper proof forensic evidence bag, which was designated NFB 12467. The FTA was removed from the easy collect device and sealed in the envelop 11NAAA0271EC. The evidence was

sealed in forensic evidence collection bag NFB12427 and this was submitted to the BCIT in Canada for DNA analysis through courier services.

[47] The witness further identified a report from BCIT that was marked exhibit "Q". In the report numbered 555/2006 R 3 exhibits, it was stated that the BCIT report exhibit "Q" the items pertaining to this case were received from Mrs M Swart on 3 November 2011 at BCIT NFE 09179 OCS courier. Exhibit FTA card is 11 NAAA0271EC which was in NFB 12428.

[48] Steen Hartsen from BCIT, Vancouver, Canada gave evidence to the effect that he worked on samples that were received from NFSI (Namibia) in relation to case no 555/2006. The samples were shipped to him via courier in two separate batches. One was obtained in January 2011 and the other in November 2011.

[49] Three swatches were received, vaginal swab introitus and vaginal swab extroitus. (witness referring to samples from complainant's rape kit exhibit 'A') and a known sample referred to exhibit B (accused rape kit) which contained blood sample and two additional saliva swabs. The witness referred the court to the report dated 5 October 2011. The report of the samples received in November was labelled 2011/D277/1. Another sample was received namely NFTA card and a known sample on 3 November 2011. The report is labelled report number 2011/D277/2 dated 20 November 2011. According to the witness the samples received from NFSI (Namibia) were not tampered with.

[50] The samples received in January 2011 were in larger evidence bags that contained small evidence bags. One of the bags was opened, closed and sealed with a DHL seal and the other bag was not opened. There were two larger bags containing small evidence bags. The two large evidence bags contained the separate different cases. The samples were in separate individual evidence bags inside the large evidence bags and when he examined those smaller evidence bags as he was doing his analysis he did not see any evidence of tampering on those small evidence bags as the bags were sealed by NFSI. On 5 January the witness filled in a receipt form which is entitled 'movements of the samples from the National Forensic Science Institute in Namibia to the British Columbia Institute of Technology'. The content of the movements of samples form was read into the record and marked as Exhibit "N".

[51] The witness further testified that on 3 November 2011, he took possession of further samples in connection with this case which he received from Dr Hildebrand. He photographed the evidence bag NFB-12427 from NFSI. He had also received evidence bag NFB 12428. NFB 12428 contained NFTA card. On the bags which were received from NFSL, there was a barcode 11NAAA0271EC. The witness identified case receipt form dated 3 November 2011 and marked as Exhibit O. All the samples which were received in respect of this case on 5 January and 3 November 2011 were analysed by the witness. After he analysed the samples he compiled two reports.

[52] The first Laboratory report Exhibit "P" report No. 2011 – D 277-1 dated 5 October 2011 was read into record as below:

Subject: DNA testing

BCIT Laboratory file no. 2011-D277 External Agency file no. 555/2006. The following items pertaining to this case were received from Mrs M Swart on 5 January 2011 at B.C Institute of Technology (Bag NFE-09387 via DHL Courier).

Exhibits no (external) Swatch A2.1 BCIT exhibit No. 2011-D277-Q1 Source NFB – 12536 was submitted. DNA Swatch A2.2 external No. 2011-D277-Q2 (BCIT No, source NFB – 12536, Swatch A2.3 external No, BCIT No. 2011 – D 277-Q3 source NFB-12536.

Swatch A1 (external No.) 2011-D277 Q4 source No. NFB–12537. Vaginal swab extroitus (external No) (BCIT No) 2011–D277–Q5 source NFB 12533; vaginal swab Introitus (external No) 2011–D277–Q6 (BCIT No) source NFB–12533. FTA card (Exhibit "B") (accused) (external No) (BCIT No) 2011–D277–K1 source NFB–12540. Saliva swab external No. 2011–D 277– K2 (BCIT No) source NFB–12535; saliva swabs NFB–12539 BCIT No. 2011–D277–K3 were submitted for DNA analysis.

However, blood sample (external) (BCIT No) 2011–D277–K4 source NFB–12534 was not submitted to him for analysis. Exhibits were processed and results interpreted (where applicable) in accordance with the laboratory's standard operating procedure.

[53] DNA conclusions were as follows:

(1) With respect to exhibit K1 (FTA card; exhibit B):

- (a) Sample K 1-1 (cutting) yielded insufficient amplifiable human DNA to proceed with STR analysis.

(2) With respect to exhibit K2 (saliva swab):

- (a) Sample K2-1 (cutting) yielded insufficient human DNA to proceed with STR analysis.

(3) With respect to exhibit K3 (saliva swab):

- (a) Sample K3-1 (cutting) yielded insufficient amplifiable human DNA to proceed with STR analysis.

(4) With respect to exhibit Q1 (swatch; A2.1)

- (a) Sample Q1-1 (cutting) yielded insufficient human DNA to proceed with STR analysis.

(5) With respect to exhibit Q2 (swatch; A2.2):

- (a) Sample Q2 - 1 (cutting) yielded insufficient human DNA to proceed with STR analysis.

(6) With respect to exhibit Q3 (swatch A2.3):

- (a) Sample Q3-1 (cutting) yielded insufficient human DNA to proceed STR analysis.

(7) With respect to exhibit Q4 (swatch; A1):

- (a) Sample Q4-1 (cutting) yielded sufficient DNA to proceed with DNA profiling and resulted in a mixed profile consistent with having originated from 3 individuals (at least one of which is male).
  - (i) The profile of the female contributor designated as "female - 1", is suitable for comparison purposes.

(ii) The profile(s) of the male contributor(s) are not suitable for comparison purposes.

(8) With respect to exhibit Q5 (vaginal swabs Extroitus):

(a) Sample Q5 – 1(cutting) yielded insufficient human DNA to proceed with STR analysis.

(9) With respect to exhibit Q6 (vaginal swab Introitus):

(a) Sample Q6–1 (cutting) yielded sufficient DNA to proceed with DNA profiling and resulted in a full profile that is suitable for comparison purposes. The donor of this profile is male and is designated as “Unknown male–1”, because there were no reference profiles. No male reference sample to compare at the time. No sufficient information or useable DNA to get a genetic profile and as such it was deemed insufficient for comparison purposes...'

[54] Mr Hartsen proceeded to testify about the second report he compiled (report No. 2011–D277–2) dated 20 December 2011.

The subject of the report DNA testing BCIT Laboratory file No. 2011–D277, external agency file No. 555/2006. The following exhibits or items pertaining to this case were received from Mrs M Swart on 5 January 2011 at British Columbia Institute of Technology (Bag NFE–09387 via DHL Courier).

Exhibit No (external) Blood sample (Judith Dora) (NFB– 12534) BCIT Exhibit No. 2011–D277–K4 description blood sample source Judith Dora - Known (complainant).

[55] The following items pertaining to this case were received from Mrs M Swart on 3 November 2011 at British Columbia Institute of Technology (Bag NFE–09179 via OCS Courier).

Exhibit No (external). FTA Card (11NAAA0271EC) (NFB–12428, BCIT Exhibit No 2011–D277–K5 description: FTA card, source: known male.

Analysis Requested:

Exhibits were processed and results interpreted (where applicable) in accordance with the laboratory's standard operating procedures. This is a supplemental report to report No. 2011–D 277-1 (dated 5 October 2011).

DNA Conclusions:

1. With respect to exhibit K4 (Blood Sample; Judith Dora):
  - (a) Sample K4-1 (aliquot) yielded sufficient DNA to proceed with DNA profiling and resulted in a full profile that is suitable for comparison purposes. The donor of this profile is female.
    - (i) The profile of the female contributor (Q4-1, Swatch; "Female-1" as reported in Report D277-1) matches that of the known sample (K4-1; Judith Dora). The estimated probability of selecting an unrelated individual at random from the CFS Caucasian population with the same profile is 1 in 9 billion.
2. With respect to exhibit K5 (FTA Card; 11NAAA0271EC):
  - (a) Sample K5-1 (cutting) yielded sufficient DNA to proceed with DNA profiling and resulted in a full profile that is suitable for comparison purposes. The donor of this profile is male and is designated as "known male–1".
    - (i) The profile of the male contributor (Q6-1, vaginal swab introitus; "unknown male -1" as reported in Report D277-1) matches that of the known sample (K5-1 "Known male-1"). The estimated probability of selecting an unrelated individual at random from the FBI Caucasian population with the same profile is 1 in 450 billion.

The report was admitted in evidence and marked as exhibit "Q".

[56] After the state had closed its case the accused gave evidence under oath. He called no witnesses. In respect of the complainant Paulina Blom the accused's evidence can be summarised as follows:

On 13 December 2003 the accused was at Simon Pius' Pub or bar socializing with his friends from late afternoon until the late hours. He was drinking with friends.

Around 23h00 he saw the complainant seated and requested her to dance with him to which she agreed. They introduced each other. Whilst they were dancing, the complainant (Paulina Blom) told the accused that she was knew in town and she did not know how to get back home from the bar. She informed him that she was staying with a cousin who was renting at the big man's house known as Uncle Coleridge. The accused offered to take her home since he knew the house. The accused and the complainant walked to that house. She knocked, entered the house and the accused also left.

[57] On a Friday, the accused and the complainant met again at Eddy's Bar. The complainant was in the company of her cousin. The complainant told her cousin that accused was the guy who escorted her home on 13 December 2003. Deborah is the name of the complainant's cousin. The cousin invited the accused to visit them on a Saturday. That the cousin had invited the accused was denied by her. The accused continued with his evidence by stating that on Saturday he visited the complainant and her cousin. He found Deborah busy washing and the complainant was standing on the doorway. The accused was given a chair to sit and a drink and the three of them started to chat. Accused and the complainant agreed to meet at Pius' Pub the following day but the complainant never pitched.

[58] On a Tuesday, the accused went to the place where the complainant was staying in order to take her out to the beach because when the accused escorted the complainant the day they met the complainant informed him that she had never been to the beach and the accused promised to take her there. When the accused arrived at that house he found the complainant in the company of the owner of the house. The complainant told the accused to wait for her. She and the owner of the house went inside the main house. The owner of the house drove to town. The accused entered the main house and found the complainant with the wife of the owner of the house. The owner of the house's wife asked what the accused was looking for. The complainant appeared to have changed her mind to go to the beach and the accused suspected the owner of the house of gossiping about him in front of the complainant.

[59] The accused left with the complainant. Whilst they were walking, the complainant went into a certain yard. The complainant had made the accused to

believe that they were going together but instead she changed her mind whilst on their way. The time the complainant went in the yard she tripped and fell down. The accused decided to go and get the complainant from the yard but the people who were there stopped him and they chased him away. It was further the accused's evidence that before he and the complainant left the house of Mr Coleridge they had an argument. He denied having argued with the complainant at any stage whilst they were on the way. On 27 December 2003 the accused was arrested whilst he was at home. The reason for the arrest was because the complainant had laid charges against him. A rape charge that allegedly took place on 13 December 2003 and a charge of assault that allegedly took place on 17 December 2003.

[60] The accused disputed having quarrelled with the complainant on the way from Pius' Bar. He disputed that he held the complainant's arms backwards or that he threatened her with a knife. He denied that he ever forcibly took the complainant to the mountain, because from Pius' Bar he escorted the complainant home and left after she had entered the house. He disputed that he took the complainant to the grave yard, threatened to kill her and raped her. The accused testified that he knew the owner of the house where the complainant was before this incident and that he knew the complainant's cousin by sight.

[61] The accused further testified that the complainant never jumped out of the room through the window as it was testified by a State witness. He denied having dragged the complainant from Mr Coleridge's house and having fought with her. The accused also denied that he had chased the complainant up to Caroline Daniels' house. He said he only followed her when the complainant jumped over the fence. It was again the accused's testimony that on 13 December 2003 the complainant went willingly with the accused when he escorted her home.

[62] In respect of the rape that allegedly took place on 17 December 2005 where, Judith Dora Afrikaner is the complainant, the accused's testimony is as follows:

The accused said he was at home from 23h00 at Jakkalsdraai in the outside room. The house had had a white paint at the back but in front it was grey because it was not painted. The accused's room was made of corrugated iron sheets. The accused disputed that he met the complainant Afrikaner on 17 December 2005 and took her to the mountain or to his room. He denied having raped the complainant or having

been near Club Step Inn on 17 December 2005. The accused only came to know about the rape case after he was arrested and taken to the hospital for examination. From there the accused was taken to the complainant's house where the complainant pointed at him as the culprit. There has never been an identification parade. The accused was the only person taken to the complainant. The accused denied that he had a Rasta hair style during 2005. The accused further testified that he does not agree with the DNA result that linked him to the commission of the crimes.

[63] That concludes the summary of the evidence presented by the state as well as by the defence.

[64] I will briefly deal with the submissions made by the respective counsel. Starting with the submission of counsel for the state in respect of count 1 (kidnapping) and count 2 (rape) committed against the complainant Pauline Blom, counsel for the state argued that the accused should be found guilty in respect of counts 1 and 2. The state based its argument on the grounds that although the complainant had consented to being escorted home by the accused, the kidnapping started at the stage when the accused and the complainant were outside Simon Pius' Bar when the accused started to touch the complainant on her shoulder. She protested, the accused grabbed her and held both her hands behind her back. Thereafter the accused forcibly led her to a grave-yard on top of a mountain where he kept her for about two hours against her will.

[65] She referred this court to the definition of kidnapping and that the offence of kidnapping is committed even if the duration of confinement of the complainant against her will was not for a long time. She referred the court to authorities in this regard.

[66] As far as the rape charge in respect of Ms Blom is concerned, counsel for the state argued that after the accused took the complainant to the grave-yard, the accused threatened to kill the complainant if she did not comply with his instructions. The accused showed the complainant a red pocket knife and instructed her to lie down. When she tried to resist, the accused pulled down her under pants with his right hand while his left hand was holding the knife. The accused had sexual intercourse with her. Counsel for the state further argued that the accused, by

forcibly taking the complainant to the grave yard and by threatening to kill her with a knife in order to induce her to submit to a sexual act amounts to coercive circumstances.

[67] Counsel for the state further argued that the issue of identity of the accused does not arise because there is no dispute that it was the accused who left with the complainant from Pius' Bar. Although the accused disputed having kidnapped the complainant and having raped her at the mountain, the accused himself testified that after the complainant left Pius' Bar willingly with him he escorted the complainant to the house where she was staying. Concerning the issue of visibility at the place where the alleged rape took place, counsel for the state submitted that the complainant testified that she could see with the aid of streetlights that were coming from the road side. Her evidence was collaborated by the testimony of Sgt Nghihepa that the grave yard is next to the main tarred road and that there were street lights.

[68] Counsel for the state continued to argue that the complainant did not know the accused before this incident. If it was true that all what the accused did was to do the complainant a favour and take her home, the complainant would have been grateful to this accused for the kind gesture. The complainant when she arrived at home told her cousin that something terrible had happened to her that night of the 13 December 2003. Complainant also testified that she was injured on the hand when she fell on a broken bottle while she was running away from the accused that same night. That was the reason she had to request her cousin to assist her to wring her washing cloth. The evidence of the injuries was corroborated by Deborah, the complainant's cousin. Counsel for the state argued further that the accused by saying that on 17 December 2003 he visited the complainant and her cousin on their invitation after the complainant introduced him as the person who took her home on 13 December 2003 runs counter to the totality of the evidence of the complainant. When complainant learned that the accused was knocking at the door her reaction could not be consistent with the accused's version that he had come to pick her up in order to take her to the beach.

[69] It was again counsel for the state's submission that the fear and resistance put up by the complainant on 23 December could only be attributed to the fact that the accused had done something bad previously to her. Although the complainant

did not report that she was raped that night, no adverse inference should be drawn against the complainant by her failure to report immediately. It was counsel for the state's further submission that there is circumstantial evidence that tends to support the complainant's testimony that the accused person raped her. When the evidence is looked in its totality the explanation by the accused could not be reasonably possibly true. Therefore, counsel for the state urged the court to reject the accused's version and convict him as charged.

[70] Counsel for the state further argued that although the complainant is a single witness the court may convict on the evidence of a single witness if such evidence is clear and satisfactory. This court was referred to several authorities concerning the approach of evidence of a single witness, by the courts.

[71] As regards counts 4–6 in respect of complainant Judith Dhora Afrikaner, counsel for the state submitted that after the accused offered to assist the complainant to take her to her aunt's place, instead the accused took her to his room. He suggested that the complainant should spend a night there. After she refused and turned back, he grabbed her and ordered her to lie on the ground. He threatened her with a knife. The complainant was kept for about an hour before she managed to escape. The act of keeping the complainant against her will amounted to a deprivation of complainant's liberty of movement which is an offence of kidnapping. The complainant saw the accused at Photo Fun where there were street lights. Complainant again testified that at the structure where she was taken there were lights. It was further Counsel's argument that the complainant spent about an hour and half with the person who kidnapped her, therefore, she had the opportunity to observe this person. The visibility was good and the person was in close proximity to her.

[72] Furthermore counsel for the state argued that the complainant identified the outside room where she was taken by the accused and it happened to be the accused's room. Complainant described in detail the person who kidnapped her. This Court was referred to authorities concerning identification of accused person by witnesses. The Court's attention was also drawn to the fact that although the complainant was a single witness her evidence was clear and satisfactory, therefore the court should accept the evidence of the complainant on the identification of the

accused as the truth and the accused should be found guilty of kidnapping the complainant Afrikaner.

[73] With regard to the counts 5 -6 of rape in respect of Afrikaner counsel for the state contended that the accused raped her on the mountain and when he finished to rape her he took her to his room and raped her again. The evidence of the complainant that the accused had sexual intercourse with her was corroborated by other evidence. The complainant was examined by the doctor and samples were collected from her. A rape kit was prepared in respect of the complainant and forwarded to National Forensic Science Institute in Windhoek. Semen was found on the introitus vaginal swabs, towel and underpants of the complainant. When the introitus vaginal swab of the complainant was examined by Mr Hartsen from BCIT on 5 October 2011 male DNA was found on that swab. The rape kit of the accused person that was forwarded to Canada with that of the complainant on 5 January 2011 did not yield sufficient DNA which could be used to compare with the male DNA found in the vaginal swab of the complainant.

[74] Counsel for the state submitted further the bucal swab that was collected from the accused on 20 October 2011 was properly done and the whole procedure was explained to the accused. The swabs that were collected from the accused were forwarded to the British Columbia Institute of Technology in a sealed tamper proof evidence bag. The swab collected from the accused was analysed and compared with the male DNA that had been found in the vaginal introitus swab of the complainant and in a report dated 20 December 2011 it is indicated that the DNA on the accused's bucal swab matched the DNA found in the vaginal introitus swab of the complainant. In view of the DNA evidence, counsel for the state argued that the state had proved its case beyond a reasonable doubt that the accused is the one who committed these two sexual acts against the complainant as charged.

[75] Counsel for the state contended further that the two sexual act committed against the complainant were committed under coercive circumstances as narrated by her in evidence. Therefore the accused should be convicted of committing the two sexual acts under coercive circumstances.

[76] On the other hand counsel for the accused argued that in respect of the charge of kidnapping of complainant Blom the complainant left Pius' Bar willingly with

accused, therefore she was not kidnapped. The complainant informed the accused that it was her first time to visit Luderitz and complainant requested the accused to take her home since she did not know her way home. The accused played a role of a Good Samaritan by taking the complainant home.

[77] In respect of count 2 which is rape against Blom the accused did not rape the complainant. Complainant only reported the rape against the accused because of the incident that took place on 23 December 2003. It was argued that the accused escorted the complainant home on 13 December 2003 as per her request. They met again after a week when the complainant was in the company of her cousin and complainant's cousin invited the accused to visit them. This piece of evidence, as previously mentioned, is of course disputed by the complainant and her cousin. The accused obliged and went to the complainant's home to fulfil his promise. Counsel further submitted that the reason for the accused to go to the place where the complainant was residing on 23 December 2003 was to take the complainant to the beach.

[78] It was further counsel's argument that the complainant testified that she did not inform anybody concerning the rape that took place on 13 December 2003. However, her evidence was contradicted by Caroline and Nicolene Daniels who testified that the complainant informed them that the accused had raped her on 13 December 2003.

[79] Counsel went on to contend that the complainant had ample time to report the matter but she never did. She argued that the rape on the complainant was an afterthought as a result of the incident that took place on 23 December 2003 after the complainant heard from other community members about the accused's alleged bad behaviour. She referred to the testimonies of the Daniels' sisters who testified that the accused was a trouble maker in the community. In the light of the above arguments counsel for the accused urged the court not to find the accused guilty.

[80] Concerning counts 4–6 counsel for the accused submitted that it is her instruction that the accused never went to Photo Fun on the date complainant Afrikaner was allegedly kidnapped and raped and the accused had never met the complainant in this matter. The accused further gave instruction that he did not

commit the said alleged sexual acts on the complainant Ms Afrikaner and does not agree with the DNA evidence linking him to the commission of the offence.

[81] After all the evidence and arguments placed before me, I am called upon to determine whether the accused person committed the five counts preferred against him beyond a reasonable doubt. I will first deal with the two counts alleged to have been committed on complainant Blom. But before I attempt to answer this crucial question, I propose to state facts that are common cause. It is common cause that the complainant met with the accused on 13 December 2003 at Pius' Bar. It is also common cause that the complainant was a visitor at Luderitz. The complainant informed the accused that she did not know her way home and the accused offered to take her home. It is not disputed that the accused went to the place where the complainant was staying on 23 December 2003. On this date accused admitted to have assaulted the complainant and he was convicted of assault with intent to do grievous bodily harm on the person of the complainant.

[82] Issues in dispute are whether the accused did deprive the complainant of her liberty of movement and whether the accused did commit a sexual act against the complainant.

[83] Counsel for the state rightly pointed out that the complainant is a single witness as far as these charges are concerned, therefore her evidence should be treated with caution. I am alive to the principles of law regarding evidence of a single witness. In terms of section 208 of the Criminal Procedure Act 51 of 1977, "an accused may be convicted of any offence on the single evidence of a competent witness". The uncorroborated evidence of a single witness should only be relied upon if the witness is competent and credible. The single witness' evidence should also be clear and satisfactory.

[84] Although the complainant is a single witness in this case, she is not mistaken about the accused's identity because the accused's identity is not in issue. The accused himself confirmed that he is the person who escorted the complainant from Pius Bar up to the house where she was residing. Again there is no evidence before this court that the complainant was in the company of any other person when she left Pius' Bar.

[85] Regarding the argument advanced by counsel for the accused that if it was true that the accused raped the complainant, she could have reported to her cousin and not to wait until 23 December 2003. In terms of section 7 of the Combating of Rape Act 8 of 2000 “in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature, the court shall not draw any inference only from the length of the delay between the commission of the sexual offence or indecent act and the laying of a complaint”.

The complainant in this matter was 18 years old at the time of the alleged commission of the offence. She explained to the court that she did not tell her niece that she was raped because she was embarrassed. At the time the complainant arrived at her niece’s room her niece’s boyfriend was also present and this could have contributed to her failure to report. The fact that the complainant delayed to report the matter cannot be used as a weapon to draw adverse inferences against the complainant.

[86] Although there is no medical evidence supporting that the complainant was raped, this does not rule out that a sexual act was committed against the complainant. Sexual act as defined in terms of section 1 (a) of the Combating of Rape Act means among others:

- (a) “the insertion (even to the slightest degree) of the penis of a person into the vagina or anus or mouth of another person.”

[87] There were no other witnesses present when the alleged kidnapping and the alleged rape of the complainant were committed. Therefore the court is faced with versions by the state and the defence which are mutually destructive, the court, must properly apply its mind. This involves, inter alia, weighing up the probabilities of each version. Where this leads to doubt in the court’s mind as to proof of the guilt of the accused, such accused should be given the benefit of doubt.

[88] The accused denied that he kidnapped and committed a sexual act against the complainant. Although the probabilities of the case appears to favour the version of the complainant, that after she left Pius’ bar she was only in the company of the accused, and having properly weighing the probabilities of each version I am not satisfied beyond reasonable doubt that the state had proved its case and there is no

apparent reason why the accused's version should be rejected. I therefore decided to give the accused a benefit of doubt on both counts of kidnapping and rape. The accused's is found not guilty and acquitted.

[89] Coming to counts 4–6 in respect of complainant Afrikaner, the accused's defence is that he did not commit the offences preferred against him because he never met the complainant before this incident took place. He only came to see her after he was arrested.

[90] The complainant's evidence is that she only met the accused for the first time on the date of the incident. After she was allegedly raped she ran from the accused's room and met the people who came to her aid. After Ms Ntlai inquired whether there was a problem with the complainant, she reported that she had been raped and she pointed to a room at a certain house in the corner where she was allegedly raped. That structure happened to be the accused's room. Although she gave a description of her assailant, there was no identification parade held. The accused was put in a van and taken to her in order for her to identify him. The accused was the only person in the van and the complainant had no choice but to point at the accused. The procedure adopted by the police in the identification of the accused in this instance is improper. The proper procedure was to conduct a properly constituted identification parade where the witness, who indicated that she could identify her assailant, should have been given an opportunity to do so. Since there was no proper identification of the accused, I will not rely on evidence of identification placed before court.

[91] Complainant in these three counts is again a single witness whose evidence should be treated with caution. It is, of course, trite law that a court may convict on uncorroborated evidence of a competent single witness if the evidence is clear and satisfactory. In addition to the evidence of the complainant, there is medical evidence that sexual intercourse took place. This was supported by the fact that the complainant's underpants and a towel were found with semen. Complainant's evidence is that she was raped twice, at the room behind a certain house and on the mountain.

[92] Although the complainant is a single witness, I have no reason to doubt her testimony that sexual acts were committed against her on the date of the incident.

The complainant appeared to be a reliable witness and I am satisfied that the truth has been said. The only issue to be determined is who committed sexual acts with the complainant.

[93] The complainant was examined by a doctor after a report was made to the police. A rape kit was collected and forwarded to the National Forensic Science Institute for forensic examination. The scientific report by Ms Swart confirmed the presence of semen on the towel and on the underpants. The rape kit of the complainant was further forwarded to British Columbia Institute of Technology in Canada for DNA analysis. The accused was also taken to the doctor and a rape kit collected. Samples contained in the accused's rape kit collected from the accused were forwarded together with samples of the complainant's rape kit for DNA analysis first to the laboratory in Namibia and thereafter to BCIT Canada.

[94] The vaginal swabs introitus from complainant yielded sufficient DNA to proceed with DNA profiling and resulted in full profile that is suitable for comparison purposes. The donor of this profile was male and was designated as unknown male 1. Furthermore the cutting collected from the complainant yielded sufficient DNA to proceed with DNA profiling and resulted in a mixed profile consistent with having originated from 3 individuals (at least one of which is male).

[95] The rape kit of the accused that was forwarded to Canada on 5 January 2011 together with the complainant did not yield sufficient DNA which could be used to be compared with the male DNA found in the vaginal introitus swab of the complainant. This led to further samples namely bucal swabs to be taken from the accused for further DNA analysis. The samples collected from the accused were forwarded to BCIT through Mrs Swart from National Forensic Science Institute. In Canada the swab collected from the accused were submitted for DNA analysis and compared with the male DNA analysis that had been found in the vaginal introitus swab of the complainant and it matched that of the accused.

[96] Although the accused said he does not agree with the DNA conclusion, there is no evidence that the samples were tampered with and again there is no other forensic evidence to rebut the findings of Mr Hartsen. According to DNA conclusion the estimated probability of selecting an unrelated female individual at random from the CFS Caucasian population with the same profile is 1 in 9 billion and the

estimated probability of selecting an unrelated male individual at random from the FBI Caucasian population with the same profile is 1 in 450 billion.

[97] In the light of the forensic evidence, linking, the accused to the commission of the offence, I am satisfied that the state has proved its case against the accused person beyond reasonable doubt. The accused is indeed the one who raped the complainant Afrikaner. These rapes were committed under coercive circumstances because application of physical force and threats of application of physical force existed.

[98] With regard to count 4, namely kidnapping, I am of the view that the intention of depriving the complainant of her liberty was to enable the accused to rape her. In the result, I find that the act of kidnapping is a coercive circumstance. To convict the accused on the charge of kidnapping and that of rape at the same time on the facts of this case would amount to a duplication of charges. Therefore, the accused is found not guilty and acquitted.

[99] For the fore going reasons the verdict is as follows.

1. 1<sup>st</sup> count: Not guilty and acquitted.
2. 2<sup>nd</sup> count: Not guilty and acquitted.
3. 3<sup>rd</sup> count: Guilty of assault with intent to do grievous bodily harm.
4. 4<sup>th</sup> count: Not guilty and acquitted.
5. 5<sup>th</sup> count: Guilty of rape as charged c/s2 (1) (a) of Act 8 of 2000.
6. 6<sup>th</sup> count: Guilty of rape as charged c/s2 (1) (a) of Act 8 of 2000.

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N N Shivute  
Judge

APPEARANCES

STATE : Mrs Nyoni  
Instructed by the Office of the Prosecutor-  
General

ACCUSED: Ms Mbome  
Instructed by Directorate of Legal Aid