

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC 07/2012

In the matter between:

THE STATE

and

BONIFATIUS MBWALE

ACCUSED

Neutral citation: *The State v Mbwale* (CC 07/2012) [2013] NAHCNLD 36 (26 June 2013)

Coram: LIEBENBERG J

Heard: 17-18; 21-25; 28-31 January; 01-02; 04-05; 07-08; 25-28 February; 02-04; 08-10; 15-17; 19; 23-24 April; 20-21 May; 14; 19 June 2013.

Delivered: 26 June 2013

Flynote: Criminal law – Rape in contravention of section 2(1)(a) of Act 8 of 2000 – Accused faced with 13 counts – Charges arising from traditional healing practices conducted by the accused – Such practice not excluded

from definition of 'sexual act' on basis of being consistent with sound medical practices.

Criminal law – Rape in contravention of section 2(1)(a) – coercive circumstances enumerated in subsection 2 not a *numerus clauses* – Coercive circumstances not defined in the Act may be relied upon – Court only to find such circumstances coercive if compelling and failure to do so amounts to an injustice.

Criminal law – Persons, liability of – Statutory offences – Requirement of mens rea – Traditional healing practice – Subjective test – Treatment of genitalia of another utilising hands and fingers constitutes sexual act under Act 8 of 2000 – Accused believed the utilisation of hands and fingers formed part of traditional healing practice, not constituting a sexual act as defined – State failed to prove that accused had required mens rea – Each case to be decided on own merits – Acts of sexual intercourse not part of traditional healing – Accused aware of unlawfulness – Mens rea proved.

Evidence – Assessment of – Deviation by State witness from police statement – Purpose of statement to obtain details of offence in order to decide whether or not to institute prosecution – Statement not intended to be precursor to witness' court testimony – Often written in language other than that of witness and tending to be summary of what witness said to police officer – Neither unusual nor surprising that discrepancies occurred between witness' evidence and contents of that witness' police statement.

Evidence – Assessment of – Deviation by State witness from police statement – Proper approach to discrepancies – Necessary to determine what witness meant to say on each occasion in order to decide whether or not there was an actual contradiction and, if so, what nature thereof was – Not every contradiction, error or deviation material – Circumstances under which two versions were given, effect of any contradictions on witness' credibility, and quality of any explanation given by witness for such contradictions must be taken into account.

Evidence – Assessment of deviation by State witness from police statement – Witness claims statement containing facts not forming part of her narrative to police officer who reduced statement to writing – *In casu*, possible that police officer recording the statement facts not being part of oral statement made to him – Not to be viewed as a deviation from witness statement.

Summary: The accused, practicing as a traditional healer, was arraigned on 13 counts of rape in contravention of section 2(1)(a) of Act 8 of 2000 for having committed sexual acts with the complainants during their treatment. The accused pleaded not guilty disputing the unlawfulness of his acts which included the insertion of herbs into the private parts of the complainants on the basis of being consistent with sound medical practice and thus excluded from a 'sexual act' as defined in the section 1 of the Act. The accused disputed having had sexual intercourse with the complainants as it does not form part of traditional healing practices. Whereas on the strength of the evidence adduced two sexual acts – insertion of the fingers into the vagina and sexual intercourse – were committed with the complainants, the court separately dealt with each.

Held, acts committed by a traditional healer being part of traditional healing practices which amount to 'sexual acts' as defined in the Act, are unlawful.

Held, as regards the utilisation of fingers when inserting herbs into the private parts *in casu* the evidence falls short of proving that the accused acted with mens rea.

Held, evidence proved that acts of sexual intercourse were committed with complainants in respect of only some of the counts and not all. Accused convicted on those counts.

ORDER

On counts 1; 2 + 3; 5 + 6; 8 and 11 the accused is found guilty of rape in contravention of s 2 (1)(a) of Act 8 of 2000.

On counts 4; 7; 9 + 10; 12 and 13 the accused is found not guilty.

JUDGMENT

LIEBENBERG J:

[1] The accused, a 62 year old male of Angolan nationality, pleaded not guilty to 13 counts of rape in contravention of s 2(1)(a) of the Combating of Rape Act, 8 of 2000 (hereinafter referred to as 'the Act'). He disputes having committed unlawful sexual acts with any of the complainants during the period 1 June 2009 to 27 November 2011, as alleged in the indictment.

[2] Mr *P Greyling*, representing the accused, submitted oral and written plea explanations setting out the accused's defence in respect of each count. Briefly summarised it amounts to the following: The accused, being a traditional healer, treated approximately between 50 and 150 persons per day. Thus, he says, he is unable to recall some of the names mentioned in the charges and would only upon seeing these persons physically in court when testifying, be able to identify them and challenge the allegations made by each. Although he admits having had consensual sexual intercourse with a certain 'Rosalia' and one 'Martha', he is unable to say whether these persons are the complainants in counts 2 + 3 and 5 + 6, respectively. He furthermore admits having had a sexual relationships with complainants in count 7 (Laina

limangu) and 10 (Magreth Nangenda); though disputing that sexual intercourse took place under the pretext of it being part of their treatment. He further disputes having made any misrepresentation to the complainants pertaining to the treatment he administered. In respect of those counts where he, by utilising his fingers, allegedly committed sexual acts with the complainants, he said this procedure is consistent with traditional healing practices and that he never intended to commit sexual acts with any of the complainants.

Introduction

[3] It is common cause that the accused, at different stages, conducted what could (for purposes of this judgment) be described as 'clinics', at Omutaku and Onuno villages, respectively. Persons suffering from some or other illness would report themselves to the accused who appears to be a well-known traditional healer in this area. The accused sat under a tree where the customers (referred to as 'patients' in the trial) were first 'screened'; a process during which a person is 'diagnosed' and informed about his or her illness or the cause thereof; and how it would be treated. The accused had assistants who recorded the medicine prescribed by the accused and which had to be dispensed. The medicine was apparently always of herbal nature and in some instances his customers had to be washed and smeared with some herbal mixture. It further appears that this happened in two ways: In some instances the washing was done behind some netting in an open area, or in the nearby bushes. As for the smearing the customers had to line up outside the accused's sleeping room where they were individually treated (usually when naked). The latter involved smearing of the private parts which was done in private. This treatment usually required the insertion of herbs into the vagina with the fingers. According to the complainants' evidence it was during these incidents that the accused would thereafter have sexual intercourse with them; which allegations he challenges. It is not in dispute that complainants occasionally accompanied the accused to his house in Angola to be washed in a river, also forming part of their treatment. This practice continued up to the accused's arrest towards the end of November 2011. According to the Regional Crime Co-ordinator of the Ohangwena Region, Deputy

Commissioner Abner, the accused's arrest came as a result of a complaint made by one of the complainant's Laina limbangu (count 7). She also provided him with the names of other persons who allegedly suffered the same fate as she did. These names were followed up by the police and statements were taken of those persons willing to press charges against the accused. The complainants were further advised to have tests done to determine their HIV status. In some respects the complainants only laid charges after having tested positive, blaming the accused for having infecting them.

[4] Those complainants who tested HIV+ put the blame squarely on the accused for having infected them by having had sexual intercourse with each during their treatment. However, the prosecution in the end conceded that no medical evidence was presented to court supporting the complainants' assertions and, in the absence of reliable evidence to that effect, the court is not entitled to make a finding of their alleged HIV status as the evidence adduced in that regard constitutes hearsay evidence. That would equally apply to the evidence of complainant, Laina limbangu, about the accused's health report ('passport') allegedly reflecting that he was HIV+. I consider these concessions correctly made.

[5] Whereas the treatment of complainants in some instances lasted over long periods of time, it became necessary during the trial to hear evidence which otherwise would not have been relevant to the charge(s) at hand; however, given the complexity of the matter and the manner in which the charges were drawn, it was necessary to receive all the evidence in order to fully appreciate the relationship that existed between the accused and the complainants during their stay. The State led the evidence of 32 witnesses while the defence called a further 6, which included the accused.

[6] Before I come to discuss the charges preferred against the accused in detail, I deem it proper at this juncture to make a few general remarks pertaining to this case. From the onset it must be said that due to the volume of evidence presented and the absence of case law on certain legal questions

that arose during the trial and which, to my mind, as yet, have not been decided by the Superior Courts in this jurisdiction, it has not been plain sailing in coming to the conclusions as set out in the judgment. To complete this unenviable task in the end would hardly have been possible without the valuable contributions made by Messrs *Greyling* and *Lisulo*, both counsel having filed well-researched and comprehensive written submissions which I found extremely helpful; also the oral submissions subsequently made. Their diligence and industry is appreciated.

Count 1

[7] In this count it is alleged that the accused on the 1st of June 2009 at Omutaku-Wakaupa village (hereinafter referred to as 'Omutaku') committed a non-consensual sexual act with Rauna Wilhelm, aged 16 years, in contravention of s 2 (1)(a) of the Combating of Rape Act 8 of 2000. Though the coercive circumstance(s) under which the alleged rape was committed were not at first incorporated in the charge, the charge was on application subsequently amended *inter alia* to insert several coercive circumstances.

[8] The evidence of four witnesses was led, namely, that of complainant; her cousin Nangula Kamangili ('Nangula'); her aunt Pelagia Kankono ('Pelagia'); and another aunt by the name of Elise Samuel ('Elise').

[9] It is common ground that complainant was called by the accused for treatment at Omutaku in 2009. This happened at the insistence of her family after the mother committed suicide earlier that year. The family thereafter sought the accused's assistance in breaking a spell or curse which, according to the accused, afflicted the family. Complainant testified about three different incidents, weeks apart, when she was interviewed and treated by the accused. It is not clear from her testimony exactly when she went to the accused for the first time, but her second visit was on the 1st of June 2009. On the first occasion she and her siblings were taken into a mahangu field where they were washed by the accused with some herbal mixture. The accused also inserted herbs into her vagina utilising his fingers. She was instructed to return for further treatment and this time she was accompanied by Nangula.

[10] Complainant said she was alone when called into the accused's sleeping room where she had to undress herself. As before, the accused inserted herbs into her vagina but on this occasion she was told to lie down on the bed whereafter he lay down next to her. She became afraid when she saw him taking out his penis from his trousers. They were lying side by side, facing one another when he instructed her to move closer and he then penetrated her with his penis. It is clear from her testimony that the accused had sexual intercourse with her. She did not remonstrate against his actions. It is common cause that no threat was uttered at the time which might have forced her into submission. When he had finished the accused explained to her that he had 'pushed the medicine deeper' into her; an explanation she at that stage accepted as being part of the treatment. Complainant did not report the incident to anyone except for complaining to Nangula that her private parts were paining and itching. During a subsequent visit the accused informed the family that all of them have healed.

[11] In his testimony the accused did not dispute that he had sent for the complainant and that he had treated the whole family by washing and smearing them. He said after cleansing the family house he again washed them. This was the time when they asked him for medicine that would kill the person who bewitched them. He refused their request but was later approached by the complainant at Omutaku, offering him sex in exchange for such medicine; again he refused. She thereafter left without them having any further contact.

[12] Accused confirmed having smeared the complainant's private parts on two occasions, first in the company of her family and the second time in his sleeping room. This he said, was part of the treatment which was necessary because of the curse (of committing suicide) resting on the family, and complainant being the daughter of the deceased. He said the reason for treating the complainant's genitalia is because 'she was born from the deceased's vagina'.

[13] He further said he personally had to apply the medicine because some of it is 'very strong and could kill a person'. However, he explained that after showing his customers how to administer the medicine, they would be allowed to apply it themselves. Accused said that he in all instances would first obtain permission from his customers – including this complainant – to treat their private parts (male and female) before the smearing would start. He will abide by the person's decision if he or she refuses and will not continue treating the person against his or her will. Accused disputes evidence about him having had sexual intercourse with the complainant on diverse occasions and suspects that this is an instance where she was influenced by complainant in count 7, Laina limbangu, to falsely incriminate him.

[14] I pause here to remark that the circumstances under which the matter was reported to the police in this count, differ from the accused's assertion about some complainants having been influenced to lay false charges of rape against him. It would clearly not apply to the present instance as the charge against the accused was already laid in 2009, some time before Laina made her report to the police in which she disclosed the names of other persons said to have suffered the same fate. Furthermore, the complainant's aunt, Elise Samuel, laid the charge of her own volition and not the complainant.

[15] Complainant later developed sores on her genitalia and this seems to have caused her reporting to Pelagia about accused having had sexual intercourse with her. She, in turn, informed Elise who then laid charges with the police. According to a medical examination report (J88) handed in by agreement and marked Exhibit 'A', the complainant was medically examined on the 16th of June 2009 by a certain Dr Sidile at Oshikuku hospital. The report *inter alia* reflects that no abrasion, laceration or tear was observed on the private parts. The part of the report dealing with the person's private parts reflects that the hymen was 'regular in size; edges regular; [and] admits 3 fingers'; and that complainant experienced the examination as painful. However, no mention in the report is made about the complainant having had sores and tears on, or inside her genitalia, as testified. The description of the hymen being 'regular in size' with 'regular edges' is ambiguous in that it does

not state that it was no longer intact; though the admission of three fingers seems to suggest that it was not.

[16] Except for showing consistency in complainant's version about sores she developed on her private parts shortly after the accused had the alleged sexual intercourse with her, the evidence of Nangula does not take the matter any further. As for the witness Pelagia, besides confirming the first report made to her by the complainant, nothing further turns on her evidence.

[17] Elise's evidence in all respects is circumstantial and concerns the accused's involvement in the cleansing of her deceased sister's house; her approval of complainant being treated by the accused; that she paid a substantial amount for his services; and that she laid charges with the police against the accused.

[18] According to the complainant she had no previous sexual experience but from her studies she knew what 'sexual intercourse' entailed. In view thereof she was asked to explain why she did not leave the accused's room the moment she realised he had positioned himself on the bed next to her with clear intentions of having sexual intercourse. She responded by saying that she realised something was wrong but that he then explained to her *that he had to push the medicine deeper inside her*.

[19] I interpose here to remark that she at first testified that the explanation only came *afterwards* when she asked him for an explanation. Be that as it may, there was, according to her, an explanation given about her being treated in the specific manner and she took his word for it. When asked why she did not stop the accused from what he was doing, she explained that she was already scared upon entering the room; that he ordered her to lie down whereafter he inserted herbs into her vagina; and that he told her that she need not be afraid.

[20] In view of the above, it seems to me that when the complainant said she was taken by surprise, she did not mean to say that she did *not* realise that he

was preparing to have sexual intercourse with her, but rather (i) that it happened unexpectedly and (ii) that she considered it part of the treatment (as nothing was explained prior thereto about the manner in which she would be treated). When assessing complainant's evidence on this point, I am mindful of the complainant's young age and that it was difficult for her to relate her emotions and feelings experienced during the incident to the court; probably explaining why she became evasive when asked about her failure to act or leave the room when the accused exposed his manhood. It is however clear from her evidence that she believed that sexual intercourse was part of the treatment and for that reason (alone) permitted the accused to continue 'treating' her in that belief. It was only later that she became doubtful and entertained a different view of what transpired. In her own words, she said she 'felt bad because of what happened'.

[21] When regard is had to the application of medicine to the genitalia in order to exorcise some evil spirit, I do not find the complainant's passivity prior to the sexual intercourse committed with her at all strange. It is clear from her evidence that she was solely, through the accused's actions, led to believe that it was part of the treatment, and though the complainant may be criticised for being naive in the circumstances, sight must not be lost of her young age and the fact that she was there for 'treatment' at the insistence of the accused and her family, and not of her own volition. This was her first visit to a traditional healer and it appears to me that the complainant did not know what to expect; more so after being told that she has 'bad luck' and without accused explaining to her what was meant by that. The fact that the accused was a well-known traditional healer who had impressed upon the family that he had supernatural powers and thus capable of ending the curse resting on them, most probability contributed to the situation where the complainant permitted him to go about as he did. This conclusion is fortified by the complainant's evidence about her not reporting the incident to anyone because she did not know what she was suffering from; or what (medicine) had been put inside her; and her fear of the 'bad luck' that might return. It must be said that the latter were her own perceptions and that nothing to that effect was mentioned by the accused.

[22] The complainant's evidence describing the circumstances under which her witness statement was recorded, differs markedly from what has been testified by Sergeant Enjala in that regard. As for the content of the statement, complainant said not everything recorded therein was correct and pointed out one or two things which, in her view, were incorrectly stated. For reasons that will become apparent in due course, I am unable to conclude that the discrepancies shown between the statement and the complainant's testimony are such that it significantly diminishes the credibility of the witness. Suffice it to say that the contradictions complained of essentially relate to the recording of her witness statement and not the content as such; therefore, in the absence of evidence showing otherwise, I am of the view that not too much weight should be given to the so-called contradictions – more so where the complainant testified that she was confused at the time of making the statement.

[23] It is not in dispute that the accused penetrated the complainant's vagina with his fingers more than once when inserting the herbs, though denying having had sexual intercourse with her. As mentioned, he said it was complainant who offered him sexual intercourse but that he declined. The court is thus faced with two directly opposing versions. It would appear from the evidence presented that the complainant played no role in obtaining the services of the accused as she was only called later, at his request. In view thereof it seems to me highly unlikely that she afterwards, and on her own volition, would have offered sexual intercourse to the accused in exchange for some potion that would kill the person who brought the curse over her and her family. She was a child of 18 years when taken to the accused by her family. As from there on she was instructed by the accused as to what she should or should not do. I did not gain the impression from her testimony that the complainant was on a mission to have the curse reversed. The opposite rather appears to be true namely, the only reason why she was present is because the accused insisted on her being treated as well; nothing else. It further appears that she was the only one thereafter required to do follow-up

visits for smearing – a decision taken by the accused, not by her or anyone else.

[24] The accused disputes the complainant's evidence about him having had sexual intercourse with her but admits having inserted his fingers into her vagina as part of the treatment. I find the accused's explanation as to why he had to treat the complainant's private parts to break the curse over the family, implausible and suspect. As mentioned, it seems that she was the only one who had to be treated separately after the family had been treated as a group. There was no explanation from the accused as to why this was necessary and why she was singled out for private treatment. Even on the accused's own version one cannot help getting the impression that there was more than what he was willing to admit, and that he had ulterior motives for treating the complainant in this manner. His method of treatment also differs markedly from that practiced by another traditional healer called by the defence to testify in support of his methods of treatment, in that she was equally unable to see the connection between a curse of suicide hanging over the family and treatment of the private parts of the deceased's children. This tends to confirm the notion of the accused's treatment of the complainant's private parts to be suspect. His conduct in this regard rather has the appearance of being preparatory steps taken in order to eventually have sexual intercourse with the complainant.

[25] It is for these reasons that I find the accused's explanation why the complainant's private parts had to be treated unconvincing. It appears to me that his blunt denial to the charge and his explanation of complainant having offered him sexual intercourse to rather be an afterthought; thereby attempting to rebut her evidence about the sexual intercourse. To that end his evidence is clearly false and falls to be rejected. However, the accused cannot be convicted on the strength of his false evidence alone and even where the court does not believe the accused's story, it must still 'investigate the defence case with a view to discerning whether it is demonstrably false or inherently

so improbable as to be rejected as false' when considered together with the rest of the evidence.¹

[26] Complainant gave single evidence on the alleged incidents of sexual intercourse committed with her and the court, in its evaluation of the evidence, stands guided by well-established principles about the approach that must be followed when assessing evidence given by a single witness.² Although such evidence must be approached with caution, it is trite law that the exercise of caution should not be allowed to displace common sense. Once the court is satisfied that the uncorroborated evidence of a single witness is clear and satisfactory in all material respects, and that the truth has been told – despite it having some imperfections or shortcomings – the court may convict on the evidence of a single witness (s 208 of Act 51 of 1977).

[27] When applying the aforesaid principles to the complainant's (single) evidence, I am satisfied that the complainant's evidence is trustworthy and that the truth has been told. Though her evidence is not perfect in every respect, it is satisfactory and cogent on material aspects and thus reliable.

[28] Regard being had to the inherent strengths, weaknesses and probabilities on both sides, I am convinced that the balance weighs in favour of the State and that it succeeded in proving beyond reasonable doubt that the accused had inserted his fingers into the complainant's vagina and that he had sexual intercourse with her as testified by her.

[29] Before I proceed to the next count, I deem it necessary at this stage to make the following remark which might reflect adversely on the competency of the police. Despite a complaint having been made to the police already in June 2009 in respect of this count, nothing seems to have come from it. It is evident that the accused continued working at Omutaku until the end of 2010, from where he moved to Onuno village and where he remained until his arrest

¹*S v Munyai* 1986 (4) SA 712 (V) at 715G.

²*S v Monday* 2002 NR 167 (SC); *S v Noble* 2002 NR 67 (HC); *S v HN* 2010 (2) NR 429 (HC); *S v Snyman* 1968 (2) SA 582 (A); *S v Sauls and Others* 1981 (3) SA 172 (A); *R v Mokoena* 1932 OPD 79; *S v Artman and Another* 1968 (3) SA 339 (A).

in November 2011, more than two and a half years later. Accused was (and still is) a well-known person in that community and it is inconceivable that he could not have been traced by the police during that period. I am mindful of evidence presented that he at some point fled to Angola when he got wind of the police looking for him, but it is common cause that he did not stay there for long before returning to Namibia. All he did was to move his business to Onuno. The police's seemingly inability to trace the accused is indeed an unfortunate state of affairs because all of the remaining charges relate to similar crimes allegedly committed *after* the first report was made and which, in all probability, could have been prevented, had the police acted sooner.

Counts 2 and 3

[30] In these counts it is alleged that the accused on the 4th and 5th days of October 2009, respectively, committed sexual acts with Rosalia Shaanika, aged 19 years, under coercive circumstances. These circumstances were fourfold namely, threatening by word or conduct the application of physical force to the person of the complainant; that it was not reasonable for the complainant to disregard these threats; or that fraudulent misrepresentations were made as regards sexual acts committed with her as being consistent with traditional medical practices; and complainant being affected by inability to understand traditional medical practices to the extent that it rendered her incapable of understanding the nature of the sexual act committed with her.

[31] These two counts involve one complainant and relate to two separate incidents of alleged rape committed on consecutive days. Besides the complainant, the State also led the evidence of her mother (Aina Paulus); an older sister (Albertina Shaanika); and a registered nurse (Helena Angala), from Oshikuku Catholic Hospital.

[32] Complainant testified that she was suffering from, what appears to be, a sleeping disorder and that she was haunted in her dreams by a ghost or supernatural being. She and her sister Albertina were taken to the accused at Omutaku by their mother for treatment. During the screening process the accused told complainant that something had been inserted into her womb for

which she had to be treated. After she was given some medicinal herbs they returned home the same day, but when the complainant later became suicidal, she went back to the accused in September for further treatment.

[33] Complainant described two incidents that took place at night in the surrounding bushes when she and others queued up in order to be treated by the accused. When it was her turn, she went to where the accused was, out of sight of the others. He told her to undress herself and she obliged. He then washed her body and ordered her to lie down on the towel she had with her. The accused lied down next to her and used his fingers to insert some herbs into her vagina. He thereafter positioned himself on top of her and had sexual intercourse, lasting only a short while. She said she cried out softly when he penetrated her to let him know that she disapproved of what he was doing, but he then told her to keep quiet. Once done, he stood up and instructed her not to tell anyone about him having had sexual intercourse with her or else her 'disease will continue'. She returned to her sleeping place and kept quiet about the incident. She did however decide to leave the clinic but first sought the accused's permission to do so. He declined her request and said she still had to be washed. The second incident took place the following evening and things happened exactly as before. After she succeeded in convincing the accused that she had to leave as her exams were to begin the following day, she returned home.

[34] According to the complainant there was no prior explanation by the accused pertaining to the treatment he would administer; in fact, nothing was said between them before he had sexual intercourse with her. It was only on the second occasion that he told her that this was the manner in which he treated his customers. Complainant said she did not give consent for sexual intercourse. In cross-examination she recounted that she did not stop the accused when he smeared her genitals or when he had sexual intercourse with her, as she wanted to be cured. She believed him about this being part of the treatment – despite her realising on both occasions that he was having sexual intercourse with her. When asked why she did not tell the accused to stop, she explained that she was afraid of him. She said her fear for the

accused originates from him having yelled at her earlier. However, what is clear from her evidence is that she was mainly fearful of not being cured and therefore decided to continue with the treatment, despite of what had happened earlier. When asked why she did not simply leave the accused's clinic, she answered '*I found myself in a position where I could not react*'. This seems to suggest that she was caught up in the situation.

[35] It is common cause that the complainant kept quiet about these incidents and it was only when she later fell ill and went to the hospital for treatment that she was coerced in telling a nurse what had earlier happened. Her reluctance to speak out was because of the accused's warning about her illness becoming worse if she were to tell anyone. Complainant was examined by a doctor and subsequently informed that she contracted a sexually transmitted disease (STD); though, according to her, she was not involved in a romantic relationship with anyone.

[36] I have given due consideration to the discrepancies and improbabilities pointed out by defence counsel in the complainant's testimony pertaining to issues such as the exact date and number of times she went to the accused for treatment; about complainant seeking the accused's permission to leave; whether or not she saw the accused's penis before he penetrated her; and why she did not leave sooner, but have come to the conclusion that these are insufficient to find the complainant an incredible witness. Neither do I consider the difference in her narrative to the nurse about her having been tripped by the accused to be of material nature and whether the accused's penis was on top or inside the complainant's private part, as it is equally possible that the nurse's testimony in this regard is wrong. In any event, in the absence of evidence to the contrary, a deviation of this proportion, in my opinion, would be insufficient to come to the conclusion that the complainant's evidence is false and unreliable.

[37] The discrepancies in the police statement were explained by the complainant in that it contains information about the accused threatening to beat her and which she denies having disclosed to the officer who reduced

her statement to writing. Deputy Commissioner Abner, to the contrary, said he just recorded what he was told. In view of what I have said below about witness statements and defence counsel's accompanying expectation that a witness gives a verbatim account of what has been recorded in the statement or, that the statement should reflect everything that will be testified in court, I do not consider the discrepancies pointed out to be material, or of such nature that it discredits the complainant; thus rendering her evidence untrustworthy. However, the court must still follow a cautious approach in its assessment of the complainant's evidence being single and uncorroborated on these points.

[38] The evidence of the complainant's mother Aina and that of her sister Albertina, corroborate the complainant's evidence as far as it concerns them going to the accused together for treatment; and complainant not having been involved in a love relationship with another man at the time. Opposed thereto is the accused's evidence that he has no recollection of having treated the complainant as testified.

[39] A medical examination report (J88) compiled by Dr Nrenza on the 30th of November 2009 in respect of Rosalia Shaanika was handed into evidence and reflects that the hymen was torn. The doctor's evidence was that during a digital vaginal examination conducted on the complainant, the vagina admitted two fingers. Though at first not amenable to defence counsel's assertion that the admission of two fingers into the vagina is suggestive of a sexually active person, the doctor conceded that such possibility could not be excluded. However, when regard is had to the doctor's further explanation that a number of factors could play a role before coming to the proposed conclusion, it seems to me that the court would not be able to draw a single inference from the medical evidence adduced as to whether or not the complainant was sexually active at the time the alleged sexual acts were committed.³ It thus means that the medical evidence relating to the admission of two fingers is a neutral factor adding nothing to the case.

³ See *R v Blom*, 1939 AD 188 at 202-3.

[40] Whereas the accused is unable to recollect whether or not he treated the complainant, his defence, in essence, amounts to a blunt denial of complainant's evidence in respect of both counts. Though complainant gave single evidence as regards the sexual acts committed, her evidence about the visits to the clinic was corroborated. The accused disputed evidence about treatment having been conducted in the bushes outside the homestead, however, defence witness Ambrosius Shikongo gave evidence to the contrary and thus corroborates the complainant's evidence in that respect. In the absence of evidence showing otherwise, this practice could only have come to the complainant's knowledge from what she experienced during her treatment. It seems to me farfetched to suggest that the complainant's evidence pertaining to the treatment she received is a fabrication and something she had made up only after being informed at hospital of her health status. In order to come to the conclusion that the complainant fabricated her evidence, the court needs to reject the complainant's entire evidence and there is no legal basis to do so.

[41] When evaluating the evidence the court must guard against following a compartmental approach by considering the complainant's testimony in isolation and not together with the rest of the evidence. Where the complainant's evidence in some respects is found wanting on peripheral issues, her narrative of the incidents of sexual intercourse is clear and cogent. There is no reason to believe that she has fabricated evidence which falsely incriminates the accused.

[42] When measuring the totality of the evidence and due regard being had to the shortcomings in the complainant's evidence, the probabilities and improbabilities on both sides taken into account, I have come to the conclusion that the complainant's evidence is trustworthy and reliable. In the light of all the evidence adduced, the accused's defence is not only improbable but false beyond reasonable doubt. The court is accordingly satisfied that the State succeeded in proving that the accused had sexual intercourse with the complainant in respect of counts 2 and 3.

Count 4

[43] This count relates to a charge of rape according to which the accused in February 2010, at Omutaku village, allegedly had sexual intercourse with Shaanda Ndapewoshali, aged 17 years, under coercive circumstances in that a fraudulent misrepresentation was made to the complainant about sexual acts committed being consistent with traditional medical practices; and that she was affected by inability of understanding traditional medical practices, rendering her incapable of understanding the nature of sexual acts committed with her.

[44] Four witnesses testified in respect of this count, namely, the complainant, her mother (Veronika Amaambo); a nurse from Oshakati State hospital (Sao Shipanga); and a social worker (Tabita Kalunduka). I do not consider the evidence of the latter two witnesses to be material to the outcome of the proceedings under consideration, except perhaps for remarking that it confirms that complainant was at first unwilling to implicate the accused as the culprit who infected her through sexual intercourse; and Mrs Amaambo's personal fears of becoming bewitched if she were to report the accused.

[45] Mrs Amaambo described the background against which complainant fell ill and her decision to take the complainant to the accused for treatment. She said complainant one day, whilst with the neighbours and without cause, suddenly became unable to communicate and walk on her own. She took the complainant in February 2010 to the accused at Omutaku and remained with her until January 2011, a period of almost one year. She said that according to the accused it was the neighbours who had her daughter bewitched. In the beginning the complainant was aided by her mother who took her to the accused's sleeping room to be smeared in her presence; however, after complainant's condition improved somewhat, the accused insisted that complainant enters his room alone for treatment. It seems that though her health improved after six months, her behaviour towards her mother became disrespectful. According to Mrs Amaambo this started when the accused regularly gave the complainant beer to drink – against her wishes. This

unacceptable situation reached a climax during a visit to Angola when the complainant had to be washed in a river. There, and in the presence of her mother and grandmother, the accused told the complainant that it was actually *they* who were the cause of her condition for being barren (and not the neighbours), and that she had them to blame. This not only came as a shock to Mrs Amaambo and her mother, but understandably, caused distrust in their relationship to one another and they decided to end the treatment and return home.

[46] After some time had passed Mrs Amaambo noticed warts on the complainant's genitalia and decided to take her to the hospital. There she was informed (via the complainant) that the accused had sexual intercourse with her. She was shocked to hear this as the accused himself had earlier told her that he is not like other traditional healers who have sexual intercourse with their customers. Mrs Amaambo had no personal knowledge of incidents of sexual intercourse between the accused and her daughter and all she knew was that there were times when the complainant was alone with the accused in his room. She further said the complainant is currently on anti-retroviral medicine and receives counselling.

[47] In cross-examination she disputed counsel's assertion that one of the reasons for going to the accused was to have complainant's genital warts treated. She further explained that, despite the hostile treatment she received from the accused, she decided not to return home with the complainant sooner as she was hoping for her child's recovery.

[48] Mrs Amaambo struck me as an honest witness who gave her evidence in a clear and forthright manner and, not having been discredited under cross-examination, I consider her evidence trustworthy and reliable.

[49] I now turn to the evidence of the complainant. According to her she was 16 years of age when taken to the accused. The complainant's narrative of the events that took place during their stay at Omutaku significantly contradicts that of her mother as regards the time when the alleged incidents

of sexual intercourse took place. She described an incident which happened *shortly after their arrival in February* when she was raped by the accused. She said she found the accused already lying on the bed upon entering the room. He instructed her to undress herself but she refused, saying that she was not going to sleep with him. When he again told her to do so, she obeyed and lied down as told. After first applying some herbs to his penis he penetrated her vagina and had sexual intercourse with her 'for about an hour'. When he had finished he told her not to tell her mother about it as this would involve the police and cause him to be arrested.

[50] Though admitting that he treated the complainant and *inter alia* penetrated her vagina with his fingers when inserting herbs, the accused disputes having had sexual intercourse with the complainant at any stage. He said it was whilst under treatment that he noticed the genital warts which required treatment. In view of Mrs Amaambo's evidence about her having been present at all stages of the treatment for the first six months, I find it surprising that she had not noticed the genital warts herself, had it already been there during the treatment; more so, if the complainant was specifically treated for it. It seems highly unlikely that she and the complainant would not have observed the warts themselves. In the light of the evidence given by complainant and her mother, it appears to me that the alleged treatment of warts is something the accused fabricated when testifying, possibly to justify the smearing of the complainant's genitalia (which otherwise would not have formed part of the treatment).

[51] Although the complainant during her evidence in chief described only *one* incident of rape that happened in February 2010, she, during questioning by the court, said that there were 'many subsequent occasions' when the accused had sexual intercourse with her, but that she was unable to remember the particulars of these incidents. This clearly came as a surprise to all as the complainant, until then, had said nothing about subsequent incidents of rape. This aspect of her evidence is also inconsistent with her first report made to the nurse at the hospital where she referred to only *one* incident. No mention was made in her witness statement about several

incidents and neither did she testify about such incidents in evidence in chief. In cross-examination more discrepancies emerged. The witness statement reflects that the accused undressed himself at a different stage than what she testified and that he had left the room prior to having sexual intercourse with her. When asked to explain these inconsistencies, she said she had just forgotten about what was recorded in her statement.

[52] These discrepancies are material in view of the charge brought against the accused and, in the absence of some satisfactory explanation that could possibly explain the differences in the complainant's version, it must impact on the credibility of the witness. Not only is the complainant's evidence self-contradicting, it also contradicts her mother's evidence pertaining to the one incident of rape the complainant testified about. I have already found Mrs Amaambo to be a reliable witness and when considering the discrepancies in their respective versions, I would be inclined to rely on the evidence of Mrs Amaambo instead of that of complainant. Furthermore, complainant did not particularly strike me as an impressive witness testifying in a forthright manner as she at times appeared to be evasive when questioned on crucial aspects of her evidence. The alleged rape incident in February could thus not have happened as she claims simply because Mrs Amaambo would have been present at the time. Is it possible that the complainant could just have mistaken the dates? Even if that were to be the case, there still remains her self-contradicting evidence about the other incidents for which she was unable to give any satisfactory explanation.

[53] The connection between the accused and complainant as regards STD's, in my view, has not been established beyond reasonable doubt, and in itself does not serve as corroboration for the complainant's evidence. According to Mrs Amaambo the complainant at some stage of the treatment became rebellious and left the clinic during her mother's absence. It is common cause that she was later found in a nearby village. The accused confirmed this incident which seems to refute the notion that the complainant at all times was under the care of her mother and therefore could not have had sexual intercourse with anyone else during her treatment. I have already

found the complainant not to be credible; hence, the possibility of her having been with another man cannot be excluded.

[54] Whereas the complainant's evidence is single and in material respects unsatisfactory, I have come to the conclusion that such evidence falls short of satisfying the test of proof beyond reasonable doubt. That being the only incriminating evidence against the accused, it cannot be relied upon to convict.

[55] Despite having come to this conclusion, there remains the accused's admission that he inserted his fingers into the complainant's vagina during her treatment. Whether or not this constitutes a sexual act committed by the complainant remains to be decided.

[56] In the result, I am not persuaded that the State succeeded in proving beyond reasonable doubt that the accused had sexual intercourse with this complainant.

Counts 5 and 6

[57] These two counts relate to different incidents which allegedly happened on the 4th and 5th of November 2010 at Omutaku when the accused had sexual intercourse with the complainant, Martha Nenkama, under coercive circumstances in that she was threatened by word or conduct of the application of physical force to her person; and/or that the accused fraudulently misrepresented the fact that sexual acts committed with her were consistent with sound traditional medical practices.

[58] Complainant was a grade 12 learner and just shy of 18 years when she came to the accused's clinic on 4 November 2010 at Omutaku because of pain she experienced in her chest. She stayed there throughout the month of November and said during the screening process the accused removed something like 'small tortoises' from her chest by (fictitiously) extracting it with his teeth. This much was confirmed by the accused. She testified about two

subsequent incidents when the accused had sexual intercourse with her under the pretext of treating her.

[59] The first incident took place at night when she had to be smeared in his sleeping room. She entered when it was her turn and was instructed to lower her trousers and panties onto her knees. After undressing himself, the accused told her to lie down on the bed. It is not exactly clear whether or not the accused by then was already on the bed as she contradicts herself on this point. When she lied down he smeared her face and chest and then instructed her to position her legs in a specific way. He then penetrated her with his penis and had sexual intercourse with her. When she asked him why he was doing this, he replied that this was the manner in which he conducted his treatment. Once he had finished she left the room and went to bed.

[60] The second incident happened the next day and according to her, everything happened exactly as before. Whilst busy having sexual intercourse she again asked him why he was doing this. On this occasion she told him that he must stop having sexual intercourse with her or else she will report him to the police. To this he replied that she would then not heal. This frightened her. She thereafter enquired from one of the accused's assistants whether the accused also had sexual intercourse with his other customers and she was advised not to return to his room. The treatment thereafter only included her being smeared. She was fetched by her uncle in December but remained ill for some time. During subsequent blood tests it was discovered that she was HIV+. It was only when this came to the attention of her parents that the matter was reported. Until then, complainant had not mentioned the sexual intercourse accused had with her to anyone. Only during subsequent consultations with a social worker did complainant disclose the incidents of sexual intercourse which resulted in the matter being reported to the police.

[61] The State also led the evidence of the complainant's father Jerry Nangolo, and her mother, Shoombe Maria, whose evidence mainly relates to events leading up to the complainant being tested and her subsequently being counselled. Though undisputed it adds little to the State case. The evidence of

Ms Lena Ndauendapo, a social worker stationed at Outapi district hospital, merely deals with the complainant's first report and not much turns on her evidence either.

[62] When complainant was asked in cross-examination why she did not leave the room upon seeing the accused being naked, she said he had told her that *this was the manner how he treated his customers*; also, that he had threatened her. The threat referred to by the witness was that she should not tell anyone, for if she were to do so, then she would be damned not to recover. When reminded of her evidence earlier about this warning coming only *after* the second incident when she informed him that he must stop this practice or else she would report him to the police, she changed course by saying that this warning already came on the first occasion. She also said that during *both incidents*, she warned him to stop; however, this did not form part of her evidence in chief. According to her witness statement the warning only came *after* the second incident. It would thus appear that the complainant on this point contradicted herself. Regarding the treatment, she explained that she already during the first incident did not believe the accused when he said that sexual intercourse forms part of his treatment, but that she 'could not do otherwise'. When asked to explain herself on this point, she said that she *wanted to be treated* but ended up being betrayed. In these circumstances it might be said that one would not have expected of her to return to the accused for further treatment. What then caused her to stay on and subject her to further treatment knowing that it involved sexual intercourse conducted with her?

[63] Complainant testified that in respect of both incidents things happened exactly the same; which I deem highly unlikely for there would have been no reason for her to ask the accused for a second time whether sexual intercourse forms part of the treatment, had he already explained himself on the first occasion. Complainant under cross-examination also contradicted herself as to whether or not she saw the accused's genitals; and what visibility was like inside the room.

[64] In an attempt to determine what the complainant's thought process was at the time, it was put to her that on the one hand she deprecated the manner of treatment and on the other hand, she continued with it. Regarding the treatment itself, she said: 'I did not believe it. I only did it because *I was asked to do it*'. Despite this belief she obeyed his instruction when told to lie down on the bed because she *wanted to be treated*. It was only after she had left the room that she harboured the idea that she was raped. Complainant conceded that when she reported herself the following day for the same treatment, she anticipated the same to happen. It was only after this incident that she made enquiries about the accused manner of treatment.

[65] Regarding the first incident it appears from the complainant's evidence that sexual intercourse took place immediately after the smearing and without anything being said or explained to her. Understandably, at that stage the complainant had reason to consider this being part of the treatment – though doubtful as to the accused's true intentions. It seems to me that if the complainant were to be believed on this point, she, despite realising that sexual acts were being committed with her on each occasion, considered it to be part of the treatment. That would also explain her making enquiries about the accused's treatment afterwards.

[66] The accused, when pleading in respect of this count, said that he had a sexual relationship with a person by the name of Martha, but was unable to say whether or not it was this complainant. Only later during the trial did it turn out not to have been the complainant. He confirmed having treated complainant for problems of the heart and chest but denied having smeared her private parts; or that he had sexual intercourse with her as alleged. According to him she was merely smeared on the neck and chest and was given medicine to drink. This treatment did not require of her to enter his sleeping room.

[67] In cross-examination the accused tried to explain – unsuccessfully in my view – his uncertainty as to the identity of Martha (Joseph) with whom he had a sexual relationship (and fathered a child) and was at pains in explaining how

he confused her with the complainant, Martha Nenkama, a completely different person whom he had previously treated. It remained unclear how he could confuse the identities of these two persons – unless he gave conflicting instructions to his counsel – a possibility which, given the magnitude of the case, could reasonably be possible. Accused generally disputes evidence about him having been naked when treating his customers; that he applied some herbal ointment to his penis before penetrating the particular complainant; or that he told her that she will not heal if she were to report him for having had sexual intercourse with her. He further disputes having instructed his counsel about the complainant having been infected by a boyfriend as put to her in cross-examination. However, I am satisfied that the latter could only have come as an instruction from the accused and that he had contradicted himself on this point.

[68] As it has been the case with all the complainants who gave evidence in these proceedings, the complainant on this count equally gave single evidence and the court must thus follow a cautious approach in its assessment of such evidence. The complainant's narrative of the two incidents describes how the accused had sexual intercourse with her inside his sleeping room. Opposed thereto stands the accused's evidence that the complainant never entered his sleeping room to be treated. If that were to be correct, then she would have been unable to describe the inside of the room as she did; neither would she have been able to explain the manner in which the accused treated his customers' private parts. As regards the latter, complainant's evidence relating to the (preparatory) steps taken by the accused and his explanation of his manner of treatment, corresponds with that of other witnesses who testified about similar experiences. Similar-fact evidence is admissible if it has relevance other than showing that the accused person is of bad character. The accused during his testimony described the procedure usually adopted when smearing a customer's private parts and which materially corresponds with the explanation given by this witness. This means she must either have experienced it personally, or had been coached in that regard. According to the accused it is the latter, though without evidence proving this contention.

[69] The complainant's evidence strikingly corresponds with that of some of the complainants who received the same treatment. This similar-fact evidence is not aimed at showing that the accused was of bad character and therefore must be ruled irrelevant and inadmissible. I am satisfied that the probative value of similar-fact evidence regarding the procedure adopted by the accused during his treatment of all the complainants referred to in this matter, warrants its reception and does not – in the light of the accused's own corroborative evidence in that regard – operate unfairly against him. This tends to strengthen this complainant's evidence about her having been treated in the accused's sleeping room and that she did not fabricate evidence to that end. In the absence of any evidence to the contrary, the probabilities seem to favour the complainant as far as it concerns the manner in which she was treated. I am thus satisfied that the possibility of complainant giving false evidence in this regard can safely be ruled out.

[70] The contradictions in the complainant's evidence which emerged under cross-examination mainly deal with observations she was expected to have made before and during the sexual acts committed. She was questioned in the smallest of detail on issues she said she had no interest in at the time ie those relating to the accused's position on the bed and what his penis was like. She explained that she simply did as instructed, though at first not convinced that sexual intercourse formed part of the treatment. It seems to me in the circumstances unreasonable to argue that complainant could be expected and able to give evidence in the smallest of detail on everything that happened. Common sense dictates that discrepancies in all its detail on peripheral issues should not be over-emphasised at the expense of evidence directly bearing on the commission of the alleged offence. Though not completely to be ignored, it must be considered in view of all the evidence to see what weight it should be accorded in deciding whether the witness is trustworthy.

[71] Complainant was extensively cross-examined particularly in the light of her evidence that she did not really believe in (the success of) accused's

treatment and that she only did what she was told; and why she did not simply leave knowing what he was up to. She explained her conduct by saying she did not leave because she *wanted to be treated* but ended up being betrayed. She felt under threat when told not to speak out and that she would not heal if she does; also that she was told not to leave until her parents came to fetch her. That complainant was in a confused state of mind seems evident from her decision afterwards to make enquiries about the accused's method of treatment, and her following advice given to her by not returning to his room again. In fear of her not getting better, she thereafter kept quiet until she was forced to reveal the cause of her being HIV+. This tends to show that complainant – despite her previous disbelieves about the treatment – actually believed that the accused did have healing powers. In my view, this largely puts her actions, whilst under treatment, in context.

[72] After due consideration of all the evidence and the legal principles applicable to single evidence, and regard being had to the approach the court must follow when evaluating directly opposing versions, I have come to the conclusion that – despite shortcomings in the complainant's version – her evidence in all material respects was reliable and that she did not fabricate evidence implicating the accused. I find the accused's evidence where in conflict with that of the complainant to be false beyond reasonable doubt. Accordingly the court finds that the accused had sexual intercourse with the complainant on two occasions.

Count 7

[73] In this count it is alleged that during the month of April 2010 the accused committed sexual acts on diverse occasions with Laina Imangu, aged 24 years, at Omutaku village, in circumstances where she was threatened of the application of physical force or harm to her person; and/or due to inability she was incapable of understanding the nature of the sexual acts committed with her; and being deprived of the opportunity of communicating her unwillingness to submit to the sexual acts so committed.

[74] Complainant came to the accused's clinic in April 2010 as she was suffering from back and lower abdominal pains. She was further haunted in her dreams by someone having sexual intercourse with her through witchcraft and that she was 'impregnated by a ghost'. This much was confirmed by the accused during the screening process. She required treatment and were not to leave before the end of her treatment, and only after the accused had cleansed her (mother's) home.

[75] On the third day after her arrival she went to the accused's sleeping room for treatment and found him lying on the bed. She undressed as instructed whereafter he smeared her forehead and neck. After inserting some ointment inside her vagina the accused applied ointment to his penis and told her to lie down. She realised the accused intended having sexual intercourse with her and got up and left the room. She thereafter shared her concerns with the accused's two assistants (who apparently brought this to his attention).

[76] When summoned to his room the following day the accused suddenly grabbed her on the neck and asked her whether she was spreading stories about him having sexual intercourse with people. He warned her not to do so. I pause here to observe that the reason for the complainant being manhandled on this occasion was because she blackened his name. This much the complainant confirmed. After three days the accused again summoned her to his room and this time explained that the reason why she had to be treated in this way was to 'pump out the evil spirit'. Ointment was again applied as before, except this time allowing him to penetrate her with his penis. Complainant said this was the way he had been treating her throughout her stay – a period of approximately 19 months.

[77] It is common cause that complainant at no stage was threatened or forced into submission for purposes of committing sexual acts with her.

[78] It is not disputed that complainant on several occasions accompanied the accused to Onghumbi in Angola to be washed in a river. On one such

occasion she was introduced by the accused to another wife of his as 'his woman'. Complainant did not protest to be referred to as such and was thereafter directed to the accused's sleeping room where she stayed until her departure some time later. During her stay at Onghumbi the accused on diverse occasions had sexual intercourse with her. She later returned to Namibia on her own and in February 2011 the accused's driver fetched her from home and took her to Onhuno village where she started dispensing medicine for the accused until his return from Onghumbi. She explained that she referred customers to the accused during that time and that she continued dispensing medicine after his return until she finally left at the end of that year. According to the accused this came about after she misappropriated his money. He said formal charges were laid against her, though the outcome thereof is not known.

[79] Complainant at some point went for tests and discovered that she was HIV+. She had twice tested negative during 2008 and 2009 and claimed not to have been sexually active before she came to the accused for treatment. She thereafter found the accused's medical report (health passport) amongst his personal belongings from which she learned that he had already tested positive during 2010.

[80] I interpose to remark that complainant's evidence about the content of this report amounts to inadmissible hearsay evidence if tendered as proof of the truth. The person who made the entry into the report was not a witness to the proceedings and no evidence was adduced as regards the truth and reliability of the entry so made, thus rendering the complainant's evidence on this point to be hearsay evidence.

[81] She subsequently confronted him with this information and he apologised to her. This much was confirmed by the accused who said complainant accepted her fate; though, according to her, he had made certain promises to her about buying her a motor vehicle, a bed and a TV set. He had also promised her a house but this never materialised. The accused, though admitting that he bought the items as testified, disputes these being gifts from

him to the complainant. After the complainant moved out she, on 21 November 2011, made a report to the police about her (and others) having been raped by the accused and made a statement to that effect to Deputy Commissioner Abner (Exhibit 'J'). Subsequent thereto she pointed out certain scenes depicted in the photo plan (Exhibit 'H').

[82] Complainant also testified about an incident she witnessed in June 2010 at Omutaku when the accused was having sexual intercourse with lileni Kapandu (complainant on count 9) in his sleeping room. She was of the opinion that it amounted to rape because Kapandu at that time was delirious ('talking a lot') and not of sound mind. She however did not report the incident. She further claims that whilst with the accused, she witnessed several similar incidents where the accused had sexual intercourse with his customers – including a child once. To her mind this constituted acts of rape; however, although she confronted the accused about these incidents and reminded him of his HIV status, she made no attempt to report any of these incidents to the authorities. When asked why she failed to do so, she said it did not cross her mind then, but that she did eventually report it when making a statement to the police. She further said that throughout her stay the accused continuously had sexual intercourse with her; something she considered to have been *part of her treatment* until November 2011 when he told her to leave.

[83] Complainant's failure to make any report to the police since 2010 about several incidents of rape committed with her, and other persons, came under heavy attack during cross-examination, particularly where it involved a young child and because of the accused's alleged HIV status. This aspect of her evidence must be assessed against the background where she already in 2010 realised that she *could* report an incident of rape; that she already back then warned the accused that *she would have him arrested if he were to infect her* (this was before she tested positive); and that she had made it clear to him that if he forced her to leave, she would see to it *that he will never again practice as traditional healer* in Namibia.

[84] During her testimony she disputed the existence of any love relationship between them, or that she had become his wife. She was adamant that the only reason why she remained with the accused for that long (19 months) was because she was still receiving treatment; that she was told not to return home without his permission and not before the house had been cleansed. It is common cause that the latter never happened. In fact, upon her return from Angola she actually went home where she remained until taken to Onhuno village.

[85] It is evident from the complainant's evidence that she was not treated like the other customers during her stay. She had moved in with the accused; assisted him in his work; was maintained by the accused since she moved in with him and even received expensive gifts. This evidence rather supports the accused's evidence that she had become his wife and acted as such during the time they were together. In cross-examination she admitted that she once wanted to commit suicide but could not recall what caused her to take that decision. I find this surprising. According to the accused this was after he had confronted her about the stolen money; an explanation I consider to be more likely.

[86] What is clear from the complainant's own evidence is that since her arrival at Omutaku, things had changed dramatically. There can be no doubt that she already in 2010 had *no* intention of parting ways with the accused – a fact that corroborates the accused's version of him having had a love and sexual relationship with her during the relevant period. Her evidence that, throughout her stay, she was under his treatment, is simply not true, and stands to be rejected as false. On the contrary, the evidence rather shows that she acted like someone being in a romantic relationship with the accused. Is it however possible that the complainant's evidence about the first incident of sexual intercourse might be true and that the relationship only started later? In order to decide this question regard must be had to the established principles relating to the evaluation of evidence and more so, that of the single witness.⁴

⁴*Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others*, 2003 (1) SA 11 (SCA) at 14I-15D; *S v Sauls and Others*, 1981 (3) SA 172 (A) at 180E-G.

[87] In its assessment of the evidence adduced on this count, the court must follow a cautious approach for more than one reason. This witness not only gave single evidence but also professed that she would see to it that she ends the accused's career for reasons other than him having raped her. She had an axe to grind when he forced her to leave, thereby denying her the luxuries she had been enjoying whilst under his roof. It is further evident that she initiated the investigation by furnishing names and contact details of other former customers to Deputy Commissioner Abner, and went so far as to encourage one girl to lay charges against the accused even though there was no reason to do so. Although the evidence does not prove the accused's assertion that she financially compensated some of the complainants to falsely incriminate the accused, there are clear indications that she played an active role in gathering as much as possible information against the accused for purposes of getting him behind bars. To that end she had an ulterior motive which, in my view, makes it difficult – if not impossible – to determine the extent this might have had on her trustworthiness during her testimony. The court has already found the complainant not credible on certain aspects of her evidence. When this evidence, being single and uncorroborated, is weighed together with the evidence as a whole, I have come to the conclusion that it is not trustworthy and cannot safely be relied upon.

[88] It is trite that where there is a conflict of fact between the State witnesses and that of the accused, the proper approach, in a case such as this, is for the court to apply its mind not only to the merits and the demerits of the respective witnesses, but also to consider the probabilities of the case. The accused denies having had sexual intercourse with the complainant whilst treating her, claiming this happened only after their relationship had started. Given the unreliability of the complainant's evidence, the court is unable to conclude that the accused's evidence on this count is not reasonably possibly true; hence, he must be given the benefit of the doubt. The evidence therefore does not sustain a finding that the accused had unlawful sexual intercourse with the complainant in this count.

Count 8

[89] On this count it is alleged that the accused, during the month of April 2010, at Omutaku village, on diverse occasions committed sexual acts with Helvi Nakale, aged 23 years, under coercive circumstances in that he fraudulently misrepresented to her that the sexual acts committed were consistent with traditional medical practices; and/or that the complainant was affected by inability to understand traditional medical practices to such an extent that she was rendered incapable of understanding the nature of the sexual acts.

[90] It is common cause that the complainant during April 2010 visited the accused's clinic at Omutako as she was suffering from 'stiff legs' and constipation. After the screening was done he told her to remain behind. The next morning she was accompanied to the accused's room by his two assistants. After they had left the room he instructed complainant to undress in order for him to treat her. Whilst seated on the bed next to him, the accused applied some herbs to her vagina. He then took out his penis and told her to lie down; she obliged. He thereafter penetrated her and had sexual intercourse with her 'for a long time'. When he had finished he washed her face and stomach with some herbal mixture. She left the room and returned to her sleeping place. It is clear from the complainant's evidence that she did not query the manner in which she was treated – including the sexual intercourse – though she did complain at a later stage. The next day when her guardians came to pay her a visit, the accused called her in and told her not to tell them about the sexual intercourse, as it will 'cause problems'. Complainant, notwithstanding, informed her aunt Loide that the accused's behaviour towards her was 'not good', but never came to tell her exactly what had happened.

[91] The second incident happened one day after her guardians' visit when she again went to the accused's room for treatment. After undressing, the accused smeared her and pushed herbs into her vagina with his fingers. She was told to lie down and he again had sexual intercourse with her. He did not explain anything to her; neither did she question him about his actions. She

said that she was afraid of the accused and at no stage even considered stopping him; however, she was unable to say what sparked the fear she had for the accused. According to her she was afraid of the accused from the onset. She thereafter returned home but in September 2011 came back for treatment because she was now haunted by sightings of birds. This time she stayed on until January/February 2012 despite the accused having been arrested already in November 2011.

[92] Complainant testified that at different stages of her treatment she returned home for various reasons and at some point went to the hospital to be tested. It would thus appear from her evidence that the complainant was at liberty to leave the clinic at will. When asked why she then did not simply go home if dissatisfied with the treatment, she said that she was told by the accused that there was something in her room at home that caused her illness and therefore, she should not return until such time her room had been cleansed; which never happened.

[93] Complainant said that during her stay at Omutaku she told Kapandula (complainant in count 10) about the accused having sexual intercourse with her, despite him 'having some illness'. Besides mentioning this to Kapandula, she did not inform her parents until after the accused's arrest. Defence counsel made much of the interaction between these two complainants and the evidence of Ambrosius Shikongo who had seen them moving around together during their stay, but in the absence of evidence to the contrary I am unable to see how this could possibly confirm the accused's assertion of a conspiracy afterwards between these witnesses to falsely incriminate him.

[94] Complainant's statement to the police was reduced to writing by Sergeant Sibolile and forms part of the evidence. Although the officer testified that complainant expressed her satisfaction with the statement before appending her signature thereto, complainant said it was incorrect as far as it refers to a third incident of sexual intercourse committed with her; and whether the second incident happened the following day or only after two days. What also emerges from the statement is that the complainant was

taken back to the accused for treatment by her father and it was then when the accused asked her whether she was HIV+ and not before. On this occasion she was treated by the accused without him having sexual intercourse with her. Besides the aforementioned discrepancies between her statement and *viva voce* evidence, the complainant's evidence is otherwise consistent with what she had told the police on the first day. This tends to show consistency in her version and would refute the accused's assertion that evidence against him was a recent fabrication.

[95] Complainant was extensively cross-examined on the alleged incidents of sexual intercourse committed with her. She contradicted herself as regards the positions they were in and observations she had made on the accused's genital parts. As far as it concerns the preparatory steps taken by the accused prior to having sexual intercourse with the complainant, it seems to me inevitable to conclude that complainant realised that the accused intended having sexual intercourse with her. Complainant explained the inconsistencies in her evidence regarding these issues by saying that she forgot certain things due to efflux of time and that she was '*very sick*'.

[96] Complainant, when asked to give a detailed account of what transpired during the two rape incidents, became vague and proffered explanations which appear to be unlikely. This seems to have been an attempt to explain her passivity during the alleged rape incidents. It is evident that she did not do anything to prevent the accused from inserting either his fingers or penis into her vagina.

[97] What is clear from the complainant's testimony is that there was no prior discussion between her and the accused during which he first obtained her permission to insert herbs into her vagina or to penetrate her with his penis. Complainant's evidence, in my view, reflects that, although realising what the accused's true intentions were, she laboured under the impression that she was being *treated* and that sexual intercourse was part of the treatment. As earlier mentioned, these incidents should not be considered in isolation and for reasons that will become apparent in due course, regard must be had to

circumstances and factors which preceded these incidents and which, in all probability, affected complainant's reasoning and state of mind. In these circumstances, the complainant's passivity during the sexual intercourse, in my view, must not of necessity be interpreted as her consenting to sexual intercourse with the accused *outside* the context of her treatment.

[98] Accused disputes any sexual intercourse committed with this complainant and says she came to him for treatment for stiffness of the legs, and that she had 'wounds' (sores/warts) on her genitalia. He got the impression that she was HIV+ and advised her to be tested. His suspicion was later confirmed. Complainant on this point said that although she was sexually active prior to her treatment, she had tested negative before coming to the accused for treatment. When she again tested after the accused's treatment, she was HIV+ and to her mind it was the accused who had infected her.

[99] Accused said that despite informing the complainant that he could not cure her from HIV, she insisted on treatment. Under cross-examination the accused was vague as to how it came to his knowledge about complainant's genital warts (according to complainant she had none upon her arrival) and he appeared uncertain as to whether or not he at all smeared the complainant. Surprisingly, he later during his testimony distinctly remembered having treated her in his room for the warts and that she had to undress and lie down on the bed to be smeared. He did not dispute having treated the complainant on subsequent occasions but denies having had sexual intercourse with her, saying that this was not how he treated his customers. He further said he had only used his fingers to insert herbs into the vagina. When asked why complainant, in view of him being unable to treat persons with HIV had to be treated for a period of *two years*, he said she would leave and come back after six months because 'his treatment gave her some relief for the pain she was suffering'. This explanation stands in sharp contrast with evidence adduced about accused having told the complainant's father that she could not leave before she has healed; and who later even brought her back to the accused for treatment. Suffice it to say that on the accused's own evidence

there was no reason for him to continue treating the complainant's private parts for a protracted period if he was unable to cure her. This tends to support the complainant's evidence about her staying on at the clinic even after the accused's arrest. It was only then, and after being questioned by the police, that she reported what had happened to her.

[100] I have dealt with police statements elsewhere in the judgement and there is no need to rehearse what has been stated. Suffice it to say that a court, for the reasons mentioned, should be very slow to discredit a witness on the strength of discrepancies between a police statement and what the witness has testified in court; unless the discrepancies are not properly explained and are material to the essential allegations of the charge and therefore, cannot be ignored during the assessment of the witness' evidence. In such instance, it would obviously impact on the credibility of the witness. Complainant explained that Sergeant Sibolile, who recorded her statement, was not fluently Oshiwambo speaking and pointed out certain mistakes that were made when recording the statement; also that it contains facts not disclosed by her to the said police officer. According to the complainant the second incident was repeated in her statement, creating the impression that there were three incidents where the accused had sexual intercourse with her, whilst it happened only twice. In turn Sergeant Sibolile testified that the complainant was satisfied that the statement was correctly recorded before appending her signature thereto. It seems noteworthy to remark that the said police officer testified that she was fluent in the English language – this is apparent from the statement itself – and that she *understands* Oshiwambo, clearly making a distinction regarding her command of the Oshiwambo language. This clearly supports the complainant's evidence and in my view, satisfactorily explains the so-called discrepancies in her evidence. I am accordingly satisfied that the complainant cannot be discredited on the strength of differences between her witness statement and her evidence in court.

[101] Complainant's evidence, being single, must obviously be approached with caution, but where the court is satisfied that the witness is credible and her evidence trustworthy, it may rely on such evidence. I find the

complainant's evidence cogent to the extent that it rules out the possibility of her having fabricated evidence that falsely incriminates the accused. Her evidence regarding acts of sexual intercourse committed with her is clear and consistent with the procedure of treatment followed by the accused.

[102] Despite the imperfections in the complainant's evidence, it is satisfactory in all material respects and when considered together with the rest of the evidence presented, I am convinced beyond reasonable doubt that the State succeeded in proving that the accused had sexual intercourse with the complainant on two occasions as testified; and that the accused's evidence to the contrary is false, and falls to be rejected.

Count 9

[103] On this count it is alleged that the accused in June 2010 and on diverse occasions thereafter, at Omutaku village, unlawfully committed sexual acts with lileni Wahengo Kapandu, aged 27 years, under coercive circumstances in that she was threatened of the application of physical force to her person, or other harm being caused to her; and that complainant was affected by inability, to the extent that she was rendered incapable of understanding the nature of sexual acts committed with her.

[104] Complainant said she approached the accused in June 2010 at Omutaku as she, since her childhood, was afflicted by an evil spirit. This was confirmed by the accused at the screening stage who told her that she had been poisoned; also that he must exorcise the evil spirit from her body. The treatment she received stretched over a period of six months (until December 2010). Shortly after the treatment had started she fell ill and was hospitalised. However, immediately after her discharge she again returned to the accused for further treatment. As from then her aunt stayed with her for a while as complainant was 'not mentally fit'.

[105] At first she was smeared with herbs but the accused then called her into his sleeping room and said she had to undress because 'an evil spirit conducted sexual intercourse with her'. Though reluctant to adhere to the

instruction, she undressed herself and lied down on the bed next to him whilst he was only wearing his under pants. He used his fingers to insert herbs into her vagina. He then applied herbs to his penis and penetrated her vagina, explaining that he was *exorcising the evil spirit from her body*. Though permitting the accused to go about in this way, complainant was clearly not satisfied with his conduct and afterwards queried him, saying that he in fact had raped her and besides the possibility of having infected her, he could also have impregnated her. He retorted that he was not forcing anyone to receive his treatment. She became afraid of him and upon mentioning that she would report him to his wife, he warned her not to do so as she would lose her mind ie 'go mad'. This scared her and she decided not to report him.

[106] Complainant testified about a second incident when she was called to the accused's sleeping room. When asked why she had not come to see him for some time, she explained that she was afraid of being infected or impregnated by him and that her family would reject her if it were to happen. Accused however insisted that she has to be treated. After she was smeared with herbs the accused again had sexual intercourse with her. Complainant stayed on until her mother came to pay the accused (N\$6 000 plus one head of cattle) whereafter she left for Windhoek.

[107] She returned to Eenhana during the following year and on the 25th of November she was interviewed by Deputy Commissioner Abner, who took a statement from her. Complainant said she was medically examined on the 29th of November by Dr Ogundivan when it was discovered that she was HIV+. The medical report was received into evidence but does not, in my view, add much to the merits of the case. The complainant attributes her HIV status to the sexual intercourse the accused had with her during his treatment. Fearing rejection by her family, she did not disclose her HIV status to them or anyone else. It was only towards the end of November of the same year that complainant, seemingly at the insistence of Laina limbangu, went to the police and reported the accused.

[108] Discrepancies between the witness statement and complainant's *viva voce* evidence emerged in cross-examination, mainly relating to whether the alleged rapes took place *before* or *after* she had been admitted to hospital; and the number of occasions on which she had been raped. The authenticity of the statement was duly established and it was received into evidence (Exhibit 'G').

[109] Deputy Commission Abner in cross-examination disputed that the complainant told him about a second incident of rape and that he failed to record this information. He was adamant that he recorded everything she had mentioned. In this respect the complainant's evidence stands contradicted in material respects as regards the second incident testified about by the complainant.

[110] From a reading of the statement it is clear that it substantially deals with the witness' personal perceptions and contains information the complainant was not privy to; thus, amounting to inadmissible hearsay evidence. The statement further reflects a detailed account of complainant's thoughts and perceptions pertaining to treatment she received from the accused as well as the sequence of events that happened. When assessing the evidence of this witness it must be borne in mind that the statement was taken down 11 months *after* the alleged incidents and her memory may have faded with the passing of time.

[111] I now turn to consider these discrepancies for purposes of determining whether or not it is material to the extent that it renders the complainant's evidence untrustworthy.

[112] Although complainant testified about *two* incidents of sexual intercourse which took place *after* she returned from the hospital, the contrary appears from the statement which reflects that there was *one* such incident *before* she was hospitalised. Complainant also did not testify about a further *five* incidents of sexual intercourse as stated in the statement. Her failure to give evidence in that respect was explained by saying that she was advised

by the State prosecutor to only testify about those incidents she could clearly remember. Despite reference being made in the statement about five incidents, it still does not explain how complainant was able to testify in detail about a *second* incident if she was unable to describe that same incident with some particularity to the police when making her statement. In par 7 of the statement complainant said that during the first incident of sexual intercourse she was 'very weak' and that she 'had no power to push the suspect off [her]'; also that '[he] forced himself on [her] till he was done with raping [her]'. In her testimony in court no mention was made about her having felt too weak to put up any resistance when the accused allegedly forced him onto her. She instead described an incident where she was reluctant to undress but yielded upon his insistence, permitting the accused to have sexual intercourse with her. It was only afterwards that she questioned his conduct and the risks it involved. Although not entirely clear from the statement, it would appear that the complainant had undergone tests (for STD's and HIV) at Oshikuku hospital whilst still under the accused's treatment, and that she had tested negative. In her testimony she only mentioned about similar tests done in April 2010 (prior to her treatment) and in February 2011 (after the treatment) when she tested positive. This aspect of her evidence is obviously aimed at showing that she was infected by the accused as a result of sexual intercourse conducted with her.

[113] When applying the principles applicable to diverting statements made by a witness to the present facts, I am satisfied that, although some contradictions are of less importance, there are others which are material and as such cannot be ignored. These relate to circumstances under which the alleged rapes took place and the number of occasions on which this happened. It relates to the essential elements of the charge against the accused and is important to the determination of the accused's guilt. Regard must further be had to complainant's evidence being single and that a cautious approach must be followed; more so where she contradicted herself on crucial aspects of her evidence.

[114] Another factor that in my view must play in on the evidence of the complainant is that she, prior to reporting the matter, had been contacted by Laina limbangu and at whose insistence (so it would appear) she went to make a report to the police. In the light of the conclusion reached by the court in respect of Laina's evidence not being credible and reliable, the court should apply further caution when assessing the present complainant's evidence because of the contact between the two witnesses prior to the laying of charges. More so, in my view, where Laina allegedly witnessed an incident when the accused had sexual intercourse with the complainant who, according to her, was mentally unfit at the time and that complainant was raped. Considered against the background that the smearing of customers took place in private and where other customers were unable to look inside the accused's sleeping room, it seems highly unlikely that Laina could have been able to have witnessed such incident. The value of this evidence however, is that it tends to show the connection between the two complainants, and that Laina's evidence in this regard is clearly directed at giving credence to the complainant's story. It seems to me that the possibility cannot be ruled out that the complainant might have been unduly influenced by Laina prior to making a report to the police; a factor that deserves consideration when assessing the complainant's evidence.

[115] There is compelling evidence that the complainant's state of mind broke down after the first session of her treatment when she became irrational to the point where family members had to take her to hospital. Laina also testified about the complainant not being of sound mind at the time. In her statement to the police the complainant said that the accused had sexual intercourse with her *before* she was taken to the hospital which means that this was when she was of unsound mind – as Laina testified. Now if that were to be the case and complainant's testimony being wrong about these incidents having taken place *after* her discharge from hospital, it certainly raises the question in one's mind whether the complainant was at all mentally fit and able to recall these events as reflected in her police statement and which she testified about? Is it possible that this could have been fabricated

evidence prompted by Laina prior to the making of the report? Again, in the light of the evidence adduced, this possibility cannot be excluded.

[116] The accused disputes the complainant's evidence simply because he is unable to recognise her as one of his patients. He explained that there were many persons who came to him being possessed by evil spirits, making it impossible for him to recall any specific treatment he administered to the complainant. According to him the exorcising of an evil spirit does not require treatment of the genitalia; thus, he would not have smeared her as she claims. He further disputes having had sexual intercourse with her; that he told her that he expels evil spirits by having sexual intercourse with the person; and that he said she would become insane if she were to report him.

[117] The fact that the accused is unable to challenge the complainant's evidence in all its detail does not *per se* make the complainant a (more) credible witness. The accused's evidence forms part of the body of evidence to be evaluated and the test is whether in the light of all the evidence, it is reasonably possibly true. Obviously, the weaker the State case the stronger the possibility of the accused's version being reasonably true.

[118] I have for the reasons set out above come to the conclusion that the single evidence of the complainant in this count is not reliable and does not cross the threshold of constituting proof beyond reasonable doubt. Accordingly, it has not been proved that the accused had sexual intercourse with the complainant in this count.

Count 10

[119] In this count the accused allegedly during July 2010, at Omutaku village, on diverse occasions, committed sexual acts with Magreth Nangenda, aged 18 years, under coercive circumstances by threat or conduct to apply physical force to the complainant; and made a fraudulent misrepresentation about sexual acts committed with her being consistent with sound traditional medical practices.

[120] Complainant said she was suffering from stomach and heart problems when she came to the clinic the first time in June 2010. She again returned after two months and this time the accused told her to stay on for treatment as 'the person who put the problem in [her] will put it back in [her]' if she were to return home. She agreed and on the third day she was called to the accused's sleeping room for treatment. She found him undressed and lying on the bed. He told her to undress and lie down, but she refused. Accused then grabbed her on her one arm and leg and pulled her onto the bed. She then realised that he wanted to have sexual intercourse and asked him whether he would not infect her. He brushed this aside whilst undressing her of her panties. Despite her resisting him, the accused managed to undress her and had sexual intercourse with her. When he had finished, he offered her N\$200 which she declined. The accused then told her not to tell anyone about the sexual intercourse as she would die; this frightened her. When leaving the room she was paining and bleeding from her private parts. She continued with the treatment and only left the clinic in December.

[121] Complainant testified about three more incidents during her treatment where the accused had sexual intercourse with her, the last being in Angola when he took her there to be washed in a river. When she returned to Namibia she went to live with her aunt at Oshikuku, simply being too scared to return home because of the accused's warning that her house had to be cleansed first before she could return there.

[122] According to the complainant the second and third incidents of rape took place in the accused's room at Omutaku, each happening in exactly the same manner as before. She said every time he told her that sexual intercourse was part of the treatment and that she should not tell anyone about it or else she would die. On the third occasion the accused first smeared her chest and stomach with herbs before he ordered her to lie down. She said she refused because she was not willing to sleep with a man of his age. Again she was manhandled onto the bed as before, undressed and raped. The fourth and last incident took place at the accused's house in Angola when he told her that before she could be washed, he first had to have

sexual intercourse with her. She again refused but was forced to lie down whereafter he had sexual intercourse with her.

[123] Complainant had gone for HIV testing in 2009 (prior to her treatment) and then tested negative; however, when she again tested in December 2011 she was positive. She ascribes her HIV status to the accused for having infected her because she had not engaged into any sexual acts after the treatment and before she tested positive, a period of one year.

[124] Although complainant claims to have had no previous sexual experience prior to her treatment, she knew what sexual intercourse entailed and was therefore alive to the accused's intentions when he forcibly pulled her onto the bed. When asked why she in the circumstances did not cry out for help, she explained that she did not think of doing so as she was scared. Her reply obviously prompted further questions about her being too scared to cry out for help, yet, she dared to physically resist the accused.

[125] Though the explanation under normal circumstances may be viewed as unsatisfactory and unconvincing, it must, in my view, be considered in context and against the backdrop where the complainant ended up in that situation because of the treatment. It appears that complainant was confused; on the one hand realising that accused was busy having sexual intercourse with her, whilst on the other her expectation of being healed. Though she was free to leave, she decided to stay on because she wanted to be healed, coupled with the accused's warning against her leaving without being treated.

[126] It seems to me that the complainant's reasoning in this respect is not unique. Her reaction and state of mind is no different from that of other complainants who found themselves in the same situation. The evidence in this respect clearly bears out – for reasons that will become apparent later in the judgment – the confusion created by the accused in her mind where she, though realising that a sexual act was being committed with her, permitted it in the belief that it was part of the accused's treatment.

[127] If the complainant's evidence were to be accepted as the truth, there can be no doubt that the first incident of sexual intercourse constitutes rape because of the physical force that was applied to her person. It would equally be the case with all other subsequent incidents which, according to her, happened in the exact same manner. However, whether the complainant's evidence is trustworthy and as such reliable; remains to be decided.

[128] Turning to the sequence of events testified by the complainant during the alleged rape incidents, it seems highly unlikely that on all four occasions the taking of the complainant would have happened in the exact same manner; with the same exchange of words between her and the accused. If she had already been told during the first incident that sexual intercourse was part of the treatment, why would it have been necessary to continuously ask the same question if the answer stayed the same? Why refuse to undress and wait for the accused to use force against her person if she knew it would end up with him having sexual intercourse with her? And why would she have acted in this manner if she honestly believed it was part of her treatment? These questions remain unanswered. Therefore, the complainant's testimony about three more identical incidents in which she was forcefully raped by the accused, seems to be a mere repetition of what she claims had happened on the first occasion; something I consider unlikely. It would appear that she is unable to give any detailed explanation of what transpired during each occasion and simply generated evidence to say that on all four occasions everything happened exactly as before. Be that as it may, it has a hollow ring to it and the flavour of fabricated evidence.

[129] It should further be noted that although the first incident was described in full in her witness statement, reference was only made to three further incidents without any particularity about the circumstances under which it happened. I am mindful that a witness at the stage of making a statement is not required to give a full statement in all its detail as that is not the purpose of making a statement. However, in this instance one would have expected that something more be said about these incidents and that further information be elicited from her, at least so that the State is able to discern the crimes which

the accused must be charged with, if any. The statement lacking this information would suggest that already at the stage of making the statement to the police, she was unable to describe the other incidents of rape in any particularity. Another shortcoming in her testimony is that, only when the court raised with her the treatment she received from the accused did she mention that on each occasion when raped, the accused *first* smeared her *before* he pulled her onto the bed and undressed her. Except for mentioning this in passing when testifying about the third incident, *nothing* was said about her receiving treatment first *before* she was forced onto the bed and raped. When questioned about her failure to mention this during her testimony in chief, she brushed this aside by saying that any person could forget. I find this explanation unsatisfactory and unconvincing because the sole reason why she went to the accused's sleeping room, in the first place, was to be *smeared!* Furthermore, if she had to be smeared on her chest, one would have expected of her to say that she was – like all the other complainants who gave evidence in this case – required to take off some of her clothes (at least the T-shirt she was wearing). In my opinion, these contradictions and shortcomings in the complainant's evidence cannot be ignored and must impact on her credibility.

[130] A worrying aspect of the complainant's evidence turns on her denial of having stated in her witness statement about the raping of other girls as reflected therein (Exh 'O'). In paragraphs 9 and 10 of the statement is a list of names, in some respects accompanied by telephone numbers, of persons who were all raped by the accused. However, according to the complainant she mentioned these names only to say that these were persons treated by the accused whilst she was there, and not that they had been raped.

[131] Deputy Commissioner Abner, who recorded the statement, was adamant that what is reflected in the statement came from the witness who afterwards confirmed it to be correct. It should be noted that the statement was made as a result of the complainant being approached by the police. By then the investigation must have started and the names of persons being possible victims, in all probability, already known to the police. This is not the

only complainant who gave evidence in respect of names being inserted into the witness statement which was not part of the witness' evidence. In these circumstances and for the reasons set out in the judgment pertaining to witness statements, I am of the opinion that it would be wrong for the court to discredit the witness solely on the alleged discrepancies between the witness statement and the evidence presented in court.

[132] Although the accused admits that he treated the complainant and had smeared her private parts, he disputes allegations about him having had sexual intercourse with her. His testimony in this regard contradicts his plea explanation, where he admitted having had consensual sexual intercourse with the complainant. Despite this admission, he was adamant under cross-examination that he only washed and treated the complainant without him having sexual intercourse with her. Although this constitutes a material contradiction in his evidence, it must still be considered together with the rest of the evidence and not in isolation. In circumstances where the accused had literally worked with hundreds of people per day, it seems to me not surprising that he became confused with the names of some of them and only when they were called to give evidence, and him having had sight of them, did he realise that mistakes were made. Though not admitted by the accused in so many words, it seems to me that this is what happened in this instance. Therefore, I believe that not too much weight should be given to the contradiction between his plea explanation and his evidence in court; more so where there is no evidence proving the existence of such relationship coming either from the complainant or the accused.

[133] The complainant on this count gave single evidence and her entire version is without corroboration. As mentioned, in order to decide whether single evidence is credible and reliable, it must not be viewed in isolation but has to be evaluated against the rest of the evidence. Although the probabilities regarding the manner in which she was treated seem to favour the complainant's version in that it was basically similar to that of the other complainants, the contradictions and inconsistencies in her evidence are material and must affect her credibility.

[134] In deciding the question as to whether the complainant's evidence is trustworthy and reliable, I have for the above reasons come to the conclusion that it falls short of constituting proof beyond reasonable doubt and therefore insufficient to sustain a finding that the accused had sexual intercourse with the complainant in this count.

Count 11

[135] On this count the accused is charged with rape in that on diverse occasions between July 2010 and January 2011, at Omutaku village, he committed or continued to commit, sexual acts with Maria Shakungu, aged 17 years, under coercive circumstances in that he threatened by word or conduct to apply physical force to her person; and/or fraudulently misrepresented the fact that sexual acts committed with the complainant were consistent with sound traditional medical practices.

[136] Complainant testified that she was suffering from epilepsy when going to the accused's clinic at Omutaku in 2010. During the first screening session the accused informed her that she had to be smeared, being part of the treatment. She described two incidents that happened on different dates when she went to the accused's room to be smeared, each time finding him lying on the bed dressed only in his underpants.

[137] On the first occasion when instructed to undress, she refused and left the room. She raised her concern with another person (Ndahala as per complainant's statement) about the manner in which the accused wanted to treat her. Shortly thereafter Ndahala accompanied her back into the accused's room where he reprimanded her for divulging information about his treatment and asked her whether she wanted to bring him into trouble. She was further instructed to report herself to him under the tree for a second screening. This happened on a later date. During this screening session she was told not to leave as there was a problem at home that endangered her life, but that she could leave if she wanted to. She decided to rather stay on for treatment and was instructed to join those patients who had to be smeared.

[138] When she entered the room, the accused was again dressed only in his underwear. After he smeared her face, he told her to undress; again she refused and left the room because she became afraid. As before, she was fetched from her tent and brought back to the accused's room. He then explained to her that what he wanted to do was not 'sexual intercourse as such' *but that it was part of the treatment*; and if she wanted to be treated, she had to obey his instructions or rather go home but if she were to leave, then she would certainly die. Complainant perceived this as a threat to her life.

[139] Complainant said, from the onset she did not really believe the accused when he said she had to be treated through sexual intercourse and in her view he just wanted to have sexual intercourse, which she refused him. It would however appear that complainant during her third visit came under a different impression and accepted that sexual intercourse formed part of the treatment; and then obeyed the instruction to undress. Though the accused said she also had menstrual problems, she was unaware of this as her menstruation had not yet started (something she did not consider to be a problem). She allowed the accused to use his fingers to insert herbs inside her vagina. He then positioned himself onto her and had sexual intercourse. He assured her that he was *not having sexual intercourse with her* but was actually *extracting the poison from her body*. She felt severe pain as she had not been with someone before. Despite telling the accused to let go of her, he continued until he had finished. She was instructed not to tell anyone as she would then not heal. According to the complainant, the accused, on many occasions thereafter, had sexual intercourse with her; some of which took place at Onghumbi in Angola when she accompanying him there to be washed in the river. On some of these occasions, when reluctant to accede to having sexual intercourse with him, the accused would use force, making it impossible for her to say during her testimony whether or not she was raped. She said she was unable to testify about these incidents in any detail because there were simply too many.

[140] At some point the accused told her that she had healed and could return home. When asked why she at that stage did not report the matter to the police, she said that it simply did not come to mind; also because she was told not to tell anyone. She was subsequently approached by the police and questioned without her having made any report to anyone; neither did she have any intention of reporting the accused to the police prior thereto.

[141] According to the accused the complainant was suffering from epilepsy and menstrual problems when she came to him for treatment. He admits having treated her by smearing her private parts on diverse occasions, but denies having had sexual intercourse with her during any of these sessions; that he told her that sexual intercourse forms part of the treatment; or that he said she will not be cured, or will die, if she were to leave before her treatment has come to an end. He thus disputes the evidence about her remaining at the clinic for treatment for the whole period and claims that she went home with intervals.

[142] It is common cause that complainant's statement was reduced to writing by Deputy Commissioner Abner who testified that he correctly recorded what she had told him. In cross-examination the complainant's attention was drawn to certain discrepancies between that statement and what she had testified about the names of other complainants included in her statement who were all together when treated; also about her having heard of the accused's arrest during November 2011. She explained that she could not recall very well what she had told the police at the time but notwithstanding, disputes having told the police officer that those girls mentioned in the statement were also raped by the accused; or that she had read about the accused's arrest in the news papers.

[143] After due consideration of the discrepancies referred to and the view I take of the correctness and reliability of the witness statements recorded by Deputy Commissioner Abner in this matter, I am not convinced that the names of other complainants reflected in the statement came from the complainant and not the said officer, despite his testimony to the contrary. It is clear that

complainant had no intention of reporting the accused and was approached by the police in order to give a statement. It is further evident that she had no contact with any of these persons except where she says in the beginning of her statement that they were present at the clinic when she got treated (par 3). Where the statement later on reads that 'Many women have suffered on his hand too especially those I mentioned their names above' (par 14), it seems to me unlikely that these are words the complainant would have used and rather appears to have come from Deputy Commissioner Abner. One of the persons mentioned in the statement, according to the complainant, is not even known to her. It appears to me that there is merit in the complainant's evidence as regards her witness statement containing information which she did not divulge when giving a statement to the police. In my view it suffices to cast doubt upon the correctness of the statement and cannot be relied upon as proof of contradicting statements made by the complainant in order to discredit her.

[144] What stands out from the complainant's evidence is that she refused to have sexual intercourse with the accused until the third occasion, and only after he had explained to her that she should not see it as sexual intercourse but rather as treatment and the manner in which poison is extracted from her body. This explanation clearly persuaded her and changed her mind whereafter she subject herself to such 'treatment'. This paved the way for him to have sexual intercourse with the complainant on a number of occasions thereafter. When asked why she in view of what happened to her did not simply leave without being treated, she explained that she had come there to be treated on the recommendation of others as the treatment she had earlier received at the hospital was unsuccessful.

[145] What must be considered is whether complainant's single evidence about the alleged incidents of rape and, in view of the discrepancies pointed out, is trustworthy and reliable. In cross-examination much was made about complainant (and most of the complainants in other counts) not crying out for help the moment they realised that the accused was about to have sexual intercourse with them; or, why these incidents were not reported to the police

at the first possible opportunity. It was argued that because complainant did not act or react as could be expected of her in the circumstances, her evidence about the sexual acts committed with her, was improbable. Generally speaking, to cry foul might be expected of someone in a specific situation, however, history has shown that victims of rape for a variety of valid reasons do not always react in that manner; hence, the need for each case to be decided on its own merit. In the present instance it does not mean to say that, because the complainant did not react in a specific manner, therefore, her evidence is improbable and a fabrication and must be rejected as false. Complainant explained why she did not act as proposed and, when considered in context with the circumstances prevailing at the time, I find the explanation not without merit.

[146] Complainant explained her inability to narrate to the court in any detail about several other incidents when the accused also had sexual intercourse with her and ascribes this to the regular frequency with which it occurred. In this regard she testified in an honest and forthright manner without fabricating evidence about facts she was not certain of and which implicate the accused. The young age of the complainant and the unfortunate situation she found herself in, in all probability, impacted on the young mind of the complainant who had to take weighty decisions on her own in circumstances likely to have weighed her down.

[147] Complainant's evidence – though not perfect – is satisfactory and reliable in all material respects and, in my view, the discrepancies in her evidence loses significance when considered together with the rest of the evidence. I am furthermore unable to come to the conclusion that complainant concocted her evidence in order to falsely incriminate the accused.

[148] The evidence further tends to show that the same pattern of treatment was followed by the accused in this instance. Though a court should be cautious when drawing inferences from similar fact evidence, there is no reason why the court should not rely on similar fact evidence duly established and relevant to an issue in dispute and where allegations of fabricated

evidence has been made. Given the corresponding evidence between complainant and those complainants on the other counts who found themselves in similar circumstances, it seems highly unlikely that each one could have concocted her evidence in all its detail without the complainants having joining forces – an allegation made by the accused but which he was unable to prove in respect of all the complainants.

[149] Opposed thereto is the accused's defence which amounts to a blunt denial and evidence of general nature. In the light of all the evidence adduced, I am convinced that the accused's version is not merely improbable, but that it is false beyond reasonable doubt.

[150] Thus, for the foregoing reasons I have come to the conclusion that the State has been proved beyond reasonable doubt that the accused committed sexual acts with the complainant on at least two occasions.

Count 12

[151] In this count it is alleged that on the 9th of November 2011 at Onuno village, the accused on diverse occasions committed sexual acts with Rauha Ndeunyema, aged 29 years, under coercive circumstances in that he made fraudulent misrepresentations to her about sexual acts committed with her being consistent with sound medical traditional practices; and that complainant was affected by inability to understand traditional medical practices to the extent that she was rendered incapable of understanding the nature of the sexual act committed with her.

[152] This complainant was 27 years old when she and other customers of the accused were rounded up by the police in November 2009 at Onhuno following his arrest. Complainant had come to the clinic earlier that month (on the 9th), suffering from vaginal problems and her being suicidal. She had been treated unsuccessfully by other traditional healers who had told her that she was a victim of witchcraft, whereas the accused said she was 'mad', suicidal and was 'sexually abused by witchcraft' for which she had to be treated. After

she was washed by the accused she had to go to his room (at night) to be smeared.

[153] When she entered the room it was completely dark, making it impossible for her to see anything. I pause here to remark that this is the only instance among all the complainants who testified at the trial where the treatment was administered in complete darkness inside the accused's sleeping room. She said he started smearing her body whereafter she had to undress so that her private parts could be smeared. She was instructed to position herself on the bed in a specific manner. Accused applied ointment to her genitalia up to the point that she realised he was having sexual intercourse with her. She did not consider sexual intercourse to be part of the treatment and pushed him away, asking what he was doing. She got dressed and went outside to her mother who then asked her whether the accused had sexual intercourse with her, which she denied. (It would appear that the mother earlier got wind of sexual intercourse being part of the treatment.) The next day whilst on their way home complainant mentioned to her mother that it 'appeared to her' that the accused 'wanted to have sexual intercourse with her' because she had no feeling in her female part and that she had felt his penis inside her. This was clearly an understatement of what had really happened.

[154] I interpose to observe that the complainant was at pains in cross-examination to explain her and the accused's respective positions on the bed during the sexual act. Although having said during her evidence in chief that the accused lied down on the bed next to her and started kissing her, she appeared to be less certain of the facts under cross-examination; first saying that she was unable to tell in what position he was but then changed course by saying that she cannot recall whether or not he was lying on the bed. When pointed out to her that she contradicted herself as to the stage she was kissed ie whether it was *before* or *after* they had lied down, she replied that she was suffering from a 'mental disease' and therefore *unable to remember certain things*. Complainant contradicted herself on crucial aspects of her

evidence related to the circumstances under which the sexual intercourse took place.

[155] These contradictions remained unexplained and when cornered in cross-examination, complainant proffered the excuse of her having been *mentally ill at the time and therefore unable to remember certain things*. Though this may reasonably be true, it does not however explain the contradictions between her evidence in chief and what she has said under cross-examination. It also begs the question how reliable is the witness' evidence about the alleged rape incident in view of the mental illness she was suffering from?

[156] There are material discrepancies in the complainant's testimony oppose to her statement made to the police. The statement is silent about her having pushed the accused off her whilst par 4 of the statement reads: 'After he finished treating me as he is saying, he told me that I am done, and [I] just leave the room'. (My underlining) The statement further reflects that she was able to make certain observations when inside the room, whereas she was unable in cross-examination to explain the accused's movements *because it was dark*, making it impossible to see what he was up to.

[157] Complainant left the clinic at some point and later returned to continue with the treatment, however, the accused was arrested three days later. During the latter part of her treatment she was only smeared. She said she did not understand the nature of the treatment administered by the accused but did not see anything wrong with it, except for the sexual intercourse – the re-occurrence of which she avoided by steering clear from his room during the rest of her stay.

[158] Accused disputes the complainant's evidence about him having had sexual intercourse with her on the basis that he is unable to recall ever treating her. Though not excluding the possibility that he could have treated her – also by smearing her private parts – he denies having done so in

darkness as that is not how he treated his patients. The accused's defence thus amounts to no more than a blunt denial.

[159] In the court's assessment of the contradictions in the complainant's evidence, regard is had to the fact that these relate to the essentials of the alleged rape and the only explanation proffered by the complainant is that she was mentally ill at the time and thus unable to remember everything questioned about. In my view, that in itself is sufficient reason to approach her evidence with caution – more so when her evidence stands uncorroborated. This possibly explains the feeling of discomfort one experiences when considering the complainant's narrative of the events describing the alleged rape incident. At some point under cross-examination it was – in my view correctly – put to her that it was virtually impossible to have been in a specific position on the bed as she described, ie lying on her left side on the edge of the bed with her left foot touching the floor, whilst the accused was lying *in front of her* (on the floor?). She further contradicts herself where she said she pushed the accused *off* her; suggesting that he was on top of her; and at what stage, the accused had kissed her. When confronted with these discrepancies in her evidence, she simply disputed having given evidence to that effect.

[160] There is a further sense of unease in the complainant's evidence about her having lied to her mother about the sexual intercourse that took place – particularly when the sexual intercourse issue was raised by her mother. I find her explanation of her being ashamed implausible. This is not an instance where she was instructed by the accused not to tell anyone or else she would not heal. She decided on her own and without reason to lie to her mother – the one person she could trust – about what had actually happened between her and the accused inside the room.

[161] After due consideration of all the evidence adduced in respect of this count and having followed a cautious approach in its assessment of the complainant's evidence, the court is unable to find the complainant a trustworthy and reliable witness.

[162] As already mentioned, the accused's lack of memory and him being unable to recollect whether or not he treated the complainant, does not give credence to the complainant's evidence.

[163] The evidence led on this count therefore does not satisfy the test of proof beyond reasonable doubt and the State has not succeeded in proving the alleged sexual intercourse committed with the complainant.

Count 13

[164] This is the last count and here the accused allegedly between 24 – 27 September 2011 at Onunu village committed sexual acts with Victoria Paulus, aged 24 years, on diverse occasions under coercive circumstances by threatening her by word or conduct of the application of physical force to her person; and fraudulently misrepresented to her that sexual acts committed with her were consistent with sound traditional medical practices.

[165] The complainant came to the accused's clinic at Onhuno on the 12th of November 2011 for treatment and was accompanied by her younger sister. During the screening the accused told her there were problems with her head, chest and lower abdomen. Despite having paid N\$1 000 for medicinal herbs to be used during her treatment, she had insufficient funds and had to return home to collect money. She returned only on the 24th and her first treatment started at night under a tree. After informing the accused that she had to be smeared, he instructed her to undress. Accused then smeared herbs on her face and also inserted herbs into her vagina. She had to return the next day and this time they were required to queue up in front of his sleeping room where the smearing would take place. She expected to be smeared again on the face and genitalia and insisted that the accused first washes his hands before smearing her. He complied with her request and after treating her she left, but had to return the following day. On the third occasion they were back under the tree at night. She found the accused behind some blue netting and after she undressed herself, he told her that she had to hold him 'like she would be holding her boyfriend' and to kiss him; she refused. He continued to

smear her face and genitalia and told her to return to his room the next morning at 4 am.

[166] In the morning when it was her turn, she again insisted on him first washing his hands before treating her. After she took off her 'tights' and panties, she was smeared and the accused told her to lie down on the bed. Realising that he was wearing only his underwear, she refused to lie down and insisted to be smeared whilst standing. He then asked her whether she was not concerned about her health, but this clearly did not move her. She again refused when instructed to hold him like her boyfriend. He then sent her away to 'go with her bad luck'. She was about to leave the clinic when the police arrived. She was questioned and made a statement regarding the manner in which she was treated.

[167] Complainant went on to say that she did not object to the accused using his fingers when inserting the herbs into her vagina. As regards his instruction to hold and kiss him, she considered this to be nothing more than a love proposal and turned it down.

[168] The accused's response to the complainant's evidence is that he is unable to recall having treated her, but cannot dispute having done so. Although the accused said the illness she was suffering from would not require any smearing, he was unable to say whether or not he smeared her (as she testified) and in cross-examination conceded that he might have done so. He also conceded that it was possible that she could have told him to first wash his hands; but denies having told her to hold and kiss him as this would be inconsistent with his treatment.

[169] An interesting feature of the complainant's evidence is that the accused, at some point, told her that he has 'papers from the State President to practice in Namibia'. Though disputing having made such remark, he claimed under cross-examination to be registered as a traditional healer.

[170] It is evident that there is no merit in the allegation contained in the charge, that the accused had threatened the complainant. It is further common cause that she did not query the insertion of herbs into her vagina and considered this to be part of the treatment.

[171] Whereas the accused has no independent recollection of events testified by the complainant and there being no evidence before court to the contrary, I find complainant's evidence forceful and convincing. She testified in an honest and forthright manner and did not give the impression that she was concocting her evidence in an attempt to falsely incriminate the accused. Her evidence is clear and straightforward. In the light of all the evidence led in respect of this charge, I find her to be credible. The defence put up by the accused that he generally would not have told the complainant to hold and kiss him, is accordingly rejected as false. It undoubtedly was aimed at having sexual intercourse with the complainant had she acceded to his request. In view of the complainant's evidence, and the accused having admitted that he *inter alia* treated his customers by smearing and the insertion of herbs into the vagina, the complainant's treatment is thus not in dispute. However, what remains to be decided is whether the accused's acts constitute the offence of rape as defined in the Act.

Defence case

[172] I now turn to the defence case and will begin by briefly setting out those aspects of the accused's evidence not yet dealt with in the judgment.

[173] Accused said he became a traditional healer in 1964 and worked as such in Namibia from 1984 at Omutaku village. It is common cause that he had assistants working for him who were trained to dispense the 'medicine' as prescribed by him. On a daily basis he would screen up to 150 customers and prescribe the medicine the person had to use. In some instances he was required to do the washing and smearing of the customers personally and this was usually done in private. Customers would queue up at the door immediately outside his room – a fact heavily relied upon in his defence in order to show that the alleged incidents of sexual intercourse would not have

gone unnoticed by those standing outside in the queue. He says it was only in respect of Laina limbangu with whom he stood in a love relationship and with whom he had consensual sexual intercourse.

[174] According to him he in all instances prior to treatment, would explain the procedure of treatment to the person and always first obtained permission before treating the private parts. In instances where the person had sores or pimples on the genitals (male or female), or suffered from genital discharge, he would apply the medicine accordingly – a procedure during which herbs are inserted into the vagina. In his view this would not constitute a sexual act as it is merely aimed at healing the person.

[175] The evidence of other defence witnesses relate to specific incidents or practices conducted by the accused and is obviously aimed at supporting the accused's evidence on those issues.

[176] The testimony of Shihepo Ndamonghenda is limited to telephone calls she received from Laina limbangu during 2011 who encouraged her to lay charges of rape against the accused in exchange for payment of N\$10 000 in cash, but which she declined as the accused had done her no harm during her treatment. She had also spoken to lileni Kapandu (complainant in count 9) who mentioned to her about similar phone calls she had received from Laina.

[177] The importance of this evidence is that it shows that there were deliberate attempts on Laina limbangu's part to orchestrate the laying of criminal charges against the accused by former customers of his. Whereas this witness was not discredited in any way, there is no reason why the court should not find her evidence trustworthy and reliable.

[178] The evidence of the next defence witness, Saima Nghishiiko, also a traditional healer, mainly deals with the nature of the treatment she usually conducts in respect of certain illnesses. She explained that in some instances she would smear herbs on the inside of a patient's vagina which had to be done personally because she has 'healing hands'. Though treatment

administered by this witness in some respects would correspond with that of the accused, it, however, differs markedly in other respects. According to her traditional healers have their own methods of healing. Of note is that treatment of the genitals is limited to instances where there are menstrual problems; sores on the vagina or penis; and 'where an evil spirit had sexual intercourse with the person'. She was further of the view that the insertion of fingers into the private parts of a female person would *not constitute a sexual act*, as the purpose is to heal the person and not to have sexual intercourse; thus, the same view taken by the accused.

[179] As could be expected, this witness was unfamiliar with the treatment generally administered by the accused and when the court enquired from her whether she – in view of the accused's evidence that he was a registered traditional healer – was equally registered, and whether registration was required by law, she became evasive and her reply was, respectfully, nonsensical. When further questioned as to the registration of traditional healers, the witness stepped off the witness stand and, whilst making weird sounds, collapsed onto the floor and refused to get up. Obviously this brought an abrupt and unsatisfactory end to her testimony.

[180] The next defence witness was Sergeant Selma Enjala who is attached to the Woman and Child Protection Unit of the Namibian Police and the person who reduced the statement of Rauna Wilhelm (complainant in count 1) to writing. Not much turns on her evidence except for saying that she contradicts Rauna's evidence about her claiming not to have read the statement afterwards. According to Sergeant Enjala the complainant was satisfied that her statement was correctly recorded and that communication between them was good. I have already dealt with this evidence in count 1.

[181] The last witness for the defence is Ambrosius Shikongo, the accused's former driver. It would appear that the purpose for leading his evidence was merely to confirm the accused's evidence on peripheral issues which were not in dispute ie the number of customers seen by the accused on a daily basis; that smearing of the genitals was generally prescribed by the accused and

done in private; that some customers were washed in the river in Angola; that he was present when Laina was introduced as the accused's wife; and her subsequent involvement with the accused. His evidence however contradicts that of the accused in respect of treatment done on Sundays (in exceptional cases); and treatment that was administered in the surrounding bushes at Omataku, the latter disputed by the accused. He further contradicts the accused's evidence about persons standing in the queue outside the room who could possibly observe or hear what was going on inside. According to the witness he usually oversaw this process and they were not allowed to enter the first section, therefore, they would not have been able to see or hear what happened inside the accused's room. It must however be said that the witness also had other duties and was not present at the door at all times. The witness conceded that he could not dispute evidence of sexual acts having been committed inside the room.

[182] That as far as it concerns the evidence presented.

Section 174 application

[183] At the close of the State case the defence applied in terms of s 174 for the discharge of the accused on counts 2, 3, 9, 12 and 13. After oral submissions were heard for, and against the application, I dismissed the application and in an *ex tempore* judgment gave reasons for the ruling made. There is no need to revisit the court's earlier ruling; suffice it to say that the court in reaching its conclusion was guided by what has been stated in *S v Nakale and Others*⁵ and *S v Teek*⁶, respectively.

The use of witness statements in cross-examination

[184] Whereas defence counsel in cross-examination throughout the trial extensively made use of witness statements in an attempt to show discrepancies between the witness statement and a witness' evidence given in court, it seems necessary to look at existing law and the approach the court

⁵2006 (2) NR 455 (HC).

⁶2009 (1) NR 127 (SC).

should follow when evaluating the evidence of a witness who has deviated from a previous statement made to the police.

[185] The court in *R v Steyn*⁷ had the following to say on witness statements:

‘[T]here is a serious possibility that statements made to the police, which are made in entirely different circumstances, may be far from constituting this accurate representation and through inaccuracies may be a target for cross-examination which, instead of revealing the truth, may obscure it.’

This court in the past, when dealing with discrepancies between a witness statement and the *viva voce* evidence of a particular witness, as per Mainga J (as he then was), said:

‘A court of law should be careful in discrediting a witness because his/her evidence in chief slightly departs from the statement made to the police especially in this country where it is a notorious fact that the majority of the police officers who are tasked with the duties to take statements from the prospective witnesses and accused persons are hardly conversant in the English language and more so that police officers who take down statements are never called and confronted with the contradictions that the accused or a witness may have raised in cross-examination.’ (*The State v Aloysius Jaar*⁸)

See also: *Simon Nakale Mukete v The State*⁹ at 21.

[186] In *S v Bruiners en 'n Ander*¹⁰ a case in which witnesses in certain respects deviated from their witness statements and those deviations being immaterial, the Headnote reads:

‘In order to discredit a State witness on the basis of his affidavit, it was still necessary that there had to be a material deviation by the witness from his affidavit, before any negative inference could be drawn. The purpose of an

⁷1954 (1) SA 324 (A) at 335G-H.

⁸Case No CA 43/2002 (unreported) delivered on 09.12.2009;2004 (8) NCPL 52 (HC).

⁹ Case No CA 146/2003 delivered on 19.12.2005.

¹⁰ 1998 (2) SACR 432 (SEC).

affidavit was to obtain the details of an offence, so that it could be decided whether a prosecution should be instituted against the accused. It was not the purpose of such an affidavit to anticipate the witness's evidence in court, and it was absurd to expect of a witness to furnish precisely the same account in his statement as he would in his evidence in open court.'

(Emphasis mine)

[187] From the above it is clear that not every discrepancy between a witness' statement and his or her evidence in court would affect the credibility of such witness, but only when the discrepancy is found to be *material* and the court is further satisfied that the witness statement correctly reflects what the witness had earlier said. When the court is required to evaluate contradicting evidence emanating from the witness statement, the approach to be adopted by the court is set out in *S v Mafaladiso en Andere*¹¹ (Headnote):

'The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the

¹¹ 2003 (1) SACR 583 (SCA).

witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings. (At 593e - 594h)'. (My underlining)

[188] I respectfully endorse the *dicta* enunciated in the afore-mentioned judgments.

[189] I have earlier alluded to two statements reduced to writing by Deputy Commissioner Abner where the complainants (in counts 10 and 11) testified that not everything contained in their statements correctly reflects what they meant to say; and contains information not disclosed by them. For the reasons provided in respect of each count, I have come to the conclusion that it would be wrong to conclude that the witnesses deviated from earlier statements made to the police and thus contradicted themselves, particularly where there is reason to believe that the statements do not correctly reflect what the witnesses conveyed to the said officer and, for reasons unknown, additional facts or information (not disclosed by the two complainants) were inserted into the statement. Though there is no clear evidence that this was a deliberate attempt by the said officer to build or strengthen the State's case, the evidence of these two witnesses point in that direction. If that were to be the case, such conduct will not be tolerated by the courts and must be condemned in the strongest of terms. It is on this basis that the court in respect of counts 10 and 11 came to the conclusion that the two complainants did not contradict themselves in respect of their earlier statements made to the police.

Amendment of the charge – count 1

[190] After the close of the defence case and before the court heard oral submissions, the prosecution applied in terms of s 86 of the Criminal Procedure Act 51 of 1977 to amend count 1 on the basis that words or particulars that ought to have been inserted in the charge have been omitted. The amendment sought was to the effect that the charge be amended to now include the following particulars: That a sexual act was committed by the insertion of fingers into the vagina; that fraudulent misrepresentations about sexual acts being consistent with sound traditional medical practices were made by the accused; and that complainant was affected by inability to understand traditional medical practices to such extent that she was rendered incapable of understanding the nature of the sexual acts committed with her.

[191] The defence opposed the application on the basis that it constituted a new offence which the State was not permitted to do. The pinnacle of the argument was that the amendment sought would extend the charge to include the insertion of the fingers into the vagina, alleging a completely different act from what originally has been alleged and on which the accused could be convicted as it stands if proved.

[192] After hearing oral submissions the application was granted and leave was given to amend the charge as proposed. The court indicated that reasons would be given during the judgment and these reasons are briefly the following: Even after the amendment the charge remained one of rape in contravention of s 2 (1)(a) of the Act and the amendment sought, in my view, would not in essence change the charge to constitute a different crime to what the accused has pleaded, namely, rape. What the amendment was aimed at was merely to invoke the second leg of the definition of a sexual act as defined in s 1 (1) to also provide for the insertion of the accused's fingers into the complainant's vagina, and not only insertion of the penis. The accused faces only one charge of rape (count 1) where it is alleged that the accused committed a non-consensual sexual act with the complainant by inserting his penis into the complainant's vagina. Complainant gave evidence about incidents where the accused inserted herbs into her vagina utilising his fingers and was duly cross-examined on that aspect of her evidence. It was further

not disputed by the accused that he treated the complainant in that manner and admitted that in all instances where the genitalia had to be treated, he inserted herbs into the vagina with his fingers; thus, on this point there is no factual dispute. It was not contended that the accused will be prejudiced by the amendment of the charge in any other manner. In view of the evidence adduced and regard being had to the manner in which the accused has conducted his defence in respect of this count, I am unable to see how the accused would have conducted his defence on this charge any differently.

[193] Thus, being satisfied that the amendment of the charge in count 1, as proposed, does not constitute a different or new charge and that the accused will not suffer any prejudice if granted, the application succeeded and the court made the appropriate order.

The crime of rape under the Combating of Rape Act

[194] In respect of all 13 counts the accused is charged with the offence of rape in contravention of s 2 (1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000). Counts 7 – 13 must furthermore be read with s 94 of the Criminal Procedure Act, 51 of 1977, the latter providing for an accused to be charged with a single charge, though having committed the same offence on diverse occasions during a specified period.

[195] The crime of rape is defined in s 2 of the Act, and the relevant part thereof reads:

‘2 (1) Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances-

- (a) commits or continues to commit a sexual act with another person; or
- (b) causes another person to commit a sexual act with the perpetrator or with a third person,

shall be guilty of the offence of rape.

(2) For the purposes of subsection (1) "coercive circumstances" includes, but is not limited to-

- (a) the application of physical force to the complainant or to a person other than the complainant;
- (b) threats (whether verbally or through conduct) of the application of physical force to the complainant or to a person other than the complainant;
- (c) threats (whether verbally or through conduct) to cause harm (other than bodily harm) to the complainant or to a person other than the complainant under circumstances where it is not reasonable for the complainant to disregard the threats;

- (f) circumstances where the complainant is affected by-
 - (i) physical disability or helplessness, mental incapacity or other inability (whether permanent or temporary); or
 - (ii) intoxicating liquor or any drug or other substance which mentally incapacitates the complainant; or
 - (iii) sleep,
to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act;
- (h) circumstances where as a result of the fraudulent misrepresentation of some fact by, or any fraudulent conduct on the part of, the perpetrator, or by or on the part of some other person to the knowledge of the perpetrator, the complainant is unaware that a sexual act is being committed with him or her; ...'

(My emphasis)

[196] Section 2 makes plain that in order for the State to secure a conviction on a charge of rape, read with the provisions set out in the Act, it has to be proved beyond reasonable doubt that the accused (a) committed or caused another to commit; (b) a sexual act with another person; (c) under coercive circumstances; (d) with intent; and (e) such act being unlawful.

[197] Intent (*dolus*) is an element of the offence¹² and the State bears the onus of proving beyond reasonable doubt that the accused, when committing the alleged crimes, acted with intent to commit sexual acts with the respective complainants under one or more of the coercive circumstances set out in subsection 2 (2) of the Act. Intent in the form of *dolus eventualis* would suffice where the accused is aware of the possibility that a legal rule exists and reconciles himself with such possibility. It is clear that the accused's intention must embrace all the other elements of the crime. Where the accused (as in count 7) alleges that the complainant consented to sexual intercourse he merely disputes the unlawfulness of the sexual acts allegedly committed under the prohibited coercive circumstances and the onus remains on the State to prove otherwise.

[198] The preamble of section 2 (2) reads: 'For the purposes of subsection (1) "coercive circumstances" includes, but is not limited to' – followed by the coercive circumstances set out in paras (a) – (i)).

[199] Though the preamble of the subsection stipulates that the coercive circumstances enumerated under subsection (2) are not a *numerus clausus*, the court, in my view, should not lose sight of the fact that a charge (formulated outside the definition of coercive circumstances as it currently reads in the Act) must still satisfy the principle of legality as enshrined in the Constitution. It further seems apparent that the court in these circumstances is required to strike a balance between, on the one hand the principle of legality, and on the other, the powers given to the court by the Legislature to consider *other circumstances* over and above those defined in the Act which would make a sexual act committed under those circumstances (not defined in the Act) unlawful. The court, in my view, must always be mindful that the courts are not there to create law, as this function lies with Parliament. Where the court in respect of the Act is given a discretion under s 2 (2) to include "coercive circumstances" whereby certain conduct is deemed unlawful without that conduct being defined by the Legislature, the courts should be slow in the

¹² Section 2 (1) of the Act reads: 'Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances - ...'

exercise of its discretion in favour of the inclusion of new coercive circumstances. In my view, only when found to be compelling and where the exclusion thereof would be against the interest of justice should the court lean in favour of its inclusion. Before the court could convict the accused of the offence of rape committed under coercive circumstances which as yet, have not been defined in the Act, the State still bears the onus of proving that the accused knew his acts were unlawful and acted with the required *mens rea* at the time of committing the offence.

The insertion of any body part (other than the penis) into the private parts of another.

[200] A “sexual act” defined in s 1 of the Act means:

- ‘(a) the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person; or
 - (b) the insertion of any other part of the body of a person or of any part of the body of an animal or of any object into the vagina or anus of another person, except where such insertion of any part of the body (other than the penis) of a person or of any object into the vagina or anus of another person, is consistent with sound medical practices, carried out for proper medical purposes; or
 - (c) cunnilingus or any other form of genital stimulation;’
- (Emphasis provided)

[201] The only exclusion of what constitutes a sexual act as defined under (b) above, is where the insertion of a body part of a person into the private part (or anus) of another is (a) consistent with sound medical practices; and (b) is carried out for proper medical purposes. In the absence of any definition in the Act as to what would constitute ‘sound medical practices’, these words, individually considered, have to be given its ordinary meaning. According to the Concise Oxford Dictionary (11th ed.) these words mean the following: ‘**sound**’ – 1. ... 2. based on reason or judgment ► competent or reliable; ‘**medical**’ – relating to the science or practice of medicine;

'practice' – 1. ... 2. the customary or expected procedure or way of doing something.

The test to be applied by the court in deciding as to whether or not a practice or method of treatment is consistent with sound medical practices is *objective*.

Is the treatment administered by a traditional healer excluded from a 'sexual act' as defined in section 1 of Act 8 of 2000 on the basis of being of 'sound medical practice'?

[202] As mentioned, the accused does not dispute having utilised his fingers when inserting medicinal herbs into the vagina of a complainant. However, he is adamant that this formed part of the treatment administered, and it was never intended to or directed at committing any sexual act with these persons. The accused's evidence as regards vaginal treatment by the insertion of medicinal herbs into a person's vagina – depending on the illness the person is suffering from – was corroborated by the other traditional healer, Saima Nghishiiko, confirming such treatment generally to be consistent with traditional healing practices. She described herself as a person with 'healing hands' and therefore only she could apply the medicine. In the absence of evidence to the contrary it seems to me that the evidence shows that the application of medicinal herbs by a traditional healer to, or into the body of a person under treatment, is not unfamiliar and is generally accepted (among those persons having faith in this form of treatment) as being consistent with traditional healing practices. I find fortification for this conclusion in the evidence of the respective complainants treated in this manner, none having doubted or queried the authenticity of the treatment so administered, or the sincerity with which the accused conducted himself.

[203] Unlike the medical profession, there is at present no legislation which governs and controls traditional healers conducting traditional healing practices.¹³ It further appears from the evidence that there is no formal training or qualification required of persons who wish to become traditional healers and that it is a hereditary gift passed on in the family. There is no statutory registration required or regulatory body in place which regulates and controls

¹³It was recently reported in the media that legislation to that effect is in progress.

the work done by traditional healers; neither is there legislation in place as regards health requirements that have to be met – the latter of serious concern to me in the light of evidence adduced in this case about sexually transmitted diseases, and the manner in which the accused conducted himself.

[204] I have for the above reasons come to the conclusion that traditional healing does not form part of the medical profession as the latter is based on and deeply rooted in the medical science and that a clear distinction ought to be made between the two. In my respectful opinion the words ‘consistent with sound medical practices’ in the proviso of s 1 (1)(b) of the definition of ‘sexual act’ find application *only* in respect of medical practices based on the medical science and which is enacted and regulated by legislation, thus *excluding* traditional healing practices as far as it concerns the Act. I am respectfully of the view that, had the Legislature intended to include traditional healing practices in the definition, it would specifically have provided therefore in the Act.

[205] Finally on this point, because of the disparity between the manner in which conventional medical treatment is practiced as opposed to traditional treatment, the latter by some people may be deemed to be ‘sound’ in the context of traditional healing, but would be completely unacceptable to others (in society) and contrary to established medical standards and principles. For that reason alone it cannot be equated with one another, let alone that traditional healing – judging from the evidence presented in the instant case – apparently also includes treatment involving the supernatural.

[206] In reaching this conclusion, due consideration was had to the evidence presented about the nature of traditional healing and how it is practiced by the accused and another traditional healer who testified on his behalf; that traditional healing is actively practiced and pursued by those in society who have faith in it; that not all is good that comes from it; and that exorbitant fees are charged for services rendered.

[207] I have therefore come to the conclusion that insertion of any body part or object by a traditional healer into the vagina or anus of another person, constitutes a sexual act as defined in section 1 of the Combating of Rape Act of 2000.

[208] In the present case the accused admitted having treated most of the complainants by smearing them, a procedure which not only involves the application of some herbal mixture to the body, but also the insertion of herbs into the vagina. It is common cause that in all instances the insertion was done by hand. In view of the finding already made, the accused's conduct in that regard constitutes sexual acts committed with the complainants where the evidence proves the commission of such acts. What must be decided next is whether the accused, when he committed sexual acts with the respective complainants, knew that these acts were unlawful.

The accused's culpability

[209] When deciding the accused's culpability or otherwise of sexual acts committed with the complainants, I shall first consider those acts involving insertion of herbs into the vagina of a complainant, and thereafter acts of sexual intercourse committed with the complainants.

[210] The State bears the onus to prove beyond reasonable doubt that the accused's conduct is culpable ie that he intentionally acted with a guilty mind (*mens rea*). Thus, it is not sufficient for the State to merely prove the unlawfulness of the accused's act and that it corresponds with the elements of the offence; it must further prove that, at the time of committing the prohibited act, he *subjectively* appreciated its wrongfulness.

The onus of proof

[211] The position as to who bears the onus has been analysed by the learned authors of LAWSA¹⁴ where the following is stated:

¹⁴At 130 para 113.

' . . . (w)henever mens rea is an element of a statutory offence, and whatever the form of mens rea required, the state must prove the required mens rea beyond a reasonable doubt. This burden remains on the state throughout the case but where the state has led evidence that the prohibited act has been committed by the accused, an inference can be drawn, depending on the nature of the actus reus and other circumstances, that the accused committed the act with the necessary mens rea. This results in a duty being cast on an accused, who relies on the absence of mens rea to adduce evidence to rebut the so-called prima facie case made out by the state. This duty is not tantamount to an onus of proof on a balance of probabilities and the accused accordingly acquits him- or herself of this duty if he or she adduces evidence which, on an evaluation of the evidence as a whole, creates a reasonable doubt as to whether there was mens rea on his or her part.' (My underlining)

See also *S v Kramash*¹⁵; *S v Paulus*¹⁶; *R v Britz*.¹⁷

(a) The insertion of herbs into the private parts

[212] It has been the defence's case throughout the trial that the insertion of medicinal herbs into the private parts of the complainants, at all times, was part of the treatment he administered and thus lawful. The accused is adamant that he never intended committing a sexual act with any of his customers. Except in respect of count 1 where the accused's reasons for treating the complainant's private parts are suspect, the State, in my view, has failed to show that the accused's treatment of the other complainants was not consistent with traditional healing practices. The accused when testifying was frank and forceful about treatment of the private parts forming part of traditional healing and that it, to his mind, did not constitute a sexual act. Despite the court having found otherwise, is it possible that the accused was truly ignorant about the unlawfulness of his acts in terms of the Combating of Rape Act, and that he lacked *mens rea* when penetrating the complainants' private parts with his fingers?

¹⁵1998 NR 186 (HC) at 193A-B.

¹⁶2011 (2) NR 649 (HC) at [65] to [66]

¹⁷1949 (3) SA 293 (A) at 301.

[213] In the circumstances of the case and for reasons to follow, I have come to the conclusion that it is reasonably possible for the accused *not* to have known that by utilising his fingers, his actions were unlawful. Since *S v De Blom*¹⁸ every person is no longer presumed to know the law and that ignorance of the law is recognised as a valid defence. This has been confirmed in *S v Maseka*¹⁹ where O'Linn at 253B-C said:

'The defence of ignorance of the law is a defence in common-law crimes as well as in the case of statutory offences, unless the Legislature has expressly or by clearest implication provided for strict liability.

The required mens rea can be in the form of dolus or culpa. If, owing to ignorance of the law, an accused does not know that his or her conduct is unlawful, such accused lacks the required mens rea. If culpa is the required form of mens rea, then the accused would have a defence if he or she proceeded with the necessary caution to acquaint him or herself with what the law expects. See Snyman (*supra* at 180). But as Snyman points out, even where knowledge of a legal rule is required, it is sufficient if the accused is aware of the possibility that the rule may exist, and reconciles himself or herself with this possibility. Nor need the accused have known which section of a statute forbids an act or the exact punishment prescribed; for the accused to be liable it is sufficient that he or she be aware that the conduct is forbidden by law.' (Emphasis mine)

[214] Though the accused has not relied on this defence – at least not directly – it seems to me that his evidence of him having utilised his fingers which forms part of the treatment and it being consistent with 'sound [traditional] practices' amounts to exactly that ie because it was consistent with existing traditional healing practices, he was unaware that his conduct was unlawful.

[215] The evidence in this case clearly shows that treatment of someone's private parts by the accused was common knowledge; not only among traditional healers but also to those complainants treated by the accused. This much is evident from virtually every complainant who gave evidence, none of

¹⁸ 1977 (3) SA 513 (A).

¹⁹1991 NR 249 (HC).

which having doubted or queried the accused's treatment of their private parts. Already at the screening stage were these persons informed by the accused, in the presence of others, of such treatment. It does not create the impression that treatment of a persons private parts was meant to be a secret. Thus, judging from the circumstantial evidence in the present case, it seems to me impossible to draw the inference from the proved facts that the accused when treating the complainants in this manner knew that his actions were unlawful.

[216] I am further satisfied that it could not be expected of the accused to have been familiar with the law; more particularly as to what would constitute a sexual act as defined in s 1 of the Act. He is a foreign national and, in the absence of evidence to the contrary, I am unable to come to the conclusion that the accused at the relevant times was familiar with the provisions of the Act. However, it is important to point out, that the defence of ignorance of the law is decided on merit and in the circumstances of any particular case; therefore, it would only succeed if the evidence proves beyond reasonable doubt that the accused was truly ignorant of the law when committing the prohibited act.

[217] For the foregoing reasons I have come to the conclusion that although the State has proved that a sexual act was committed by the accused, it failed to rebut the evidence adduced by the accused showing that he lacked *mens rea* when treating the complainants by the insertion of fingers into their private parts.

[218] Count 13 is the only instance where the complainant's private parts were treated without being followed by an act of sexual intercourse. Unlike the rest of the complainants, the only reason why it never progressed to the stage where sexual intercourse took place is because complainant bluntly refused his advances. Whereas it has been found that the accused at the relevant time acted with an innocent mind, he stands to be acquitted on count 13.

[219] Mr *Greyling* submitted that all the complainants consented to treatment which required the insertion of herbs into the vagina by the accused utilising his fingers. It was further submitted that the Legislature never intended to exclude the consideration of consent as an element to the definition of rape in terms of the Combating of Rape Act 8 of 2000. For purposes of this judgment and in view of the conclusion earlier reached, I do not consider it necessary – and without the benefit of having heard full arguments on this point – to decide whether Mr *Greyling*'s proposition has merit. It will suffice to say that consent obtained under coercive circumstances will be void. These circumstances are defined in the Act, but even where this is not the case and the circumstances are such that the court comes to the conclusion that it constitutes 'coercive circumstances', the offence of rape is committed (provided the other elements of the offence of rape have been proved).

(b) Acts of sexual intercourse committed with complainants

[220] I now turn to consider the unlawfulness or otherwise of the accused's conduct where the court has found him to have had sexual intercourse with the complainants in respect of counts 1; 2 + 3; 5 + 6; 8; and 11.

[221] Whereas the accused disputed the evidence of sexual intercourse between him and the complainants, he did not raise any defence about these acts having been lawful. This notwithstanding, the State still bears the onus to prove the sexual acts committed to have been unlawful

[222] It is clear from the evidence that the complainants were neither threatened nor physically forced into submission in any manner whereby they were subjected to the sexual intercourse committed with each. The requirement of causation between the threat and the sexual act thus has not been established. In those instances where the accused warned or threatened the complainants not to speak out about sexual acts committed with them or else they would not heal or bring upon themselves some curse if they were to do so, were *not* aimed at coercing them into having sexual intercourse with the accused, but rather not to speak out and tell anybody about what happened. Even where sexual intercourse took place subsequent

to the giving of these warnings or threats, it cannot, in my view, be said that this in itself constituted coercive circumstances existing at the time the sexual act was committed, as it was clearly not intended.

[223] Insertion of the penis into the vagina or anus of another person obviously could not fall within the ambit of traditional healing practices; this much the accused conceded. Thus, where the evidence proves that the accused – either by word or conduct – gave out to the complainants that sexual intercourse formed part of traditional healing practices, it would constitute a fraudulent misrepresentation of a fact directly connected to the sexual acts thereafter committed with the complainants. However, that *per se* would not render the sexual act unlawful as there is a further requirement that the complainant must have been ‘unaware that a sexual act [was] being committed with him or her’ (subsection (2)(h)).

[224] Under which circumstances would a complainant *not* have been aware that a sexual act is being committed? The answer to this question lies in the proper understanding of what the Legislature intended with the enactment of subsection (2)(h) of s 2 which reads:

‘(h) circumstances where as a result of the fraudulent misrepresentation of some fact by, or any fraudulent conduct on the part of, the perpetrator, or by or on the part of some other person to the knowledge of the perpetrator, the complainant is unaware that a sexual act is being committed with him or her;’ (Emphasis provided)

[225] Counsel were invited for submissions as to what the Legislature intended when requiring of a victim to have been ‘unaware’ of the commission of the sexual act committed. Mr *Lisulo* opined that it turns on the *unlawfulness* of the act committed and without the victim being aware that the act was actually unlawful. He argued that this would for instance be where the victim is unaware that the sexual act is unlawful for lack of being consistent with sound medical practices as defined in the Act. This would mean that even though the victim appreciates the fact that the accused has penetrated her private part with his finger or penis, she did not realise or was unaware that the accused

has made a fraudulent misrepresentation to her about his conduct, pretending that it was consistent with traditional healing practices (as she was made to believe) whilst in actual fact it was not and thus unlawful.

[226] An example of the latter would be where a medical practitioner, with the patient's consent, inserts his finger into the vagina during a medical examination in circumstances where this procedure (the insertion of the finger) is *not* required for medical purposes – thus inconsistent with sound medical practice – and consent to do so was obtained as a result of a fraudulent misrepresentation made by the doctor to the patient about the procedure being consistent with sound medical practice. The patient is thus unaware that the doctor is actually committing a sexual act with her, for which she did not give her consent. Had the complainant known the doctor's true intention, she would never have consented to the sexual act committed with her.

[227] Conversely, where no fraudulent misrepresentation as to the treatment or medical procedure was made by the accused to the victim and that person permits the doctor to commit a sexual act with him or her (thus consenting), then this would *not* constitute any coercive circumstance under the Act and the accused's conduct will not be unlawful.

[228] What must be considered next is whether or not the complainants in the relevant counts²⁰ – to whom I shall henceforth jointly refer as 'the complainants' – tacitly consented to the sexual acts committed with them as a result of any fraudulent misrepresentation of some fact, made by the accused.

[229] On the strength of each complainant's own testimony describing the circumstances under which the accused had sexual course with them it can reasonably be inferred that they tacitly permitted him to do so. Can this in the circumstances of this case be construed as mutual consent, or was there some fraudulent misrepresentations made regarding the treatment they were to receive whilst being unaware that his actions were actually unlawful?

²⁰Counts 1; 2+3; 5+6; 8 and 11.

[230] Mr *Greyling's* submission that s 2 (2)(h) of the Act regarding a fraudulent misrepresentation made by the accused being in conflict with the defence of consent (under common law), is respectfully, wrong. The argument is based on a misreading of the section. As was discussed above, the question that must be answered is not whether the victim was aware that a sexual act or intercourse was committed with him or her, but whether the victim, as a result of any fraudulent misrepresentation made by the accused, was unaware that the sexual act being committed – and to which he or she consented – was actually *unlawful* in terms of the Act. I have already dealt with this aspect and there is no need to repeat what has been stated.

[231] Counsel in support of his argument relied on *R v K*²¹ where the following appears in the Headnote:

'Appellant had been convicted on a charge of rape on evidence which revealed that the appellant had agreed to treat a woman's condition of barrenness by making various incisions upon her body and then having sexual intercourse with her consent, the trial Court having taken the view that intercourse by fraud and misrepresentation was not by consent. In an appeal, *Held*, as the misrepresentation had not related to what had been intended but only to the results which would follow, that the woman's consent had not been vitiated by deception in such a manner as to destroy the legal defence of consent.'

(My underlining)

And at 368B-D:

'In *The King v Williams*, (1923) 1 K.B. at p. 340, HEWART, CJ, adopted the summing-up of BRANSON, J, as an accurate statement of the legal position. BRANSON, J, said at p. 347:

"The law has laid it down that where a girl's consent is procured by the means which the girl says this prisoner adopted, that is to say, where she is persuaded that what is being done to her is not the ordinary act of sexual intercourse but is some medical or surgical operation in order to give her relief from some disability from

²¹1966 (1) SA 366 (RAD).

which she is suffering, then that is rape although the actual thing that was done was done with her consent, because she never consented to the act of sexual intercourse. She was persuaded to consent to what he did because she thought it was not sexual intercourse and because she thought it was a surgical operation.”

[232] The facts in the present case are on all fours with that of the *Williams* case in that fraudulent misrepresentations were made to the complainants about the accused’s method of treatment being consistent with traditional healing practices and to which treatment the complainants consented. They never intended to have sexual intercourse with him in the ordinary course. Though the *Williams* case was decided under common law, the principle of consent obtained as a result of a fraudulent misrepresentation being void, remains the same.

[233] I now turn to consider whether the complainants were indeed deceived by the accused regarding their treatment. When the court has to determine the state of mind of each complainant, regard must not only be had to those circumstances prevailing when the sexual acts were committed, but also to other factors that could have played a role and which might have impacted on each complainant’s state of mind. What must be decided is what these factors were and the impact it jointly had (if any) on the respective complainants’ state of mind and conduct, resulting in them tacitly consenting to sexual acts being committed with them.

[234] First and foremost, sight must not be lost that each complainant either came to the accused or were taken to him by family members in the belief that he, being a traditional healer, was capable of healing them. That is what they wanted – to be cured from some or other illness, mental disorder; or to have an evil spirit exorcised from their body; or that the accused must break a curse resting upon that person. It was argued on the accused’s behalf by Mr *Greyling* that the accused did not possess supernatural powers. That may be so, but in my view, this is how he portrayed himself to the outside world. This was a fact well-known among those members of society who flocked to him in great numbers for treatment. In count 1 the accused gave evidence about him

possessing the power to break a curse resting upon one of the complainant's family. The perception about the accused not being an ordinary person, but a traditional healer with unconventional healing and supernatural powers, seems to have been widely accepted by those under his treatment. The court heard evidence about him informing persons present at the gathering place that he will know when they gossip about him. They also saw how he extracted something like a tortoise from someone's chest with his teeth and that he was able to smell whether someone had a snake in his or her chest and remove it without making an incision into the body. As with the tortoise, he even showed it to them after he had spit it out into a container.

[235] During the treatment of the complainants, and usually after he had sexual intercourse with them, the accused made statements to the effect that they must not tell anyone about it because they will not heal; or that they will be cursed or even die. Without venturing too much into a field the court has no personal knowledge or experience of, it seems to me that the accused, through his conduct and utterances to others, claimed to possess supernatural powers. In view thereof, it would not seem farfetched to accept that the complainants had reason to believe him simply because of what he portrayed to the outside world. Whether or not he had those powers is not the point; this is the picture he portrayed to others and, as far as it concerns the complainants under consideration, they subjectively believed that he had such powers. This much is evident from the complainants' failure or reluctance to report the accused's wrongdoing long after their treatment had ended.

[236] From their evidence there can hardly be any doubt that each of these complainants honestly believed that the accused was capable of executing his threats and therefore kept quiet about the sexual intercourse he had with them. In some instances they remained unwilling to disclose this fact, even to nurses at the hospital after it was discovered that they contracted STD's. It was only after consultations during which they were encouraged and pressurised to speak out, that they made reports implicating the accused. Against this background it seems to me reasonable to conclude that these complainants did not mention to anyone what had happened, simply because

they feared his threats might come true about them not healing or that they would die. Thus they subjectively believed that he did possess supernatural powers, a factor which undoubtedly must have impacted on the complainants' state of mind prior to, and after the treatment.

[237] From the accused's perspective, this was one way of keeping his misdoings under wraps. It would therefore, in my view, be wrong to argue that the only reason why these complainants did not speak out against the accused was because the alleged incidents of rape never happened.

[238] I earlier alluded to similar fact evidence and the circumstances under which the court may rely on such evidence (par 148). It frequently happens that where an accused on multiple counts faces similar charges (as in this case), the question which often arises turns on the admissibility of, and the weight, if any, to be attached to evidence proved on one of the counts against the accused; either as proof of the other counts he is charged with, or as corroboration or confirmation of the testimony of single witnesses on such other counts.²² The present case, in my view, is not an instance where proof of similar fact evidence regarding the treatment of the complainants bear to each other such a striking similarity that in itself it also proves the other offences. But, it does tend to show the same pattern of conduct followed by the accused during the course of the treatment with the smearing of the complainants' private parts. The sexual intercourse on each occasion was immediately preceded by some form of treatment, usually the smearing of the complainants' genitalia or the insertion of herbs into the vagina. I am satisfied that the specific procedure of treatment followed by the accused in respect of the complainants is sufficiently similar to find that, when considered as a whole, it serves as corroboration of the single evidence of the complainants who allegedly fabricating evidence in order to incriminate the accused. Other than that, I do not think that more weight should be given to the similar fact evidence adduced in this case.

²²S v D 1991 (2) SACR 543 (A).

[239] Objectively viewed, the sole purpose of this sequence of events was to create the impression with the complainants that sexual intercourse formed part of the treatment. That would explain why the accused in some instances immediately after the smearing, and without explaining his conduct, proceeded with having sexual intercourse. He achieved this by instructing them to undress and lie down on the bed *to be smeared*, claiming that they could not be smeared when standing. In respect of counts 2 and 3 it was no different even though the sexual intercourse took place in the field where the complainant had to lie down on a towel she had brought with her. In one instance where complainant in count 13 refused to lie down as instructed, he sent her away without treatment saying she must 'go with her bad luck'. This is nothing other than extortion. Though he told some of the complainants that they could leave, he extended a warning that they would either not heal or could even die if they were to do so. In that way he made sure that they were under his control for as long as he deemed it necessary.

[240] In those instances where the accused explained the treatment administered before or after sexual intercourse took place, it amounted to the following: That he had *pushed the medicine deeper* (with his penis) (count 1); that *this was the manner in which he treated* (counts 2 + 3 and 5 + 6); and, that *what he was doing was not sexual intercourse as such*, but that it was part of the treatment (count 11). In those instances where the complainants became doubtful and made enquiries as to whether this was how he treated his patients, they were called in by the accused and reprimanded for divulging information about his treatment. When complainant in counts 5 + 6 made similar enquiries, she was advised by a fellow patient not to return to the accused's sleeping room. In all these instances the complainants had to take up a certain position on the bed *so that he could treat (smear) them*. At no stage were they informed that he wanted to have sexual intercourse with them or obtained their consent prior thereto. In some instances nothing was explained prior to the sexual intercourse taking place and in some instances an explanation was only given afterwards. When considered objectively, it stands central in the evidence of all the complainants that they truly believed that sexual intercourse formed part of the accused's treatment.

[241] That the accused knew sexual intercourse between a traditional healer and his customers is not only morally wrong but also unlawful, is clear from the complainants' evidence about the accused having specifically instructed them not to speak out (about him having had sexual intercourse with them) – in some instances coupled with warnings that they will not heal or would lose their sanity. To Helvi Nakale (complainant in count 8) he said not to tell her parents about the sexual intercourse 'as it would cause problems'. On another occasion the accused ensured Mrs Amaambo, that, unlike other traditional healers, he does not have sexual intercourse with his customers – confirming his evidence that he knew it was not permitted (count 4). I am accordingly satisfied that the accused realised at all relevant times that acts of sexual intercourse committed with the complainants in these counts, were unlawful.

Conclusion

[242] The court is for the foregoing reasons convinced beyond reasonable doubt that the accused committed unlawful sexual acts with the complainants under coercive circumstances as set out in s 2 (2)(h) of Act 8 of 2000.

[243] In the result, on counts 1; 2 + 3; 5 + 6; 8 and 11 the accused is found guilty of rape in contravention of s 2 (1) of Act 8 of 2000. On counts 4; 7; 9 + 10; 12 and 13 the accused is found not guilty.

JC LIEBENBERG
JUDGE

APPEARANCES

STATE

D Lisulo

Of the Office of the Prosecutor-General, Oshakati.

ACCUSED

P Greyling

Instructed by Jan Greyling and Associates,

Oshakati.