

REPORTABLE

CASE NO.: SA 90/2014 and

SA 28/2015

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE

Appellant/Respondent

in cross-appeal

and

RALPH MZUVUKILE MTSHIBE

Respondent/Appellant

in cross-appeal

Coram: DAMASEB DCJ, MAINGA JA and HOFF JA

Heard: 13 July 2016

Delivered: 22 August 2016

APPEAL JUDGMENT

MAINGA JA (DAMASEB DCJ and HOFF JA concurring):

[1] This is an appeal by the State in terms of s 316 A(1)(a) of the Criminal Procedure Act 51 of 1977 against the acquittal of the respondent by the High Court on count 2 of the indictment, ie the rape of Ms P B in contravention of s 2(1)(a) read with sections 1, 2(2), 3, 5, 6 and 7 of the Combating of the Rape Act 8 of

2000 (the Act). The respondent also lodged a cross-appeal with leave of this court on petition against the sentence of 90 years imprisonment imposed on the respondent in the High Court on counts 5 and 6 of the indictment.

[2] The respondent was indicted in the High Court on six counts: They are as follows:

1. Count 1 – Kidnapping of Ms P B;
2. Count 2 – Rape of Ms P B in contravention of s 2(1)(a) read with ss 1, 2(2), 3, 5, 6 and 7 of the Act;
3. Count 3 – Assault with intent to do grievous bodily harm on Ms P B
4. Count 4 – Kidnapping of Ms J D A
5. Counts 5 and 6 – Rape of Ms J D A in contravention of s 2(1)(a) read with ss 1, 2(2), 3, 5, 6 and 7 of the Act.

The respondent was convicted on count 3 to which he had pleaded guilty and counts 5 and 6. He was acquitted on the two counts of kidnapping and on count 2 the subject matter of the state's appeal.

[3] The trial court gave a detailed account of the crime on count 2 but a summary of the more important evidence adduced before the trial court on count 2, has been rendered necessary.

[4] I turn to a broad summary of that evidence.

[5] The alleged crime took place in the coastal town of Lüderitz on 13 December 2003. The complainant Ms P B and her brother went to Simon Pius Bar (the bar) the evening of 13 December 2003. At some point during their stay there, her brother left her at the bar to check on a friend. The brother took long to return, and as it was going for midnight she wanted to go home. The respondent approached her and offered to take her home. She accepted the offer as the respondent appeared to be 'a gentleman'. They left the bar. On the way the respondent started to touch her on the shoulder. She told him to leave her, but instead the respondent grabbed her and held her hands behind her back. At some point she released herself from the respondent's grip. She ran into one of the homes whose gate was open but before she could enter, a man who was at the gate closed the gate.

[6] The respondent who was pursuing her got hold of her again and held her hands behind her back again. He took her to the graveyard. At the graveyard the respondent pulled out a red pocket knife and threatened to kill her if she did not comply with his orders. She testified that she saw the knife as the scene of the crime was illuminated with lights from the street. He instructed her to lay down and pulled down her panty with his right hand. He laid on top of her and had sexual intercourse with her without her consent. After that ordeal the respondent ordered her to stand-up. The respondent informed her that he knew where she was residing and offered to take her home which he did. He took her up to the gate of the house belonging to Coleridge Lento where her cousin Frances Deborah Matthys resided in the outside room. When she entered the room where her cousin resided, she made a report to her cousin that she was with a man by the

name of Ralph. She did not report the rape because she was too embarrassed to say she was raped.

[7] Ten days later on 23 December 2003, the respondent arrived at the same house where he had accompanied the complainant to after the alleged rape on 13 December 2013. He knocked at the door of the outside room where the complainant was by herself. The complainant enquired as to who was knocking. The respondent asked the complainant to open the door. She recognised the respondent by his voice. The owner of the house, Coleridge Lento, asked the respondent what he was looking for. He said he was looking for the complainant. The complainant opened the door but the respondent was not at the door. She asked Coleridge to call her cousin's boyfriend. Coleridge instructed her to get into the main house. Coleridge got into his vehicle and drove away. Once Coleridge had left, the respondent reappeared. The complainant entered the main bedroom where the disabled wife of Coleridge was in bed. She hid behind the wife of Coleridge. The respondent also entered this main bedroom and removed the complainant from the bedroom and the house to the street. The complainant was on the ground, but the respondent dragged her. She screamed for help and got loose from the grip of the respondent. She ran into another house whose door was open. Respondent followed her into that house. In the house was a boy of about 14 years old who managed to push the respondent out of the house. The complainant left the boy and the respondent at the door, she knocked at one of the rooms and a woman who turned out to be Karolina Daniels (also a witness in this case) opened the door for her. Karolina Daniels called the police who came to take the complainant to the police station.

[8] At the police station the complainant reported the incident, how she was removed by force and dragged from Coleridge Lento's house and the rape that took place on 13 December 2003. The complainant further testified that when she was raped on 13 December 2003 she did not know Lüderitz well as she had just arrived in Lüderitz for the first time on 1 December 2003. She also testified about her injury on her right hand. She sustained the injury on the evening of 13 December 2003 when she fled from the respondent, and landed on a broken bottle.

[9] Coleridge Lento confirmed the complainant's version about the respondent knocking at Deborah Matthys' room. The witness testified that while he was in his house he heard a knock at the door of Frances Deborah Matthys' room. He opened a curtain and he saw that it was Vukile, the respondent. He asked him what he was looking for as the persons who reside in that room had gone to work. The respondent said he was looking for a girl. The witness told him that there was nobody in that room. The respondent moved from the door and knocked at the window. While the respondent was knocking at the window, the complainant opened the door and ran into the main house. The witness opened the door of the main bedroom for her and she entered and she went to hide behind the witness' wife who was in bed. The witness left and when he returned the complainant was gone.

[10] Karolina Daniels testified that she knew the respondent from childhood. She knew the complainant since 23 December 2003 when she ran into their

house. She was in one of the rooms when she heard her children and that of her sister screaming. She ran to the living-room where the children had run to and they had locked the middle door. Through an opening she could see a girl (the complainant) pushing the outer door from the inside wanting to close it and another person outside was pushing the door wanting to open it. The person outside managed to open the door and entered the house and she could see that it was Vukile, the respondent. The witness' two brothers also arrived at that time and one Shiveni told the respondent to get out of the house. The complainant was knocking at the door of the middle room and asking for the people in the living room to open. The witness opened the door, went out and told the respondent to get out. The respondent said he will get out only if the girl also gets out. The witness asked the respondent whether the girl was his wife, to which he said she was his wife. The witness asked the complainant whether the respondent was her boyfriend to which she replied in the negative and further said she did not know him. The witness further asked the complainant why would the respondent follow her if she did not know him. It was at that point that she told the witness that the Saturday evening she was at the bar the respondent raped her at the graveyard. When she made that report the respondent was still in the yard in front of the house with the complainant's shoes in his hands. The witness asked the complainant why she did not report the matter to the police station, and her reply was that she did not know where the police station was. Karolina called the police who came and took the complainant with them. She further testified that the complainant was scared and she was bare feet.

[11] Nicolene Daniels corroborated her aunt Karolina's evidence. She was at the house of her aunt Karolina washing clothes in the yard. She was with two uncles. While in the yard she saw the complainant and the respondent tussling outside their yard. The complainant got loose from the respondent's grip and ran away. She jumped over their fence and ran in their house. The respondent also jumped over the fence pursuing the complainant. The respondent was shouting that the complainant should get out of the house and that she was his girlfriend. The complainant was also saying she does not know the respondent, the respondent wants to kill her. The witness and the two uncles entered the house and they asked the complainant to leave the house. The complainant said she would not leave before the respondent left that premises as she was afraid he was going to kill her. The two uncles asked respondent to leave and he jumped over the fence into the street. The witness further testified that the complainant was confused, full of dust and crying. During cross-examination when asked why the complainant testified that she never told anybody about the rape, the witness replied that as the complainant was running into the house she was screaming saying the man (respondent) wants to kill her, he had already raped her and they (people of that house) should call the police and that they called the police because they all know the respondent, he is a danger to the community and he is aggressive.

[12] Frances Deborah Matthys testified that the complainant is her cousin. On 14 December 2003 around 2h00, while in her room with her boyfriend she heard a knock. When she opened the door it was the complainant and she invited her in the room. The complainant entered and she started to undress herself. She said

something terrible happened to her but that she would relate that something the next day. The witness implored the complainant to tell her. The complainant then said someone wanted to stab her with a knife and then she started crying. The witness asked her whether she knew the person and what his name was. The complainant said the person's name is Ralph. She also informed the witness that she attempted to run away from the person and fell on a broken bottle which cut her in the palm of the hand. On 17 December 2003 the complainant asked the witness to dry her face cloth. She asked her as to what was going on and she replied that her hand was sore. The witness told her to put some ointment on the hand and told her that she must go to the clinic but the complainant refused.

[13] While she was at work Coleridge Lento approached her and informed her that someone was bothering the complainant. She asked for permission to be excused from work but it was declined because it was busy at work. Later on the complainant called her from the Woman and Child Protection Unit. She went to the Unit and she learnt for the first time that the complainant was raped. She further testified that the complainant was new in Lüderitz, she arrived in Lüderitz at the beginning of December 2003. She knew the respondent but she denied inviting him to her place.

[14] Sergeant Petrus Nyaba was the investigating officer in the crime reported by the complainant. He testified that on 23 December 2003, the complainant was brought to his office at the Woman and Child Protection Unit. She reported the incident that took place on 23 December 2003 and how it happened. She also reported the rape on her that took place on 13 December 2003. The complainant

informed the witness how she met the respondent at the bar, how they left the bar, how the respondent started touching her while on the way, how respondent grabbed her hands, how she freed herself from his grip, and how she was recaptured. The witness further testified that the complainant told him that the respondent took her to the graveyard where he threatened to kill her if she did not comply with his orders and how he raped her in a certain room at the graveyard. To cut the version short, the complainant told him everything in her testimony as summarised above. The witness testified that after the complainant had made her statement, he took her to the doctor for examination. Thereafter the witness asked the complainant to take him to the graveyard. At the graveyard he testified that there was a room with a stoep. He further testified that the graveyard is next to the main road with street lights and near the Prison Service and that the lights from the street shine over the graveyard. On this point he corroborated the complainant's evidence that if the respondent produced a knife the complainant would have seen the knife as there was enough light at the room where the rape took place. He further testified that as he was taking down the complainant's statement she was crying and he observed injuries on both elbows of the complainant and on the knee and hand but he could not recall which hand.

[15] The respondent's version on the alleged rape of 13 December 2003 is crisp. It is in this form. He was at the bar on 13 December 2003. At about 23h00 he saw the complainant seated and he requested her to dance with him to which she agreed. They made introductions. While dancing the complainant told the respondent that she was new in town and she did not know how to get back home. She also informed the respondent where her cousin Frances Deborah Matthys

was staying and that she was staying with her. The respondent offered to take her home since he knew the address. He accompanied the complainant home. When she had entered the house, the respondent left. Except for the evidence of meeting at the bar he denies the whole version of the complainant.

[16] Respondent further testified that after 13 December 2003, on a Friday he and the complainant met at Eddy's Bar. The complainant was in the company of her cousin Deborah. The complainant told her cousin that respondent was the person who took her home on 13 December 2003. Deborah invited him to visit them on a Saturday which he honoured. When he arrived, Deborah was doing laundry and the complainant was in the doorway. He was given a chair to sit down and offered a drink. They conversed and the respondent and the complainant agreed to meet at Pius' bar the following day but the complainant did not honour the appointment.

[17] The Tuesday which should be 23 December 2003, respondent went to the house where the complainant was staying with the purpose of taking the complainant to the beach as she had never been there. At that house he found her with Coleridge Lento the owner of the house. The complainant told the respondent to wait for her outside the house. She and Coleridge entered the house. Coleridge came out and drove away. Respondent entered the house and found the complainant with the wife of Coleridge. Coleridge's wife asked the respondent what he was looking for. It appeared to the respondent that the complainant had changed her mind to go to the beach and he suspected Coleridge to have bad mouthed him.

[18] Notwithstanding, the respondent testified that he left with the complainant. As they were walking the complainant entered a certain yard which, from the evidence, is that of Karolina Daniels. When she entered the yard she tripped and fell down. He entered the premises to fetch the complainant but the people in the house stopped him and chased him away.

[19] In brief, except for being at Coleridge and Karolina Daniels' houses he denied the version of the complainant as related by her.

[20] The court *a quo* raised the question for its determination thus: whether the accused (respondent) did commit a sexual act against the complainant. The learned judge correctly restated the law on single witnesses, namely, that in terms of s 208 of the Criminal Procedure Act 51 of 1977, 'an accused may be convicted of any offence on the single evidence of any competent witness'. That court also correctly found that it was common cause that it was the respondent who accompanied the complainant home from the bar. Stated differently there was no evidence of any nature before the trial court of any fact which suggests that the complainant was accompanied home by anyone other than the respondent, more so that the respondent admitted that fact. Respondent's evidence on the point was that he only left after she had entered the house. The trial court was also alive to the provisions of s 7 of the Act which provides, 'in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature, the court shall not draw any inference only from the length of the delay between the commission of the sexual offence or indecent act and the laying of a complaint'.

[21] The trial court reiterated the fact that the complainant was 18 years old and it appears that the court accepted her explanation of being embarrassed as the reason of her failure to have reported the crime, more so that the boyfriend of her cousin was also in the room. It also found that the absence of medical evidence supporting the version of the complainant that she was raped, was not an impediment to a finding that a sexual act was committed against the complainant.

[22] In paras 87 and 88 the trial court went further to say:

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

[88] The accused denied that he kidnapped and committed a sexual act against the complainant. Although the probabilities of the case appears to favour the version of the complainant, that after she left Pius’ bar she was only in the company of the accused, and having properly weighing the probabilities of each version I am not satisfied beyond reasonable doubt that the state had proved its case and there is no apparent reason why the accused’s version should be rejected. I therefore decided to give the accused a benefit of doubt on both counts of kidnapping and rape. The accused’s is found not guilty and acquitted.’

[23] Counsel for the appellant submitted that having found that the probabilities of the case appear to favour the version of the complainant the learned trial judge

misdirected herself when in the same vein she stated that there was no apparent reason why the version of the accused should be rejected. Counsel further contended that in coming to the conclusion that there was no apparent reason why the accused's version should be rejected the trial judge disregarded the compelling evidence given by the complainant and the strong corroborative evidence.

[24] I agree. The trial court did not elaborate on the probabilities that the court had taken into account; does not deal with the similarity in the *modus operandi* of the respondent according to the versions of Ms P B and the complainant in counts 5 and 6 Ms J D A, did not elaborate on the credibility of the complainant and that of the respondent, did not expressly deal with the impact of the report which the complainant had made to her cousin Deborah Matthys (that something terrible had happened to her that night and the injury she had sustained when according to her, she was trying to run away from the respondent) the corroborative evidence of Sergeant Petrus Nyaba of the room in the graveyard and the street lights that illuminate the graveyard and the room therein, and the probabilities of the case and the inferences to be drawn from the complainant's reaction when she was confronted by the respondent in the days that followed the incident of 13 December 2003.

[25] The complainant made a report to her cousin as soon as she arrived at her cousin's place. She reported that something terrible had happened to her that night and that she would tell the full version the next day. When her cousin pressed her to tell her ordeal, she said that someone wanted to stab her with a

knife and she started crying. The complainant also testified that when she was running away from the respondent, she fell down and landed on a broken bottle which injured her in the palm of her hand. That injury was corroborated by her cousin Deborah and Sergeant Nyaba. Even more compelling is the evidence of the graveyard and the room therein where the rape took place, the knife the respondent wielded to force her into submission and the light that illuminated the graveyard or the room where the rape took place.

[26] The complainant's version on that point is recorded as follows:

MS NYONI: Okay proceed --- When we arrived at the graveyard he said to me if you do not do what I say I will kill you.

Proceed. --- Then he said I must lie down, but before, My Lady, before I lay down he showed me a red pocket knife.

You said it was at night how did you see the knife? --- I have seen that, I have seen it, My Lady.

Was there any form of light? --- Yes, there was.

Okay. What kind of light was there? --- There was light from the roadside, My Lady.

He showed you a red pocket knife what then happened? --- Then he instructed me to lay down.

Proceed. --- Although I was putting up resistance he pulled my panty down with his right hand, My Lady.

COURT: You said you were struggling? --- Yes.

MS NYONI: Proceed. --- And he had his knife in his left hand.'

[27] Sergeant Nyaba's evidence in chief and cross-examination on the same point is recorded as follows:

'After you received this report from the complainant, did you go and see this room that she was talking about at the graveyard? --- Yes, I first took her to the doctor for examination. Thereafter then I took her to, I told her to show me that place, then she took me to the graveyard.

Was there a room at this graveyard? --- Yes, there was a room with the stairs as she said, or stoep in Afrikaans.

At this room at the graveyard, is there any form of lighting? --- Yes, the graveyard is next to the road, the tarred road, the main road as you are coming to this residence, as you going out, then there is a street light from that road, and also, it is also nearby the Prison Service. So that light shines over that place.

With the type of lighting system as you have just described, would the complainant have been able to see and identify this red knife? --- Yes, that is correct.'

[28] Sergeant Nyaba's evidence in cross-examination is in this form.

'So he grabbed her and then he took her up the mountain, or to a certain graveyard in the mountain? --- Yes, that is what she said.

And that is also what you informed the court that she told you? --- Yes.

Okay and at this graveyard, that is where she was raped? --- Yes, that is what she said.

Okay. You also told the court that she was raped on the stairs of this room? --- That is what she told me.

Sir the complainant told the court that she was actually raped inside this room and not on the stairs? --- That one I cannot say, but I am telling what she told me.

MS NYONI: Objection My Lady, that was not the evidence of the complainant. In fact the evidence of the complainant was that she was raped on the stoep. Okay, she did not use stairs, but she said stoep.

COURT: According to her, she was raped on the stoep.

MR MBOME: On the stoep. Let me rephrase my question. You also told the court that the complainant now, took you to this place where she was allegedly raped? --- Yes.

What, during what time of the day did you go to this place? --- After the examination because the statement, I finished the statement 13:20. So thereafter we went to the doctor. So from the doctor, we went to the scene, to the place.

So this was more or less during the day? --- Yes. Or late afternoon? --- It was during the day. During the day? --- Yes.

She also told the court that this place or this room is well lit, there is lots of light? --- You mean in there?

No, I mean in the surrounding of that room? --- Yes, there is street lights.

The street lights? --- The lights from the side of the Prison.

Have you been to this place at night? --- No, but I was at the Prison and I could see also the place, the vicinity where the light can go. But have you been to the place at night, you yourself, just to go and see how well lit it is? --- No, I was not there.

Seeing that the incident took place, you cannot say early night, it must have been early morning hours? --- Yes, one would say.

And you have been to that place yourself to see how well lit the place is? --- No, I was not. But as I said, I used to be at the Prison and I know when you are at the Prison you could just imagine that this light can go up to there.

You could imagine, but you were not there yourself? --- You can even see like from the Prison, because there is a canteen where police officers and prison wardens can also come and enjoy themselves. So when you are there, you can see how far the light of the Prison Service can go and the street lights as well.'

[29] It was common cause that the complainant was new in Lüderitz. She may have known about the graveyard but most certainly not about a room with a stoep, let alone the lights from the main road that illuminate the area where the crime took place except that she was there and during the night.

[30] The incident of 23 December 2003 to which the respondent pleaded guilty to the crime of assault with intent to do grievous bodily harm lends credence to the complainant's version on the crime of rape. When the respondent came knocking on the door of the room in which the complainant was, she refused to open the door for him, and she was visibly afraid when she saw the respondent. When she found the opportunity she left the room she was in and ran into the main house into the bed-room of the owner of the house Coleridge and she hid behind Coleridge's wife. When Coleridge left to go to town, respondent entered the house and the bed-room where the complainant was and forcefully removed her from the room into the street where he dragged her while she was on the ground. She continued to struggle for her freedom and when she released herself from his grip, she ran, jumped the fence and ran into the house of a stranger Karolina Daniels for protection. In an attempt to get her out of the residence of Karolina Daniels the

respondent lied to Karolina Daniels that the complainant was his girlfriend. The complainant refused to leave the house of Daniels while the respondent was still on the grounds of Daniels' premises. Respondent was then asked or chased away from Daniels' premises.

[31] It is improbable that the complainant would have, without any cause, snub 'the good Samaritan' who accompanied her home when she could not find her way home from the bar. It is conduct opposed to the respondent's version. The trial court should have found that the respondent was not a credible witness. Deborah denied meeting the respondent at Eddy's bar in the company of the complainant, she denied inviting the respondent to her residence and denied respondent visiting her at her residence. He lied to Karolina Daniels about the complainant being his girlfriend. In his evidence in chief he was asked pertinently whether the complainant was his girlfriend, and his reply was that 'it did not go far at that time'. The respondent pleaded guilty to the crime of assault with intent to do grievous bodily harm on the complainant. In paras 3.1, 3.2 and 3.3 of his plea explanation he admitted assaulting the complainant by grabbing her, kicking her and dragging her while she was on the ground and admitted the injuries she had sustained. In his evidence in chief and cross-examination he denied assaulting the complainant. He was asked pertinently in cross-examination thus:

'So you never laid your fingers on the complainant. The only way I laid a finger against her is when I took her by her arm and take her out of the house.'

When he was pressed on his plea of guilty, he said he was forced by his lawyer to sign the statement that recorded his plea.

[32] The respondent's evidence was also contradicted by independent witnesses (Coleridge Lento, Karolina Daniels and Nicolene Daniels) as regards the events that took place on 23 December 2003.

[33] The trial court should have considered the similarities in the versions of Ms P B and Ms J D A (the complainant in counts 5 and 6). Both complainants were young women, new in Lüderitz and stranded at night and in both cases the respondent offered to take them home. The complainants both testified that they agreed to go with the respondent because he appeared to be a 'gentleman'. They both testified that the respondent took them up a mountain and raped them. Both complainants testified that the respondent wielded a knife to subdue them into submission. The trial court accepted the evidence of Ms J D A that the respondent had a knife and made similar threats testified to by Ms P B to her. But I assume that, although the trial court did not say so, it rejected the evidence of Ms P B about the red pocket knife she saw with the respondent and threatened with.

[34] From the evidence as a whole, the trial court was on point when in para 9 of its judgment on sentence it stated:

'The accused's conduct show that he has no respect for women's physical integrity and he does not attach any value to their dignity. He goes around targeting young women who are new in Lüderitz pretending to be a good Samaritan, yet he is a monster with a devious mind, and planned to take them to

a secluded place in order to rape them to satisfy his sexual desires. The accused is a callous rapist, and from the evidence I conclude that the complainant must have had a terrifying experience.'

[35] I may add that respondent is heartless: when on the pretext of being a good citizen and a good Samaritan in the true sense of the word, offered Ms J D A who had just arrived in Lüderitz, and missed the relatives who were waiting for her because of the breakdown of the vehicle she was travelling in. She must have been desperate and anxious to get home. But that condition she was in was exacerbated when she was threatened with a knife and raped. There is no possibility that respondent would have accompanied Ms P B home as he says without attacking her. In the case of Ms J D A, her version of rape was corroborated by DNA evidence but the respondent without any evidence refuting the DNA evidence, disagreed with the result. When he moved the complainant from her place by force on 23 December 2003, in broad daylight, in the presence of witnesses, there can be no doubt that he intended to impose himself on her as he did on 13 December 2003.

[36] Counsel for the respondent submitted that there were generally some contradictions, inconsistencies and improbabilities in the complainant's version, as well as her version compared to that of other state witnesses. Counsel further adumbrates the said contradictions and inconsistencies. Counsel further made much about the inconsistencies of the complainant's version on the alleged injury in the palm of her hand on 13 December 2003. He contended that there are inconsistencies of what the complainant said and what her cousin said about the said injury and that she never told Sergeant Nyaba about that injury. It must be

remembered that at the time the complainant gave her statement to Sergeant Nyaba she was hurt and she was crying. Karolina testified that she was scared and Nicolene described her as confused. In that condition, in my opinion, she could not be expected to remember every little detail that happened to her. After all, that injury is not the only corroborative evidence of her testimony as I have shown above. It must also be remembered that the complainant was only 18 years old at the time, which fact the trial court considered. It also appears that the trial court accepted her reason why she did not report the crime to her cousin when she arrived at home. The inconsistencies counsel for the respondent relies on are peripheral issues, like, whether complainant and respondent spoke when they met at the bar, whether they had a conversation as the respondent escorted her home, whether she saw a window, or a door in the room she was raped. It may raise questions about her replies when asked by different individuals why she did not report the incident, for example, she told Karolina Daniels that she did not know where the police station is. It is also strange why her cousin did not follow up the next day to ask her what she meant by something terrible happened to her. A person in her position, threatened with a knife, most probably thought it was the end of her life, would have had no chance to observe whether the room where she was raped had windows. What is compelling in my opinion is the fact that she identified the place where the crime took place, particularly the lights from the main road that illuminated the scene of the crime. That evidence is corroborated by Sergeant Nyaba even in more detail. As I have already stated she could not have made that observation unless she was at the graveyard at night. The issue before the trial court was whether the respondent committed a sexual act on the complainant. As I demonstrated above, there was evidence *aliunde* to convict the

respondent. The court could not have found that the versions of the complainant and the respondent were mutually destructive as the versions were conflicting and mutually exclusive. The respondent being an unreliable witness, the probabilities support the state's version that he raped the complainant.

Thus, on the evidence viewed as a whole, I am satisfied that the complainant told the truth. The respondent was, as already said, an unreliable witness and his version is not reasonably possibly true. When the trial court acquitted the respondent on count 2 it misdirected itself on the facts. As a result the appeal should succeed.

[37] I now turn to consider very briefly the cross-appeal on the sentence by the respondent. There is very little to be said about the sentence of 90 years imposed on the respondent on counts 5 and 6. The trial court imposed minimum sentences as ordained by Parliament for a repeat offender, and the respondent is one. At the time when he was sentenced for the crimes which are the subject matter of respondent's cross-appeal, he had ten previous convictions, including a rape conviction. All ten committed in Lüderitz. Nicolene Daniels a witness in the assault committed on Ms P B on 23 December 2003 testified that, although inappropriately stated during the trial, respondent was known in Lüderitz, he is a menace to that community and aggressive and indeed he is, given his record of previous convictions. The trial court recorded that on the crime of rape he was convicted and sentenced in January 1997 and released in 2002. In 2003 he committed the rape on Ms P B and 2005 on Ms J D A. In my opinion when he committed the two offences, the suspended sentence of two years he received on the rape charge he

was convicted in 1997 which was suspended for five years was still hanging over his head. The trial court also recorded that he was on bail on the rape he was convicted and sentenced to 90 years but his record of previous convictions shows that while on bail he committed crimes involving violence, namely on 27 February 2006 he was convicted of assault with intent to do grievous bodily harm, on 26 February he was convicted on two counts of assaulting a police officer and two counts of *crimen injuria*. On 10 July 2008 he was convicted of housebreaking with intent to steal and theft.

[38] The reported incidences of rape as it was said in *S v Matyityi* 2011 (1) SACR 40 (SCA) paras 22 and 23 are alarming, a scourge that appears far more widespread, a pandemic that has engulfed our society with no real let-up and an embarrassment to all of us. Parliament has spoken in the Combating of Rape Act and the courts should implement the minimum sentences prescribed in the Act when it is necessary.

[39] In regard to the cross-appeal, since the crimes were committed on the same day, probably on spaced intervals, the trial court should have considered to order the sentences to run concurrently or a portion of the sentence on count 6 to run concurrently with the sentence on count 5. To order the sentences to run concurrently in the circumstances of this case would not amount to subverting the will of the legislature. What is crucial is that he received the minimum sentences, ie 45 years as s 3 of the Act dictates. With the success of the appellant (state) on the acquittal of the respondent on count 2, that minor success as it were for a lack of a better word, is of little comfort to the respondent as we are bound to impose another forty five years for that conviction. I find nothing in the circumstances of

the respondent as recorded by the trial court to deviate from the mandatory minimum sentence as per the dictates of s 3 of the Act. As the trial court correctly pointed out, respondent lacks 'respect for women', a false Samaritan. The community of Lüderitz is crying for protection. Aggravating against the respondent is the fact that he showed no remorse.

[40] Consequently I make the following order.

1. The appellant's (state) appeal succeeds.
2. The acquittal of the respondent on count 2 is set aside.
3. The respondent is found guilty on count 2 and he is sentenced to forty-five (45) years imprisonment of which twenty five (25) years is ordered to run concurrently with the sentence of forty five (45) years on count 5.
4. The cross-appeal partially succeeds.
5. The forty-five (45) years imprisonment on count 6 is ordered to run concurrently with the sentence of forty five (45) years on count 5.
6. The sentence on count 2 and the order, ordering the forty five (45) years imprisonment on count 6 to run concurrently with the sentence on count 5, are antedated to 5 March 2013.

MAINGA JA

DAMASEB DCJ

HOFF JA

APPEARANCES:

Appellant:

B M Uirab

Instructed by the Director of Legal Aid

Respondent:

I M Nyoni

For the State