

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 25/2010

In the matter between:

THE STATE

and

ELDO RICARDO KATZAO

Neutral citation: STATE *v* KATZAO (CC25-2010) [2012] NAHCMD 52
(6 November 2012)

CORAM: NDAUENDAPO J

Heard: 7/2012

Delivered: 06 /11/2012

Flynote: Criminal law—Accused charged with two counts of kidnapping and three counts of rape in contravention of section 2 (1) (a) read with sections 1,2, (2) ,3, 5, and 6 of the Combating of Rape Act 8 of 2000. Accused pleaded not guilty—Bare denial—Kidnapping depriving the two complainants of their liberty, grabbed them, hold them against their will—Rape-inserting his penis in the vagina-Corroboation by other

witnesses—Guilt of the accused proven beyond reasonable doubt—Coercive circumstances—Threats, knives used to threaten, hold against their will. Convicted as charged.

Summary: Criminal law—The accused is arraigned in this court on two counts of kidnapping and three counts of rape in contravention of section 2(1) (a) read with sections 1,2, (2), 3, 5 and 6 of the Combating of Rape Act 8 of 2000. On the counts of kidnapping the state alleges that on 9 November 2007 and 25 April 2008 respectively, 'near Westerkim in the district of Karasburg the accused did wrongfully, unlawfully and intentionally deprive Libertina Hatzkin, 14 years old, and Petronella Erna Prinz, 13 years old of their liberty of movement by detaining them against their will. The state also alleges that he raped Libertina Hatzkin on 9 November 2007 and Petronella Erna Prinz on two occasions on 25 April 2008 in contravention of section 2(1) (a) read with sections 1,2 (2), 3, 5 and 6 of the Combating of Rape Act 8 of 2000. The accused pleaded not guilty. He denied the allegations. On the first count of kidnapping Libertina Hatzkin testified that she was with her friends when they saw the accused under a tree with other man. Accused uttered words to the effect: *'hey are you not school children, why don't you go and sleep'?*. Libertina Hatzkin replied by saying *'why can't you go and sleep'*. The accused came running and grabbed Libertina Hatzkin and told them that he was 'ou kat' and walked away with Libertina, took out two knives and threatened to harm her. He took her to a certain house, took off her clothes and his. He then inserted his penis in her vagina and raped her.

The accused denies that his name is 'ou kat'. Denies that he grabbed kidnapped and raped the complainant. Complainant's evidence corroborated by other witnesses.

Court satisfied that the state proved the guilt of the accused beyond reasonable doubt. Court found that coercive circumstances present in that the accused threatened the complainant, had two knives with which he threatened her, slapped her, forcefully removed her clothes and raped her.

Criminal law-Rape Petronella Prinz (complainant), testified that she was on her way home when the accused came behind her and grabbed and held her mouth with his hand. She tried to run but the accused pursued her. Pulled her in the bush and when they reached a tree asked her to take off her clothes, inserted his penis in her vagina and raped her. After he finished, they walked a distance and again the accused asked her to take off her clothes otherwise he will harm her. She complied, lay on the ground and the accused again inserted his penis in her vagina. Accused denied that he saw the complainant on that day. His witness, contradicted him and testified that the accused met with the complainant on the day of the incident. Other witnesses corroborated the evidence of the complainant that she was crying, there were strands in her hair.

Court satisfied that the state proved the guilt of the accused beyond reasonable doubt. Coercive circumstances present—Accused threatened the complainant with harm, held her against her will and forcibly removed her clothes. Convicted as charged.

ORDER

The accused is convicted as charged.

JUDGMENT

NDAUENDAPO J

[1] The accused is arraigned in this Court on two counts of kidnapping and three counts of rape in contravention of section 2 (1) (a) read with sections 1, 2(2), 3,5,6 and 7 of the Combating of Rape Act 8 of 2000.

On count one the state alleges that:

'In that upon or about the 9th of November 2007 at or near Westerkim in the district of Karasburg the accused did wrongfully, unlawfully and intentionally deprive Libertina Hatzkin, a 14 years old female, of her liberty of movement by detaining her against her will.'

On count two the state alleges that:

'In that upon or about the 9th of November 2007 at or near Westerkim in the district of Karasburg the perpetrator did wrongfully, unlawfully and intentionally commit or continue to commit a sexual act with Libertine Hatzkin (the complainant) aged 14 years by inserting his penis into her vagina of the complainant under the following coercive circumstances:

1. *by the application of physical force to the complainant; and/or*
2. *threatening by word or conduct to apply physical force against the complainant;
and/or*
3. *threatening by word or conduct to cause harm to the complainant under
circumstances where it was not reasonable for the complainant to
disregard the threats; and/or*
4. *where the perpetrator is more than three years older than the complainant;
and/or*
5. *where the complainant is unlawfully detained*
6. *by wielding weapons to wit, two knives in connection with the commission
of rape*

On count three the state alleges that:

'In that upon or about or 25 April 2008 and at or near Westerkim in the district of Karasburg the accused did wrongfully, unlawfully and intentionally deprive Petronella Erna Prins, a 13 years old female, of her liberty of movement by detaining her against her will.'

On count four the state alleges that:

'In that upon or about the 25th April 2008 and at or near Westerkim in the district of Karasburg the perpetrator did wrongfully unlawfully and intentionally commit or continue to commit a sexual act with Petronella Erna Prins (the complainant) aged 13 years old by inserting his penis into the vagina of the complainant under the following coercive circumstances:

1. *by the application of physical force to the complainant; and/or*

2. *threatening by word or conduct to apply physical force against the complainant;
and/or*
3. *threatening by word or conduct to cause harm to the complainant under
circumstances where it was not reasonable for the complainant to
disregard the threats; and/or*
4. *where the perpetrator is more than three years older than the complainant;
and/or*
5. *where the complainant is unlawfully detained.*

On count five the state alleges that:

'In that upon or about the 25th April 2008 and at or near Westerkim in the district of Karasburg the perpetrator did wrongfully unlawfully and intentionally commit or continue to commit a sexual act with Petronella Erna Prins (the complainant) aged 13 years old by inserting his penis into the vagina of the complainant under the following coercive circumstances:

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

[2] The accused is represented by Mr Ujaha and the State by Ms Nyoni. The accused pleaded not guilty to all the charges. He told the Court that the basis of his defence will become apparent during the trial.

EVIDENCE IN RESPECT OF COUNT ONE AND TWO

[3] In respect of count one and two, the state called the following witnesses: Libertina Hatzkin, Esme Rooi, Laurencia Swartbooi, Ronel (Meidekoes) Jobs, Wilemmina

Jobs, Cedric Stefanus, Anna Jobs, Elwyn Vries and Elen Beukes, Dr Samuel Lyimo, Umana Tjazapi and warrant officer Gaoseb.

[4] **Libertina Hatzkin** (complainant) testified that she was 18 years old. She knows the accused through his sister Paulina. On 9 November 2007, a Friday night, she, Esme, Ronel, and Laurentia left home looking for John who was supposed to give some money to Esme. They did not find John and on their way home they met a group of men standing under a tree. Amongst the men was the accused who shouted: *'Hey are you not school children why can't you go and sleep.'* The complainant replied by saying 'why don't you go and sleep'. The accused came running behind them and grabbed her by the hand and he asked who talked back and she replied that she did. Ronel told the accused to leave her and he replied that he is 'ou kat'. The complainant asked him to leave her, but he refused. She testified that she wanted to scream, but the accused threatened to hurt her. He took out two knives and he scratched her on the jacket with the okapi knife. He pulled the complainant and walked in the direction of squatter a camp and went to a certain house and opened the door with a knife. He pulled her inside the house. She asked him to leave her, but he refused and he slapped her in the face. She testified that he ordered her to take off her clothes and she refused. He pulled off her jean on the one leg and her panty. She was crying and he ordered her to stop. She testified that she fell on the ground on her back. He pulled his trouser halfway and took his penis and inserted it into her vagina. After that he told her that he was taking her to his mother's house. While he was busy dressing, she managed to run away. She ran up to their house. She went inside the toilet and when she was urinating she saw things like mucus coming out of her vagina. She further testified that her cousin, Wilhelmina, came in the toilet and asked whether Cedric (her boy friend) had beaten her again. She told Wilhelmina that the accused had raped her. She went out and told Cedric that the accused had raped her. Cedric asked her whether she wanted to make a case. She agreed. They proceeded to the police station and she opened a case of rape against the accused.

[5] **Esme Willemina Rooi** testified that she knows the complainant as well as the accused. She testified that she grew up in front of the accused as they were staying at the same farm with his parents. She testified that on 9 November 2007 she was with the complainant, Ronel and Laurencia, they left home looking for John who was supposed to give her money. They went to Robbies' bar, but he was not there. She further testified that the accused came running behind them and grabbed the complainant. They walked on and told the accused to leave the complainant alone. The accused then said he is 'ou kat'. She testified that there was light from Robie's bar that is why she could identify the accused. After the accused grabbed and went with the complainant, they went to look for help. They found Cedric at Isaaks' bar and he told them to go and look for her at home. They found her at home. The complainant told them that the accused threatened her with two knives and raped her.

[6] **Laurencia Swartbooï** testified that on 9 November 2007 She, Ronel, Esme and the complainant went together to Robie's bar to look for John. He was not there from there they decided to go home. On their way they saw a group of men standing under a tree. They continue walking and then the accused said to them: "hey are you not school children why can't you go and sleep". The complainant replied by saying 'why don't you go and sleep'. The accused came running from behind and grabbed the complainant. She, Esme, Ronel started to walk faster. She looked back and saw the complainant and the accused walking slowly. She and Esme went to look for help and they went to Isaac's bar and they found Hakae the brother of the complainant. They told him what had happened. They came with Hakae and looked for the complainant, but could not find her. They proceeded to the complainant's house and found her there. She told them that she was raped by the accused. She was crying and her eyes were red. They accompanied her to the police station where she opened a case of rape. She further testified that the complainant was rubbing her abdomen and she could not walk properly.

[7] **Ronel Meidekoes Jobs** testified that the complainant is her cousin. She knows the accused through his sister. On 9 November 2007 at night, they went to Robie's bar.

She was with the complainant, Esme and Laurentia and they went to look for John at Robie's bar. When they reached Robie's bar they found the accused and other men under a tree. The accused said to them 'why don't you go and sleep?' The complainant responded by saying '*why don't you go and sleep?*' The accused came running and grabbed the complainant. She told the accused to leave the complainant and he said I am 'ou kat'. They continued walking. At the gate she saw the accused slapping the complainant and she also saw two knives in the hand of the accused. The lightning was good as there were street lamps and light from Robie's bar. She got afraid and ran away to look for help. She ran up to Isaacs bar and found Cedric. She informed Cedric what had happened. He said they must go and look for her at home. They went home and she found her in the toilet, crying. She told her that the accused had raped her. She was dirty and the back of her hair was full of sand and according to her that is not how she was before she was grabbed by the accused.

[8] **Willemina Jobs** testified that on 9 November 2007 around 20h00 she went to Isaac's bar with Ronel, and the complainant. She left them there and returned home. The complainant later came back and went to the toilet and she decided to go and investigate. She found the complainant crying, rubbing her bladder and there was sand on her head. She asked her what had happened and she told her that the accused had raped her. They went to the police station and she opened a case of rape.

[9] **Hermanus Cedric Stefanus** testified that the complainant was his girlfriend from 2007 to 2008. He also knows the accused as 'ou kat'.

On 9 November 2007 he was at Isaacs bar playing pool. Ronel came there and told him that the accused took the complainant and went with her. He and Ronel went to look for her and could not find her. He later went to the house of the complainant. She was crying and she told him that the accused threatened her with two knives and raped her. Together with her, they went to the police station to open a case.

Dr Samuel Lyimo (medical doctor) testified that he examined the complainant and compiled a medico legal report (J88). His findings were: 'The hymen was perforated

and he also observed: 'head soiled with soil and sand on the occipital area' (back part of the head).

[10] **Anastacia Jobs** testified that she is the grandmother of Libertina. She accompanied Libertina on a Saturday morning to the police station and gave a statement. She told her that she was raped by the accused. The Sunday, the mother of the accused came to her and asked her to withdraw the rape case. She told her that she has no say over the case.

[11] **Elwyn Vries** testified that he knew the accused very well as he was a friend to his late son. He was also known as "ou kat" by his friends. On 14 November 2007 he and his wife took the accused to the police station.

[12] **Elen Beukes** testified that she is the investigating officer. On 9 November 2007 around 23h00 the complainant opened a case of rape. She told them that she was raped by the accused. Her face was reddish and her hair was full of sand at the back of the head. They took the complainant to the hospital. She further testified that there were huge lights in the location where the complainant was grabbed from.

Umana Tjazapi testified that he is the investigating officer. On the 9 November 2007 he took the complainant (Libertina Hatzkin) to the hospital. On 10 November (Saturday) at around 8h00 am he visited the accused's residence. He found him sleeping in his room. He went there because the accused was a suspect. He introduced himself and told the accused that he is suspected of having raped the complainant the previous night. He explained his rights to him and arrested him. He took him to the police station and found Sergeant Freyer there. He informed Sergeant Freyer that the accused was a suspect in a rape case and he must be under his supervision whilst he is going to meet sergeant Beukes. Later on when he arrived back at the police station, the accused was not there. Freyer told him that he gave permission to the accused to go to his work place and that he would be back in 5 minutes, but never returned. He went to search for him at his work place but he was not there. Warrant officer **Gaoseb** was also called

by the state. He prepared the sketch plan in respect of Libertina Hatzkin, the plan contains points from where she was kidnapped and raped.

EVIDENCE IN RESPECT OF COUNT THREE TO FIVE

[13] **I now turn to the evidence in respect of count three to five.** The following witnesses were called by the state: Petronella Erna Prins, Anna Van Schalkwyk (also known as Meidekoes), Lisbeth Prinz, Katrina Christiaan (also known as Rita), Colleen Brandt, Johannes Fourie, Lasi Prinz and Dr Ndjuguna.

[14] **Petronela Erna Prins**, the complainant, testified that she knows the accused as her friend's father's friend. On 25 April 2008 a Friday, between 16h00-17h00 she went to her friend's house (Meidekoes), the accused and Meidekoe's father were there drinking and smoking. She assisted Meidekoes with her laundry and from there they decided to go to a shebeen to drink katokere (ovambo traditional liquor). Meidekoes then decided to go home. By then Namas had joined them. She and Nama continued drinking. At 20h00 they walked home. Namas was walking in front and she behind. The accused came and grabbed her and hold her mouth. There was light from the street light. She was crying and told the accused to leave her. He refused and he took her in the district of Ubib. They came at a tree and he ordered her to take off her clothes and said she must lay on her back. He removed his shirt and trouser halfway and undressed her and laid on top of her. He inserted his penis in her vagina and raped her. After he finished, he told her to stand up. She was crying. She put her clothes on and they walked a distance. He again asked her to lie down otherwise he will harm her. She laid down because she was afraid. The accused then removed her clothes and he inserted his penis in her vagina and raped her. When he finished, he left her there. She stood up and walked close to Kandjala's bar. She saw her cousin, Elizabeth Prinz, she was crying and she told her cousin that the accused had raped her. They proceeded home and Rita (Katrina Christiaan) came there and asked her why she was crying. She told Rita that she was raped by the accused. Rita called the police and they arrived after few minutes.

[15] **Anna van Schalkwyk** (also known as Meidekoes) testified that she knows the accused as a friend of her father. He used to visit their house regularly. On 25 April 2008 the accused came to their house. The complainant also came there. After a short while she and the complainant went to a shebeen to drink katokere (ovambo traditional liquor). They had a few drinks and from there she went back home.

[16] **Lisbeth Prinz** a, cousin of the complainant, testified that on 25 April 2008 around 21h00 she was looking for the complainant. She found her not far from the house and she was crying. She was sitting around and massaging herself on her thighs and buttocks. She told her that the accused had raped her.

[17] **Katrina Christiaan** known as **(Rita)** testified that she knows the complainant and the accused as Cardo. On 25 April 2008 she was at her house and she heard a child crying. She walked over to the child and saw that it was the complainant. The complainant was lying on the ground, rolling, and complaining about pain. The complainant told her that she was raped by the accused. She then phoned the police.

[18] **Colleen Brandt** investigating officer, testified that she took a statement from the complainant and in the statement she related to her what had happened to her, she told her that she was raped by the accused.

[19] **Johanness Fourie** testified that he is a constable in Nampol. On 25 April 2008 he received a report that the complainant was raped. He and his colleague proceeded to Kandjala's bar, and when they arrived there, they saw the accused and when he saw them, he ran away in the dark. He testified that he saw him because there was sufficient light inside the shebeen. He then proceeded to the house of the complainant and found her lying in the yard. Her hands were between her legs and she was crying in the yard. He loaded the victim in the car- and took her to the hospital.

[20] **Lasi Prinz** testified that on 25 April she saw Petronella lying on the ground crying continuously.

[21] **Dr Ndjunguna**, a medical doctor, testified that, he examined the complainant on 26 April 2008 and compiled a medico legal report. Amongst his findings were that the complainant was anxious from her appearance. The doctor also testified that he did not check whether the hymen was intact or not.

[22] **Defence's Case**

The accused testified that he came to know Libertina Hatzkin when the case started. He denied that he kidnapped her on 9 November 2007. He testified that on 9 November 2007 during the evening he was at his friend's house (Reginald Phiri). At 21h30 he was at his girlfriend's house. He denied that he ever grabbed Libertina Hatzkin and told her that he was 'ou kat'. He denied having kidnapped her and then raping her. He testified that he was arrested five days after the incident and he denied the allegations that he left the police station whilst under arrest. He testified that sergeant Freyer told him to go to his work. He denied that he was hiding. He was arrested two days thereafter. He further testified that on 25 April 2008 he was at Karasburg and he denied that he was with Petronella Erna Prinz. He denied that he kidnapped and then raped her. He testified that he came to know Petronella when he was incarcerated and she wrote letters to him. He testified that nobody called him 'ou kat' only Cardo. He testified that on that date around 20h00 he was at home with his girlfriend (Charmane Philips).

[23] **Reginald Phiri** testified that on 25 April 2008 the accused was with him the whole day, at 20h00 they went to the accused's house. On the way they met Petronella Erna Prins sitting at the sewage pipe, crying. The accused went to her and asked her what she was doing. After that she stood up and ran in the street from there they proceeded to the accused's house. After 5 minutes he left and left the accused at this house.

Analysis of the Evidence in respect of count one and two

[24] **Definition of Kidnapping**

Snyman *Criminal Law* 4 ed (2002) at 462 defines kidnapping as follows: 'kidnapping consists in unlawfully and intentionally depriving a person of his or her freedom of movement and/or, if such person is a child, the custodians of their control over the child' He further states that: the duration of the deprivation has been regarded as a material element of the crime in some cases, and rejected as such in others. The weight of authority seems to favour the view that this time factor' is immaterial. It is submitted that this is the correct view.

At 465 the learned author further states that 'Deprivation for a short period of only some hours ought, therefore, to be sufficient'.

[25] The evidence by complainant, who was a minor at the time, was that on 9 November 2007 she, Esme, Petronella were walking in the street near Robie's bar and they passed a big tree and the accused was standing under the tree. The accused shouted at them by saying '*are you not school children why don't they go and sleep*' and she replied saying by '*why can't you go and sleep*'. The accused came running from behind and grabbed her by the hand. Ronel told the accused to leave the complainant and he replied by saying he is 'ou kat' and he refused to leave her. He took her to the outside street against her will and he took out two knives and threatened to harm her. The accused denied that his name is "ou kat" and he only came to hear the name "ou kat" after his arrest. That is clearly not true. Elwyn Vries testified that he knows the accused very well as he was a friend of his late son. He regularly visited his house and that to his friends he was known as 'ou kat'. The denial by the accused that he is known as 'ou kat' was clearly an attempt to distance himself from the scene. Mr Ujaha submitted that the witness did not properly identify the accused as the lighting was poor. The witness testified that the lighting was good in the area where he grabbed the complainant. There was light from the street lights as well as light from Robies' bar. That was also confirmed by sergeant Beukes who testified.

[26] The evidence of the complainant that it was the accused who came running and grabbed her is also corroborated by the Esme, Ronel and Laurencia. Esme also confirmed that they went to look for help after the person who grabbed the complainant refused to let go off her. Esme also confirmed that the accused person threatened the complainant with two knives and she went to look for Cedric at Isaacs bar. That evidence is also corroborated by Cedric. She could also not be mistaken about the identity of the accused as she knew him through his sister. She identified him by his look and voice and there was light. When she went to their house he used to be there Esme also testified that she grew up in front of the accused as they were staying at the same farm with his parents and therefore she could not be mistaken about the identity of the accused. I am satisfied that the prosecution proved beyond a reasonable doubt that it was, 'ou kat', the accused who grabbed the complainant , hold her against her will, took her away and thereby depriving her of her liberty.

[27] On the charge of rape the complainant testified that the accused who kidnapped her, took her to a certain house and he opened the door with a knife. She begged him to leave her, but instead he slapped her in the face. He ordered her to take off her clothes, but she refused. He pulled off her jean by one leg and her panty. She was crying and he told her to stop. She fell on the ground (sand) he took his penis and inserted it into her vagina and had sex with her. After he finished he said he will take her to his mother's house and while he was busy putting on his clothes, she ran away and went home. She went into the toilet and while urinating 'something like mucus was coming out of her vagina'. The complainant was extensively cross examined, but her evidence on the rape was not shaken. She knew the accused and could not be mistaken that it was him who raped her. After the rape and at the house she immediately told Willemina and Cedric that she was raped by the accused.

[28] Willemina Jobs also testified that she saw the complainant when she came back home that night and that the complainant went straight to the toilet and that she went to check on the complainant and found the complainant sitting with her head bend down and she was crying and that she was pressing her bladder.

[29] There is also evidence by Dr Samuel Lyimo who examined her and found 'that she was shocked' condition of clothing. 'slightly soiled' and 'head soiled with soil and sand' that corroborates her evidence that she was lying on the ground (sand) when the accused raped her. Willemina Jobs also saw sand on her head and when she left she was clean. She also testified that the complainant was happy before she left, but when she returned she was crying. . She further testified that when they were going to the police station the complainant could not walk properly. Cedric also gave evidence that corroborates the complainant's version. He testified that Ronel Jobs informed him that the complainant was taken by the accused. He went to look for her, but could not find her. He found her at home. She was crying and had sand on the back of her head. She told him that the accused had raped her and threatened her with okapi knife and another smaller one. Ronel Jobs also testified that the accused came running behind them and grabbed the complainant. She told the accused to leave the complainant and that he had two knives. She went to look for Cedric and told him what had happened. Later she went to the complainant's house and she found her there. She told her that she was raped by the complainant.

[30] Although the complainant was a single witness on the actual rape, there is overwhelming evidence that corroborates her version from the abovementioned witnesses. They saw that she was crying, that her hair was soil, she immediately told them that she was raped by the accused. There was no reason or motive given why all those witnesses implicated him. His defence was a bare denial. I closely observed the complainant when she testified in Court. She was a credible witness and she did not contradict herself. Her memories of the events were clear and she clearly narrated the events as they happened. The accused on the other hand was a very evasive witness. He denied the obvious such as, that there were street lights in the area where he kidnapped the complainant, that his name was 'ou kat'. Having regard to the totality of the evidence, I am satisfied that the prosecution proved the guilty of the accused beyond reasonable doubt. The evidence adduced also shows, that the sexual act committed on the complainant was committed under coercive circumstances. The

complainant was grabbed by the accused whilst with her friends, taken away against her will, threatened with two knives, slapped in the face, her clothes forcefully removed and then raped. In terms of the Combating of Rape Act (8 of 2000) that constitute coercive circumstances.

Analysis of Evidence in respect of count three and five

[32] The complainant, who was a minor at that time, is a single witness and I will accordingly treat her evidence with caution. I am also alive to the fact that before she was allegedly kidnapped and raped she had consumed katokere (ovambo traditional liquor). From the onset the accused was not a stranger to her. She testified that she knew the accused as her friend (meidekoes) father's friend. She saw him many times. She testified that on the 25 April 2008 between 16-17h00 she went to Meidekoes's house and the accused was there drinking and smoking with Meidekoes father. She also testified that whilst there the accused asked them (she and Meidekoes) to go and buy cigarettes for them, but they refused and he told them 'they will see'. She further testified that she went to drink katokere at a shebeen and saw that the accused was fighting in the street. Meidekoes went back to inform her father that the accused was fighting. She came back and informed her that her father was not there. They continued drinking katokere and meidekoes went home. She stayed behind and Namas joined her at the shebeen. She further testified that they left the shebeen at 20h00 and whilst on her way the accused came and grabbed her. She testified that there was light and she could see that it was the accused. The accused on the other hand testified that around 20h00 he was at home with his mother and girlfriend.

[33] When cross-examined by Ms Nyoni, he confirmed that he did not see the complainant prior to 25 April 2008 nor on 25 April 2008. He testified that he only saw her after he was locked up, that he did not see the complainant on 25 April 2008 is contradicted by Meidekoes and his own witness, Reginald Phiri. Meidekoes testified that the complainant came to their house on 25 April 2008 whilst the accused and her father were sitting, drinking and smoking. She stayed there for a while before they went

to drink katokere. Phiri testified that on 25 April 2008 he was with the accused at home. They spent the whole day together until 20h00, from there they walked to the accused's house and on the way they met the complainant at the sewage drain sitting with her head bowed down and crying. The accused went to her and asked her what she was doing and after that, she stood up and ran away.

[34] The evidence of Phiri clearly indicates that the accused met the complainant on 25 April 2008 at 20h00. The time is significant because according to the complainant it was around 20h00 that the accused grabbed her. I therefore reject the version of the accused that he did not meet the complainant on 25 April 2008.

[35] The accused testified that on 25 April 2008 at around 20h00 he was at home with his mother and girlfriend, yet he did not call either his mother or his girlfriend to come and testify that indeed he was at home during that time. The complainant testified that it was Cardo the accused who grabbed her. The complainant further testified that she was taken to the district of Ubibeb against her will where the accused raped her twice.

[36] Ms Nyoni submitted that it is worth noting that when the complainant was found by her cousin Elisabeth Prince, she informed her that she was not raped by someone else but by Cardo. There is also evidence by Elizabeth Prince, Rita and the Police officer Beukes that the complainant on the same night was rolling on the ground, crying and massaging herself on the thighs and on the buttocks when she reported that she had been raped by the accused.

Ms Nyoni further submitted that it is worth noting that when the complainant was interviewed by the investigating officer inspector Brandt, she also told her that she was raped by the accused person. She also informed Inspector Bandt about the request by the accused for them to go and buy tobacco and also that the accused was involved in a fight with an unknown man.

[37] The accused also testified that whilst in prison, the complainant wrote letters to him in which she apologized for accusing him of having raped her. Those letters (if the true and genuine) which were essential to his defence and in essence exonerated him of the serious allegations of kidnapping and rape were not produced. Apparently those letters got lost in prison. He also did not share the vital information with the investigating officer or any other police officer for that matter. If indeed those letters existed, the accused would have done anything in his power to cling to those letters for they were (if genuine) the key to his acquittal. He did not do that and the only inference to be drawn is that they simply did not exist. The accused is not being truthful. Not only did he testify about the letters, but he also testified that after he was out on bail, the complainant used to follow him and she even went to his place where his girlfriend asked him why she was following him and as Ms Nyoni submitted, he failed to call his girlfriend to corroborate this very important piece of evidence. I closely observed the complainant when she testified and she made a good impression on me. Despite the cross-examination by Mr Ujaha, the complainant evidence was not shaken at all. Although she consumed katokere and she was drunk, she testified that she was not so drunk not to appreciate what was happening around. Rita also testified that the complainant was not too drunk not to know what she was doing. She clearly remembered what had happened to her.

She remembered the events vividly. Her evidence was also corroborated by the witnesses who testified. They did not contradict each other. On the other hand the accused was clearly not a truthful witness. He clearly told untruth when he testified that he did not see the complainant on the day in question. His witness, Phiri, and a good friend, of his contradicted him on that aspect. They contradicted each on their whereabouts on that day. The accused testified that he was at Meidekoes' house between 16h00 and 17h00, whereas Phiri testified that they were together the whole day. He was also untruthful about the so-called letters that the complainant allegedly wrote to him. I am satisfied beyond reasonable that it was the accused who kidnapped the complainant thereby depriving her of her liberty and then raped her. The evidence is overwhelming, conclusive and undeniable. I fully agree with the submission by Ms

Nyoni that there were coercive circumstances in this case. The complainant testified that at some stage she tried to run and the accused grabbed her and took her against her will. He also threatened to harm her when she tried to resist his advances. The fact that she was being kept against her will also constitute coercive circumstances.

In the result, I am satisfied that the state proved the guilt of the accused beyond reasonable doubt.

I make the following order

The accused is convicted as charged.

GN Ndauendapo
Judge

APPEARANCE

ON BEHALF OF STATE

IM NYONI
FROM THE PROSECUTOR GENERAL OFFICE

ON BEHALF OF THE ACCUSED:

HR UJAHA
OF MBAEVA & ASSOCIATES
INSTRUCTED BY DIRECTORATE OF
LEGAL AID