

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: CC 12/2009

In the matter between:

THE STATE

vs

GERSON KAVIYENE KAMERUAO

ACCUSED

Neutral citation: S v Kameruao (CC 12/2009) [2013] NAHCMD 284 (15 October 2013)

Coram: SIBOLEKA J

Heard on: 01, 07, 08, 09, 10, 13, 14, 15, 16, 17,
20, 21, 22, 24, 30 September 2010;
14 October 2010;
01 August 2011;
04, 05, 08 June 2012;

Delivered on: 15 October 2013

SIBOLEKA J

[1] The accused is arraigned before this court on the following counts:

COUNT 1

Contravening Section 2(1)(a) read with sections 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – **RAPE**

In that upon or about 21 July 2007 and at or near house number 707 Parrot Street, Arandis in the district of Swakopmund, the accused **KAVIYENE GERSON KAMORUAO** hereinafter called the perpetrator, did wrongfully, unlawfully and intentionally commit a sexual act, under coercive circumstances with Linda Kavendjii, hereinafter called the complainant by inserting his penis into the vagina of the complainant and the coercive circumstances are; that the perpetrator by words and or conduct applied physical force to the complainant.

COUNT 2 - ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM

In that upon or about 21 July 2007 and at or near house number 707 Parrot Street, Arandis in the district of Swakopmund, the accused **KAVIYENE GERSON KAMORUAO** unlawfully and intentionally assaulted Linda Kavendjii by hitting her with fists and stepping on her with his shoed feet and hitting her with a broom stick giving to her thereby certain wounds, bruises or injuries with intent to do the said Linda Kavendjii grievous bodily harm.

COUNT 3 – INDECENT ASSAULT

In that on or about 21 July 2007 and at or near house number 707 Parrot Street Arandis in the district of Swakopmund the accused **KAVIYENE GERSON KAMORUAO** did wrongfully, unlawfully indecently and lasciviously assault one Linda Kavendjii and did then and there put his tongue in her mouth and place his penis in her armpit.

COUNT 4

Contravening Section 2(1)(a) read with sections 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – **RAPE**

In that on or about 25 December 2007 at or near Kolin Foundation Secondary School, Arandis in the district of Swakopmund, the accused **KAVIYENE GERSON KAMORUAO** hereinafter called the perpetrator, did wrongfully, unlawfully and intentionally commit a sexual act under coercive circumstances with Veronica Garoes, hereinafter called the complainant, by inserting his penis into the anus of Veronica Garoes and the coercive circumstances are; that the perpetrator by words and or conduct applied physical force to the complainant.

COUNT 5

Contravening Section 2(1)(a) read with sections 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – **RAPE**

In that on or about 25 December 2007 and at or near Kolin Foundation Secondary School, Arandis in the district of Swakopmund, the accused, **KAVIYENE GERSON KAMORUAO** hereinafter called the perpetrator, did wrongfully, unlawfully and intentionally commit a sexual act under coercive circumstances with Veronica Garoes, hereinafter called the complainant, by inserting his penis into the vagina of Veronica Garoes and the coercive circumstances are; that the perpetrator by words and or conduct applied physical force to the complainant.

COUNT 6

ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM

In that on or about 25 December 2007 and at or near Kolin Foundation Secondary School, Arandis in the district of Swakopmund, the accused **KAVIYENE GERSON KAMORUAO** unlawfully and intentionally assaulted Veronica Garoes by hitting her with fists and kicking her giving to her thereby certain wounds, bruises or injuries with intent to do the said Veronica Garoes grievous bodily harm.

[2]

**“SUMMARY OF SUBSTANTIAL FACTS IN TERMS OF SECTION 144(3)(a) OF
THE CRIMINAL PROCEDURE ACT, ACT 51 OF 1977**

On the Friday 20 July 2007 at about 13h00 the perpetrator went into the home of the complainant Linda Kavenjii. He called the complainant outside and told her that he had seen her before. The complainant told him that she had not seen him before and he went away. The accused returned the same day at about 18h00 and started telling the complainant that he wanted her to be his girlfriend. She did not accept his proposal and at about 18h30 the complainant excused herself and went back into the house to watch television. The perpetrator also went away. The perpetrator returned the following morning at about 09h15 in the company of another man that he called his uncle. When the 2 arrived the complainant was about to go to the shops and the accused gave her money to buy a Tassenberg for him. The other man who came with the perpetrator accompanied the complainant to the shops. When they returned from the shops, the perpetrator and the other man started drinking the Tassenberg.

The man who had come with the perpetrator left the house and the perpetrator remained. After the departure of his companion the complainant again did not accept the perpetrators proposal. The perpetrator left the house but returned about 15 minutes later and lay on a mattress in the TV room. Later he got up and went to lie on a mattress outside the house. The complainant locked herself and her child in the house until about 16h00 when she decided to cook. While she was cooking the perpetrator came in and tried to kiss her. When she resisted the perpetrator started insulting the complainant. Complainant tried to get out of the house and the accused prevented her from doing so. The perpetrator assaulted the complainant and forced her to get into her room. The perpetrator tried to have sexual intercourse with the complainant and she resisted. The perpetrator

assaulted her and placed his penis under her armpit. He then proceeded to have sexual intercourse with her without her consent.

On 25 December 2007 at about 23h00, the complainant Veronica Garoes and her boyfriend Immanuel Xoeub were at Paradise Restaurant where they were drinking beer. While at this restaurant a man who later turned out to be the perpetrator in this case bought them beer. Later on the perpetrator invited the complainant to accompany him to another drinking place. At this place the perpetrator bought the complainant beer. Later the perpetrator asked the complainant to accompany him to go and look for a girl that he had sent to collect his money. The complainant was reluctant to go with the perpetrator but he assured her that he would not do anything to her. The complainant then went with the perpetrator. When they were near Collin Foundation Secondary School, the perpetrator grabbed the complainant. She resisted and he started assaulting her. The perpetrator punched and kicked the complainant, threw her on the ground and had sexual intercourse with her per annum. When he finished having sexual intercourse with the complainant per annum, the perpetrator again had sexual intercourse with the complainant through her vagina. The following exhibits were handed in without objections from Mr. Uirab:

- (a) Annexure of the charges Exh 'A'
- (b) Summary of substantial facts Exh 'B'
- (c) Pre-trial memorandum, practice directive Exh 'C'
- (d) Accused's reply Exh 'D'
- (e) Bail proceedings in the Lower Court Exh 'E'

Mr Uirab appeared for the accused and Ms Esterhuizen for the prosecution. The plea of not guilty on all six counts was confirmed as in accordance with instructions and no plea explanation was furnished.”

[2] The State has called thirteen witnesses in support of its allegations against the accused.

[3] Cassius Tjihenda testified that the accused's elder brother, also called Kameruao has a house in Arandis where he works as a police officer. When this witness started to stay there to look for work at the end of May 2007, he found the accused already at that same house, also looking for work. The witness, the accused and the police officer are cousins. They all originate from Okakarara and they know each other very well for a long time. On Saturday 21 July 2007 between 10h00 and 11h00 in the morning the witness, the accused, and two other friends Popawa and Ndirimba were busy drinking. Drinks got finished, Popawa and Ndirimba went to buy some more but they did not come back. This witness and the accused followed them to see why they were taking so long. They walked up to an ATM machine where the accused withdrew some money. As they were leaving the machine they saw a girl (the complainant on the first count) inside the yard. The accused told this witness he wanted to talk to her. The two went to the house and found the girl who later became known to him as Linda Kavendji. She was with her boy child in the sitting room. It was the first time this witness saw her. Accused gave the complainant N\$50 and asked this witness to go with her to the shop and get something to drink while he remained behind with the child. They bought two bottles of Tassenberg and the girl bought two yoghurts for herself and her child.

[3.1] According to Cassius the accused and Kavendji were talking as if they knew each other. They started drinking and this witness realized that they were staying too long there. Their intention was to go and look for the two guys, Popawa and Ndirimba. After some hours or so the witness poured some liquor in a glass for the accused and took the remaining in the bottle along with him, seeing that maybe the accused still wanted more time to talk with the complainant, and the witness left. He told the accused he will find him on the way. It appeared to him the accused wanted the complainant that is why he left them there, not wanting to interfere. This witness stayed with the accused at the same house for at least two months before the incident. He does not know

whether the accused and the complainant knew each other before. He learnt about the accused's arrest the following day. He was aware that the accused was doing some boxing in Arandis. This witness's did not deviate from his evidence in chief during cross-examination.

[4] Jacomboka Ushona testified she was 16 years old in 2007 (born on 17 January 1991). She knows the complainant Linda Kavendji, they were both residing in Arandis in 2007. This witness was doing Grade 10, staying at her father's house while the complainant, Linda Kavendji resided at the house of Jakomboka's cousin, Bella. They are families and their relationship was good. On 21 July 2007, she went to visit her friend, Elsie and in the afternoon she went to Aunt Bella's house, where she found the accused and the complainant sitting outside on the veranda. She greeted them and went into the kitchen. The accused asked the witness for some water and she gave him some to drink. She only knew the accused as a boxer, and had seen him on several occasions in the street in Arandis. The complainant allowed her to eat the food she found in the kitchen, she came outside, sat on the stoop and started eating. When she finished eating she went back into the house and the complainant followed her.

[4.1] Inside the house the complainant started locking the doors and when this witness inquired the reason therefore, she was told the accused wanted to rape her. As a result thereof, the complainant asked the witness to go and fetch her clothes and spend the night with her. The witness left and within fifteen minutes she came back and found the complainant in the TV room crying. When asked why she was crying she said the accused wanted to rape her. This witness suggested they should go and report the matter to the police but Linda said she only preferred to do so the following day. This witness persuaded her, saying if she reported only the following day people will not believe her. The complainant agreed and they both went to the police station. The complainant's right side upper lip was swollen. She has two children but was only with the boy at the scene of crime. The age of the boy is unknown to her. On the way to the police

station the complainant told her the accused beat her up and raped her there at Aunt Bella's house. She also related to her that the accused and another man who had since left came and found her at home. There the accused was forcing to have sex with her, but she did not want, and it was then that he started to beat her up. She did not tell this witness exactly where at Aunt Bella's house the incident happened.

[4.2] Despite not being told in detail how the rape took place Jacomboka believed the story. The complainant was crying and it appeared something has happened to her, she was taken to Swakopmund Hospital to be examined by the doctor the same day. They made statements, and the police went to fetch the accused. She saw him being taken behind the counter, and was later also taken to hospital in Swakopmund. This witness has been staying in Arandis for two years at the time of the incident in 2007 and it was only in that year that she became aware the accused was a boxer.

[4.3] Jakomboka testified that she gave her statement in English to a female police officer whose name is unknown to her. During cross-examination she did not deviate from her evidence in chief.

[5] Selma Kauna Shangula testified that she is the Unit Commander, Women and Child Abuse Protection Unit, Walvis Bay, a Warrant Officer Class I and one year and eight months at the Unit. She is the investigation officer of the matter in which Linda Kavendji is the complainant. She was assisting the Arandis Police Station in the investigation. On 24-25 July 2007 she went to Arandis to talk to Linda Kavendji about the case. The docket was already registered and she did not know the complainant before. After reading Linda Kavendji's statement she got the impression that she was raped. The statement left out some of the information, that is why she found it necessary to go and talk to the complainant again. She was escorted by Sgts. Kalipi and Nyambe. At first the complainant did not want to talk to her, a sign the officer described to be consistent with rape.

According to the officer a reluctance to talk is a usual symptom in rape cases which shows that it is not easy for a rape victim to talk about it again.

[5.1] While they were sitting in the lounge Linda told the officer she has already made a statement and did not want to talk about the rape again. The officer realized that Linda was not at ease in the presence of the other two police officers, and she told them to leave her there with the complainant which they did. The complainant started telling the officer about what happened to her, the officer could see that she was very hurt, because she did not believe that it would happen to her. The complainant told the officer that the man by the name Kameruao raped her. At that time the accused was unknown to this police officer. She said the accused assaulted her, pulled her and she did not know what to do. She asked the accused why he was assaulting her and whether he wanted to have sexual intercourse with her but there was no answer. He continued to assault her, later he twisted her arm and asked her whether she was afraid of having sexual intercourse. She said she did not want to do that.

[5.2] Linda told the officer the accused pulled her into her room, she did not know what to do and in the end she gave him a condom so that he could do what he wanted. Linda said the accused proposed her the previous day when he came with his uncle at her residence. She wore a skirt, the accused did not remove her panty but only moved it slightly to one side and raped her by inserting his penis in her vagina. The police officer realized that what the complainant was relating to her, is what she also stated in her first (statement. The officer nonetheless wrote down a statement on everything that the complainant related to her and it took her two to three hours.

[5.3] At the actual point of rape it became difficult for Kavendji to talk about it so much that the officer had to calm and encourage her to proceed and tell her what happened. She advised her not to feel it was her fault, or she was the one to be blamed for it. According to the officer the complainant felt that way because she

was with the accused at the house. At some stage Linda told the accused to leave but did not do so. After she took down the statement she referred the complainant to Ms. Pama for counseling. The officer was shown the small room in the house where Linda was raped, there was a bed inside it. According to the officer Linda was traumatized because at one stage she told her that she was not worth living. After the interview the officer realized that Linda was indeed raped.

[5.4] In cross-examination the officer stated that it was necessary to take the second statement from Linda because the first one did not have all the details. Apart from Linda's statement and the fact that her appearance looked like something had happened to her, the officer did not get other evidence corroborating that she was indeed raped. No trace of semen was found on Linda's underwear because the accused used a condom. The officer stated that it took her twenty to thirty minutes before Linda started telling her what had happened. The fact that she eventually opened up to her and started to relate what happened did not mean that she was forced. From the way Linda talked the officer got the impression that she was traumatized. She confirmed that Linda had no objection to the accused's release on bail.

[5.5] In re-examination the officer said Linda told her that life was nothing to her after the rape incident, and that she also looked and sounded very heart broken.

[6] Josua Munyele testified he had in the meantime retired from the police, but in 2007 he was still a police officer stationed at Arandis Police Station. On 21 July 2007 he was on standby duty when he received a radio message that he should go to the Police Station to assist in the rape case. At the Charge Office he found Linda Kavendji behind the counter, and was seeing her for the first time. The officer took her to his office and every question he asked her she started crying. All that he got from her was that the person who did it was a boxer, but he did not know the person Kavendji referred to as a boxer. Linda told him that she was alone at home, washing her child's clothes at the time of the incident. The

boxer and another man came and asked her to give them liquor, she said she did not have it. After a while the other man left leaving the boxer behind.

[6.1] According to Munyele Linda told him the boxer was under the influence and started to storm at her, followed her to the toilet. They wrestled there and she ran back to her room. The boxer came with a broom stick and tried to assault her there. He asked her to have sexual intercourse with him, but she refused. She was later in fear and she requested the boxer to use a condom during the sexual intercourse. At that stage the officer handed over the matter to Cst. Nyambe, the investigation officer. Linda Kavendji and other police officers, Kandume and Beukes who knew boxer escorted the witness to the complainant's residence on foot, but they did not find any person there. While at the scene the complainant showed the police officers the room with no bed inside where they were having sexual intercourse. It appeared that was the children's sleeping room. There was a mattress covered with a bed sheet on the floor. Linda told the officers that after sex the accused threw the condom into the dust bin at the side of the kitchen outside the house. Munyele retrieved the condom from the bin and took it along with him to the Police Station where they left the complainant.

[6.2] The officers then proceeded to look around for the suspect. At Dolphin Bar his colleagues pointed the accused out to him as the boxer to whom Linda Kavendji was relating. He called the accused outside and informed him about the allegations of rape reported against him, and that it was a serious crime. He was not required to say anything in that regard and if he did, the same would be written down and later used in Court as evidence against him. The officer also told the accused that he has a right to get a private lawyer at his own costs and if he was unable to afford one, he could apply through the Magistrate for a government funded attorney to represent him on the matter. The accused did not say anything. They walked back to the Police Station where the accused told Munyele '...yes I did it. I had intercourse with the complainant but with her consent'. The officer again warned the accused not to say anything on the matter,

and he handed him over to Cst. Nyambe. He does not know what the investigating team did with the condom he retrieved at the scene, as he heard that it got lost.

[6.3] Munyele stated that although every exhibit had to be booked in the register, he could not do that there and then because he was taking the complainant to the hospital in Swakopmund. On their way to hospital he sat with Cst. Nyambe and the complainant in front and the accused was behind. According to this officer he does not know whether it was a friend of the accused at the police station who threw away the condom. The brother of the accused W/O Kameruao was the Unit Commander of the C.I.D. at the time of the incident. The officer mixed Herero and Afrikaans when he was talking to the complainant.

[6.4] In cross-examination the officer stated that Linda Kavendji told him she was beaten with a broom stick, but he did not see any injuries on her. As a male officer, he could not tell her to undress herself. Kavendji did not cry from Arandis en route to hospital in Swakopmund. She also did not tell the officer how many times she was beaten, but only said the accused did beat her with it. The officer testified that the accused was not there when he found the condom in the dustbin, and he does not know why the investigation officer did not cause it to be photo taken.

[6.5] Munyele confirmed that it was after he threw out the contents of the dustbin, that he found the condom. He confirmed that the accused told him the complainant had consented to having sexual intercourse with him.

[7] Linda Kandjemune Kavendjii testified she is the complainant on the matter. She is currently residing in Omaruru, but was staying at Pirate Street 707 in Arandis during 2007 for three years. The residence belong to her sister Bella Kavendjii who took her and her child to go and care or look after them. She only came to know the accused the day he first approached her on 20 July 2007 on a

Friday. On that day the accused came to her residence, stood outside the yard while she was standing on the inside, and greeted her from a distance. He asked for her name, and she told him she was Kandjemune and the accused also told her his name was Kabanana. He asked why she was not greeting back, but she did not respond. According to her she cannot greet someone she did not know from a distance. He asked if he can later come for a visit, and she said yes.

[7.1] The accused left and returned that same day. He found her seated outside with her 2 year and a half month old child. He started telling her stories of how he wanted her and that there was a lady who wanted him but he did not. She kept quiet, and did not answer. He asked if she knew he was a boxer, she said she did not know. She told him it was time to go inside the house to watch the TV programme called 'Generations'. The accused asked if he could come back the next day and she agreed because he did not look like a violent person who would do naughty things to her. On 21 July 2007 in the morning while her child was still asleep she woke up wanting to go to the shop. While she was just about to leave, she heard a knock. She opened and saw two guys, the accused and another man whom the accused later said was his uncle. She told them she was going to the shop, where upon the accused gave his uncle N\$50 saying he must buy Tassenberg.

[7.2] The accused's uncle volunteered to go along with her, she agreed and the accused remained behind with the child sleeping in the house. On the way to the shop the accused's uncle told her his name was 'Cassie'. She bought Tassenberg and cooldrink. They came back and found the accused and the child sitting outside where it was sunny. The accused and his uncle started drinking outside on the stoop, while she went inside to wash the child's nappies. Later they moved into the sitting room, she would at intervals attend to them in the sitting room and go back to her washing. She later came outside and hanged the child's nappies, but did not realize that the accused's uncle had already left.

[7.3] A red pick up bakkie pulled to a stop at the gate and the accused spoke to the occupants like people he knew, and it drove off. They told him they would find him at some other place. The accused went to dress up his T-shirt, trouser, shoes and went away by himself. Linda went into the toilet and did not close the door thinking that it was only herself and the child. While inside the accused opened the main door of the house. On hearing the sound of that door being opened she immediately pushed the toilet door to a close. The accused called her, saying it was him but she was just quite, she did not answer. When she opened the toilet door to get out, the accused was already in the house. She came and found him in the TV room, he looked a very drunk person. She told him to stand up and go home but he ignored her as if she was not talking to him. She took her child and went to sit on a mattress on the stoop and the accused joined them.

[7.4] A woman passing by on the opposite side of the street saw them sitting and asked the accused whether the complainant was his girlfriend, which he confirmed. Linda just kept quiet because she took it that the accused was drunk. At the time of the accused's visit Linda's sister had gone to Ongwediva for a funeral. While sitting outside the accused fell asleep, the complainant and her child went into the house, locked all doors from inside and went to sleep. When asked why she locked herself inside the house, she said that was her normal practice. Outside, the accused only had his training shoes (tekkies) and his trouser, he had undressed his T-shirt earlier on and left it in the TV room. The complainant did not see the T-shirt, but only noticed that his upper body was naked. Linda and her child slept, later she looked through the window and saw that the accused had moved (rolled over) from the mattress and was sleeping on the floor.

[7.5] At about 17h00 in the afternoon the complainant was awake, she opened both doors as it was hot, and started cooking. She switched the TV on. The accused woke up, came inside the house, entered the toilet and washed his face. He then joined them (the complainant and her child) in the TV room. There he

told the complainant that “he wants to sleep with her”. The complainant understood this to mean the accused wanted to have sexual intercourse with her. She replied that she did not want. When asked how she came to conclude that the accused meant sexual intercourse, she said seeing that no girl and boyfriend or wife and husband relationship existed between them, there was no other way the accused would want to sleep with her without having sexual intercourse. It appeared to the complainant at that stage that the accused got angry for refusing him sex and he started pointing fingers in her face (in her forehead).

[7.6] The accused said to her “... you think you are who, you keep yourself high you think you are who.” She understood the above to mean that: “... you think too much of yourself.” She went to the kitchen to attend to her pots, the accused was following her when she wanted to go out of the kitchen door. Inside the house the accused stood at the door. In a voice that sounded like someone who is angry, he requested her to kiss him, but she refused, he then slapped her on the cheeks three to four times, and she started crying. The accused grabbed her by force on both cheeks and he pressed his mouth against hers, and inserted (pressed) his tongue into her mouth. She then asked him what he wanted and whether he wanted to rape her. The accused said no, he gave her the way and she walked out of the kitchen door. She did not walk for a distance from him, when he grabbed her right arm and twisted it. The complainant sat down. She felt hurt from the twisting and she went to sit next to the toilet.

[7.7] While Linda was seated the accused kicked her once on the legs with his training shoes, (tekkies) he had on. He then asked her whether she was afraid of sex, which she confirmed, whereby he said they must go and try. The complainant said no she did not want. The accused grabbed her right arm, twisted it so that she had to stand up and he pulled her into the room. She tried to free herself and grabbed the toilet door to resist the move but did not succeed. The child was in the TV room, he overpowered her and pulled her into her room, and threw her down on the floor. In that room was only a mattress and a

cupboard. She had a skirt on and as the accused was trying to undress her underpants by pulling it down, she was pulling it up. She was in a sitting position. She fell on her back, stood up and sat upright again. He kicked her once on the left side of her abdomen, she felt hurt. He took a broom which was next to the door of her room and beat her once on the abdomen with the stick side of it. She started crying while sitting on the floor with her hand on top of her knees. The accused was sitting next to her, kneeling down on her right hand side. He pulled out his penis and asked her to look at it, but she said no and looked in a different direction.

[7.8] The accused turned the complainant around and put his penis under her armpit. It went in, penetrated until she saw it the other side. She realized that the accused indeed wanted to have sexual intercourse with her. To avoid being beaten and hurt further she took a condom from her wardrobe and gave it to him. This, according to her, she did to help herself prevent sexually transmitted diseases and pregnancy. The accused put the condom on his penis and she laid on her back, crying. The accused lay on top of her, put his penis into her vagina, and started making up and down movements. The condom got off and she gave him another one which he again put on. He got on top of her continued sexual intercourse until he ejaculated. He stood up and she also did the same, took her child and went to sit outside the house. The accused remained in the room and later came out and joined her outside. She was crying during sexual intercourse but could do nothing more because she was at his mercy and nobody would have helped her in anyway.

7[8.9] The complainant felt very bad, sad and dirty, because the accused forced and had sexual intercourse with her while she did not want it. He asked why she was crying, and she told him it was because of what he did to her. He confirmed it was bad and told her he will buy her a cell phone worth N\$700. She told him she was not interested in it. For the safety of her child she flushed the first condom in the toilet then she saw the accused throwing the second one into the

rubbish bin. While they were sitting on the stoop her niece Jakomboka came, greeted them, and went into the house. She came out asking to eat the food she found in the kitchen, and was allowed. The accused asked for water and Jakomboka gave him and she sat with them outside while busy eating her food. The two did not speak to each other.

[7.10] The accused asked for a kiss, and as Linda wanted him to leave she gave him a closed mouth kiss and he left. She went inside and closed the doors fearing that he may come back. She joined Jakomboka in the TV room. She still remembered the accused told her he will come back, she then requested Jakomboka to come and spend a night with her. Jakomboka asked why and because Linda was very shy and felt very dirty, she told her the accused wanted to rape her. Jakomboka left and collected her clothes and came back, she found her laying down on a mattress in the TV room crying. Jakomboka asked her to go and report the matter, but she said she will go the following morning. When asked why she preferred the next morning, she said at that time she would be alone and Jakomboka would not have returned yet. Jakomboka told her it would be better if she goes to report that same day because if she only did so the next day people might not believe her.

[7.11] Linda took her child, and together with Jakomboka they left for the Police Station. On the way she told Jakomboka the accused raped her. At the Charge Office she told the police she came to open a case for rape, and was referred to a female officer. She was crying and her eyes were swollen as a result of tears. The female officer asked her whether she really wanted to lay a charge because in Herero culture the perpetrator could be a family member and laying a charge could easily turn against the victim herself. On hearing this she said they should then warn the accused. The officer explained to her, rape was a very serious offence and a convicted person is sent to goal. The police officer told her if she did not lay a charge the suspect will not stop, or leave her alone. She then decided to lay a charge against the accused and related to the police what

happened. A hefty built police officer took her home where she opened the door and pointed out the scene (room) inside the house where the rape took place.

[7.12] Linda also showed the police the rubbish bin where the condom was thrown. From there, they went back to the Police Station and she took her child along. The police did not ask her about the broom stick which was in her room. They left her at the Police Station and went to look for the accused. He was brought in and they were taken to Swakopmund Hospital by vehicle. She knew that she had to see the doctor there because of the rape. As they walked to the police vehicle the accused called her by name telling her they must talk but she did not answer, she just ignored him. At the hospital in Swakopmund the police told the male doctor and the female nurse in attendance why she had to be examined. She was called into the room, she went in with her child. The doctor asked her to undress her panty and lie on her back. She was further told not to be shy because that is what had to be done. When the doctor finished, she went outside with her child and waited there.

[7.13] Linda's mouth was swollen but not that much, she could however feel it, she did not sustain any other visible injuries. When asked how it came out that the kicking, beating with a broom stick did not result in her sustaining visible injuries, she said human beings were not the same, some people would get swollen while others not. She only felt pain, but did not sustain any visible marks. No statement was taken from her on the day of the incident. She gave one only when four police officers (names unknown) approached her and asked for it. Altogether two statements were obtained from her on this matter.

[7.14] Linda did not object to bail being granted to the accused seeing that it would not make any difference to her case. She asked that it be on condition that he stays away from her and stop telling people that she is his girlfriend. According to her if it had not been for the fact that she was raped she could have made a case against the accused. There were three mattresses at the house,

one was outside on the stoop where they were sleeping during the day, one in the TV room and the third was in her room.

[7.15] In cross-examination she testified that she did not have a cellphone. The house where the incident took place has two gates with a street on each side. There are houses opposite the street on both sides and next to Bella Kavendji's house. She heard about a gym where people exercise in Arandis but does not know where it is.

[7.16] Linda said the accused may have known her for three months before the incident as he alleges, but she only came to know him on 20 and 21 July 2007, the day of the incident. It was possible for the accused to know Bella Kavendji the owner of the house where Linda stayed, because she had been working for Arandis Town Council for some time. She wrote Grade 10 examination but did not say whether she passed it or not. She does not know the concepts of time, but understands what 13h00 is in relation to time. She does not know how long an hour is and neither does she understand minutes. She was 18 years old at the time and her statement was taken and it was not read back to her.

[7.17] Linda said the accused did not propose love to her the first time when they met but later she confirmed that he did. She spoke Herero language with the accused and his friend who appeared drunk but did not look like naughty guys to her. She only knew the accused's father but not the accused himself and did not know that she should keep the used condom as evidence, that is why she flushed it in the toilet. On their way to the Police Station she decided to tell Jakomboka, the accused in fact raped her, but did not say he assaulted her as well because she felt there was nothing she would do about it. At hospital her underwear was taken in for evidence. She did not show the doctor the areas she was paining after being beaten or kicked because she was not asked to do so. Linda did not deviate from what she said in her evidence in chief.

[8] Elvet Kandombe testified he is a constable in the Police, stationed at

Omaruru since September 2007 and he knows the accused, they met early in 2007. He also knows the accused's brother W/O Kameruao, a police officer at Arandis. This officer was a member of the Arandis Boxing Club where he also came to know the accused as a boxer. On 27 December 2007 he was stationed at Karibib Road Block. During his off duty days he went to see his colleague Cst. Hamutenya at Arandis Police Station and on the way he met the accused who was also going there. They walked together, and at the Police Station he made a turn at W/O Nghaamwa's office. Later he took the key to his friend's room and left. He had civilian clothes on and could not remember the clothes the accused was wearing when they both walked into Arandis Police Station. When asked to comment on how the accused appears to him in court, he said he has lost weight, looked slender than how he was the last time when he saw him.

[8.1] In cross-examination he said the description of "... a light brown of complexion person well built" does not only fit the accused because there will be others there. With leave of court, Counsel for the accused caused the height of this witness and that of the accused to be taken. It was found that this officer was 1,65 while the accused was 1,62.

[9] Eric Panduleni Nghaamwa testified he was currently a Detective. Warrant Officer and the Station Commander at Mondesa, Swakopmund, Erongo Region. He is 21 years in the police force, one year and six months in Mondesa. Before he came in Swakopmund, he was stationed in Arandis for seven years as Station Commander. He left Arandis early in 2008. On 27 December 2007 during the morning hours he was on duty. He was informed about a rape case that took place on 25 December 2007 and he also read about it in the Occurrence Book. This rape allegedly took place during midnight in Arandis.

[9.1] At 15h00 this officer and W/O Kefas drove to Veronica Garoes's house, where they found her with two kids. She was asked to escort them to the Police Station in connection with the alleged rape. This complainant took the two kids

along with her, her husband was not at home at the time. The victim still appeared shocked to this officer and was not in the mood to communicate freely with the police. Inside W/O Nghaamwa's office were W/O Kameruao, W/O Kefas, and Nghaamwa himself. This officer saw that the complainant had red eyes with bloodspots in them, a blue eye, and a swollen lip. Nghaamwa was interested in the description of the suspect in order to give that information over to the police officers during meetings. This officer as the Head of the Investigation Unit, started interviewing Veronica in the presence of the other two officers. His office is positioned in such a way that all people entering the Police Station gate are clearly visible through the window from the inside of his office.

[9.2] The two W/Officers, Kefas (a female officer) and Kameruao as well as the victim, Veronica Garoes were facing in the direction of the Police Station gate through the window, meaning they were able to see all incoming people entering the Police Station gate. The victim was still in a miserable state such that she appeared as if she was afraid of the officers and one could feel pity for her. Ngaamwa asked her for the description of the suspect and for how long she had known the suspect. The victim gave the officers the following description: I quote verbatim from page 27 of the record:

“... the person was wearing a military trouser. He was well built, brown light in complexion and between the age of 27 and 30 there around. And the language he could speak she suspects to be Herero speaking. Slender and well built as a sportsman.”

After the officers were given the above description they started looking at one another. Nghaamwa asked the complainant to excuse them and she walked out of the office. Although W/O Kameruao said he had somebody fitting that description he did not say who it was. The three officers agreed to release the complainant for that day and tell her to come back for an identification parade the following day. This was accordingly communicated to her, but she did not leave there and then.

[9.3] Nghaamwa told Veronica that the person of the description she made will visit the station as a bail condition. This was retracted in the following sentence:

“I did not mention for what purpose the person will come,”

Veronica was still in the vicinity and none of the three police officers mentioned who they had in mind. All of a sudden somebody Nghaamwa had in mind (the accused before court) turned up. This police officer was a member of the boxing committee for which the accused was a boxer. The gym was pre-owned by the police of Arandis. According to Nghaamwa the accused was their friend (at the Police Station) he regularly came to the station to visit and cut his hair. Two to three days before the rape incident the accused came to cut his hair wearing a military trouser.

[9.4] This is how W/O Nghaamwa described what transpired in his office the moment the accused and an off duty police officer Elvet Kandombe came walking, entering the gate of Arandis Police Station. I quote verbatim from page 272 line 10 of the record::

“Ms. Esterhuizen: Yes and then? ---I think I was done with my briefing interview a police officer came with the suspect in front of me, coming into the gate of the police station (intervention).

Ms. Esterhuizen: You must refer to him as the accused --- As the accused in front of me here, coming into the gate of the police station. And she was in that mood and she was speaking to us, looking sometimes down. I said she should look up to my window and see the oncoming people, the two men coming.”

Further on I quote verbatim at page 273 line 20 of the record:

“Ms. Esterhuizen: Before you proceed further, when you told her to look at the window and you saw these oncoming people. Was there other people also at the gate ---

They were only two that were coming that time coming to the Charge Office." (My own underling)

[9.5] W/O Eric Nghaamwa explained his conduct as follows: I quote verbatim from the record at page 272:

"Ms. Esterhuizen: Why did you say that she should look up at the oncoming people? Why did you say that? --- I just requested her because what I thought of the descriptions I received was also fitting one of the two coming down to the charge office ... And without hesitation when she looked up, she yelled and said in Afrikaans, "Is hy, is hy" translated into English it means :It is him, It is him."

Describing how the complainant was behaving when she saw the accused entering the Police Station gate, this officer said she was holding the female police officer W/O Kefas screaming, like a small child frightened to be beaten by a dog. This officer went out of his office, walked to the Charge Office and asked the accused to come to his office. When asked how the accused fitted with the description he was given, Nghaamwa stated the following at page 274 of the record:

"He (the accused) used to come at the police station and he used to cut my hair after three weeks always. And I used to give him for the job he have done. And the last time when he visited the station he had one trouser on to cut my hair."

[9.6] W/O Nghaamwa brought the accused in his office where Veronica Garoes; W/O Kefas and W/O Kameruao were still sitting. He immediately pronounced the judges rules on him and effected the arrest on the charge of rape. Still in his office he there and then referred the accused to W/O Kefas for further investigation. Inside Nghaamwa's office an exchange of words ensued between the accused and Veronica Garoes: the accused was telling the complainant "I do not know her" and the complainant was screaming "It is you, it is you, it is you." On hearing this, the officer told the accused "Go and talk to W/O Kefas she is the

investigating officer”.

[9.7] In cross-examination Nghaamwa conceded that one does not need to be a boxer to be well built, but could at least be gyming. Also conceded is the fact that a mechanic or a building contractor can be well built as well. The witness said the colour of the trouser Veronica described to them differs with that of the NDF members. He denied that the one who raped Veronica could have been an NDF member wearing the military trouser.

[9.8] W/O Nghaamwa said NDF members wear full uniforms and do not mix pieces of their military uniform with civilian clothes. He testified that Veronica gave a description distinguishing the NDF trouser from any trouser that could be bought in the shop. According to this officer when Veronica was first sent out of his office police officers started discussing the merits of the case and the holding of the identification parade the next day. During that discussion Nghaamwa had the accused in mind who by coincident was supposed to report on a bail condition for a pending rape case of Linda Kavendji the next day. Nghaamwa repeated and said the accused regularly visited the police station as a friend and the description given by Veronica Garoes fitted him quite well. The officer denied that he assisted Veronica to identify the suspect. He said he instead told her to look up at the gate in the direction of the oncoming people, to see whether she could identify her assailant. He confirmed that the accused was light in complexion and the other person was taller, darker in complexion and less well built than the accused. The officer said among the two persons entering the Police Station gate at the time the accused was the only one who fitted with the description Veronica gave the police officers.

[9.9] W/O Nghaamwa stated that at the time when the accused and the off duty police officer Kandombe were entering the Police Station gate, Veronica was also about to leave through the only charge office entrance where the accused was, and felt she could meet him there in the Charge Office. That was the reason why

he instead felt it would be better to invite the accused inside his office where Veronica was sitting so that she could confirm whether the accused was indeed her assailant or not.

[10] Johanna Kefas testified she is a Warrant Officer, nineteen years in the police force. She is in the Investigation Unit from 2004 and had an opportunity to receive investigative and basic police training. She was trained how to start investigating a reported case. In 2007 she was stationed at Arandis Police Station and is four years in the C.I.D. Unit. She is the investigation officer on the charge of rape whereon Veronica Garoes is the complainant. On 26 December 2007 she was on standby. Veronica Garoes and her boyfriend came to the Charge Office and she took them to her office. Veronica's left eye was red, and the rest of the left side of her face looked black as if she was beaten up. She was worried, and she cried as she related her story to her. This witness is not fluent in Afrikaans, but she was nonetheless able to listen to the complainant's story being told to her in that language.

[10.1] Veronica Garoes told this officer that on 25 December 2007 she escorted her boyfriend to Paradise Restaurant where there is a nearby Shopping Centre with a spotlight outside providing very clear lighting on the premises. Outside Paradise Restaurant they met two men, one of whom was known to her boyfriend. Veronica met these two persons there for the first time. Her boyfriend spoke to the one person known to him, and later all four of them went inside the Restaurant where there is very good lighting. There were no flashlights usually found at some of the liquor outlets.

[10.2] Inside Paradise Restaurant the two male persons kept moving in and out of the premises. Veronica's boyfriend bought a beer, and one of the two men also bought one beer which he gave to her and the two started dancing. Veronica's boyfriend came and told her not to dance so close with that person. It appears he noticed the in and out movements of the two (men) that is why he warned the

complainant to stay away from them. The complainant said they were just dancing. The complainant's boyfriend did not have enough money, that is why he only bought one beer. Veronica left and went to Trapietjies with the other man who promised to buy her some more beer. The unknown man told the Veronica he will not do anything to her and had apparently sent somebody home to collect money but the person did not return. They were going to look for that person. Veronica's boyfriend remained inside Paradise Restaurant. Veronica and the stranger went up to Trapietjies, and from there to a place where that person had sexual intercourse with her, first through the anus, later turned her over and penetrated her vaginally.

[10.3] After Veronica was raped she managed to escape by running away back home, crying and found her boyfriend in bed who woke up and went to sleep elsewhere. This officer was about to be transferred to Omaruru that is why she asked another police officer to write down everything that the complainant told her while she was alerting the hospital in Swakopmund to quickly arrange a doctor to examine the complainant as they were urgently coming. The complainant told this witness her assailant 'looked like a Herero speaking person ... light in complexion ... with a small body and he looked like a weight lifter.'

Before this officer took the complainant to the hospital she and the Unit Commander W/O Kameruao visited the scene. At the side of the wall of UB Dux Primary School there is a spotlight. The scene had a lot of stones and was in disarray, it appeared like people were moving or wrestling there, but no footprints could be observed thereon. This officer did nothing at this place because when they arrived there, the complainant changed her mood and she just said '... it is here' without pointing out the exact spot where she was sexually assaulted. The scene was a mixture of sand and stones.

[10.4] According to Kefas, she received a 'rape kit' for the complainant. I will not reflect on the evidence of the rape kit because it was not sent to the Laboratory for analysis and nothing further was done with it. Back at Arandis Kefas dropped

the complainant at her home. The next day this officer and the Station Commander W/O Nghaamwa went to fetch the complainant together with her two kids and brought them to the police station. They went to sit in Nghaamwa's office. After a while Veronica's boyfriend arrived and they asked him to stay with the two children outside. Kefas asked Veronica to tell the story about what happened to W/O Nghaamwa, which was done. Kefas noticed that Veronica repeated the same story she told her the previous day, to W/O Nghaamwa.

[10.5] While in the Station Commander's office, the Unit Commander W/O Kameruao came in, and W/O Nghaamwa told him the whole story. I will quote verbatim from paragraph 30 at page 335 of the transcribed record, the description which the complainant gave the Station Commander in the presence of W/O Kefas:

'Ms. Esterhuizen: What did she repeat? --- She repeated that the person who raped me is small bodied, is a small-bodied person. And when you can see that it is somebody who is doing sport. And he, she also said that he is light of complexion. And then she said he is also Herero speaking. And then she also mentioned that, that particular date he was wearing a camouflage pants (indistinct) trouser'.

[10.6] The C.I.O. Unit Commander, W/O Kameruao joined W/O Nghaamwa and W/O Kefas. The Station Commander wanted Veronica to repeat the whole story again but Kefas refused, because the complainant had become afraid and started crying. She ordered that the complainant be taken back home. When they were all about to leave the office, the Station Commander saw two people coming into the entrance gate of the Police Station. Nghaamwa then told Veronica: ' ... look there look at the people that are coming'. The windows of the Station Commander's office are facing the entrance gate of the Police Station. When the complainant stood up and looked, she just started saying ' ... it is him' referring to the accused. This officer told W/O Nghaamwa to ask Veronica which one, the latter then started crying, she turned and grabbed her while crying.

Nghaamwa went and fetched the accused before court. Inside the office Nghaamwa asked the accused whether he knew Veronica which he denied, and was told they were busy with a rape case.

[10.7] The accused asked Veronica ‘... do you know me? and Veronica said you are the one who raped me’. The accused told Veronica that he did not know her. W/O Nghaamwa then told the accused there was nothing that could be done, he would just be locked up because the complainant said it was him who raped her. W/O Nghaamwa explained all the rights to the accused and handed him over to this officer and was accordingly locked up for the rape of Veronica Garoes. The accused was taken to hospital to be examined by a doctor the next day. During the trial this officer identified the warning statement she took from the accused with the assistance of Beukes and later W/O Munyele as interpreter from Afrikaans into English and vice versa.

[10.8] W/O Kefas took the accused into her office and told him he was not forced to answer questions she may put to him or to tell her the story about what happened in connection with the rape case. If he elected to say something the same would be taken down and used against him in court. It was further explained to the accused that he had the right to be allocated with a State funded lawyer and he replied that he did not need one. When asked whether he wanted to give a statement regarding what happened and he said yes, he proceeded and made a statement about what happened. During the trial Kefas said she last saw the accused in 2009 she said in court he appeared a bit dark, looked older, his body did not look like that of a person doing exercises or training.

[10.9] In cross-examination Kefas conceded that she made her own statement three years after all other statements as well as the Prosecutor-General's decision were already in place. The complainant's boyfriend was interviewed but refused to give a statement and had since passed away.

[10.10] According to Kefas the accused was one of the nine persons lined up for the identification parade on 30 January 2008, but Desmond Mudane allegedly known to Veronica's boyfriend and the person suspected to have been in the company of the accused did not point out the accused as the person who was with him at Paradise Restaurant and the one who left with the complainant later raping her.

[11] Veronica //Garoos testified that in 2007 she was residing in Arandis and has moved to Karibib after the death of her boyfriend. On 25 December 2007 at 23h00 she and her boyfriend went to Paradise Restaurant for a walk and to have some beers. She was reluctant to go but gave in to the persuasions of her boyfriend. At the Restaurant her boyfriend went in and bought two beers. They came out and joined Desmond and another unknown man whom they found sitting with him there. Later while they were still outside the club, she also started talking to the unknown man 'basically just socializing'. All four of them drank the two 750ml beers her boyfriend had bought when they arrived at the club. When the beer got finished Veronica and her boyfriend went inside the club. There she saw her friends and other people that she knew, and she went outside the club to talk to them.

[11.1] It was there outside the club that the unknown man they found sitting with Desmond came to her and they started dancing close to each other. The unknown man bought beers from which she also drank, but according to her she was not that heavily under the influence. The stranger told her they should go to Trapietjies but she did not want to. Her boyfriend called her and asked what was going on, and she told the stranger it was her boyfriend finding out what was going on. Veronica was reluctant to go, but later she told the stranger they can go, and they walked to Trapietjies.

[11.2] According to Veronica there were lights outside shining and one could see a person clearly. It was quite bright inside as well. She and the unknown man

walked to Trapietjies, they took the road connecting to the tarred road and they ended up into the gravel road. A lot of cars were passing by and through their lights one could see people. The unknown man mostly talked general things and started proposing her saying he wanted her. She was not willing and showed no interest. The man went into Trapietjies, bought a beer, they sat there and drank it. When this was finished he told her, he sent a girl to his house to get money for more beers. He asked her to go with him to his house, to look for the girl, but she did not want to go with him. The man told her, he will not do anything to her, and that she should just go with him so that they get the money to buy her more beers. They were talking in Afrikaans.

[11.3] At Trapietjies the man bought a beer which they shared. They walked towards Collin Foundation area. There is light between Trapietjies up to Collin Foundation and she could see the man very clearly. From here the unknown man started pulling her on both arms quite strongly. She was resisting but he dragged her on the ground. She was fighting and struggling to free herself and telling him 'no leave me alone, no leave me alone', but the man pulled her very strongly without saying anything. As the wrestling and struggling continued she fell down and he kicked her on the left eye. He hit her with a fist on the mouth. The man told her if she did not pull off her pants he was going to hit her. She continued fighting and struggling to free herself, but after the man said he will hit her if she did not take off her pants she experienced a lot of fear. He told her to sit on her knees so that he can do to her whatever he wanted.

[11.4] Veronica had brown trousers and a white top tied on the shoulders. He pulled his pants off halfway and did the same to hers up to her knees. She complied, sat on her knees, leaning on her fists. She testified that what happened from there was quite gruesome. The man inserted his two fingers inside her vagina, and she could feel that he was scratching her right inside the vagina. The unknown man did that while on his knees behind her. He then turned her around and inserted his penis in her vagina and she could feel she was being

penetrated. It was without a condom, nor her permission. The sexual intercourse was very long, but she cannot estimate the time. During the sexual intercourse, she was lying on her back and the man was lying on top of her, they were facing each other during that intimacy. The unknown man ejaculated inside her vagina and he was breathing quite heavily. She told him to leave her alone seeing that he has got what he wanted.

[11.5] They pulled up their pants and the man said they should go to his house. She was not willing to go there, and as she was walking behind him she turned around and ran away. At the scene it was very visible, one could clearly see. There was a street light in front of Collin Foundation, lighting the area. This street light was very strong that she could clearly see the person's face and his build. He was a very strongly muscular built person. At home her boyfriend asked where she had been, at first she was afraid to tell him what happened to her. Later she told him she had been raped. The boyfriend said they should go to the police, which they did and there she was still very much afraid. She talked to a police officer and was told to come back the following day in order for her to calm down.

[11.6] The following day Veronica went back to the police and she gave her statement to W/O Kameruao, she does not know how many she gave because the first was not properly done and another one was taken and modified. She testified that she gave the description of her assailant to the police that same evening. I will quote verbatim at page 405 line 20-30:

'Ms. Esterhuizen: Now before you proceed there, when was this now?

--- I do not recall the date, My Lord. Now tell this court did you give the police a description about this person of that evening? --- Yes I did. What description did you give? --- How did the person look like? --- I said that he was well built, very muscular like somebody who does sports, strong built, well built, My Lord, you could clearly see that he was strong built'.

Further on at the bottom of page 407 line 30 of the record states:

'Ms. Esterhuizen: ... Ms. //Garoes I will proceed with the last question, what that person wearing that evening. --- That evening the man was wearing a brownish Army type of pants but the ones that you can purchase in the shops, ...Now why do you say the one that is purchased in shops? --- My Lord, why I am saying that is that I have seen other people also wearing similar types of pants, in particular people who would go and buy these in shops especially in our area ...'.

[11.7] Veronica Garoes testified that from Paradise Restaurant, Trapietjies, up to the scene of the incident she was with her assailant for quite a long time. From the lights of cars that drove past as they walked up to the scene visibility was clear. She was able to see clearly how her assailant looked like. She cannot estimate time in accordance to hours. Although her assailant spoke broken basic Afrikaans they talked and were able to understand each other. From the manner in which her assailant spoke Afrikaans gave her an indication that he is a Herero speaking person.

[11.8] While in the office at the police station she was asked to look through the window and she saw two men coming walking alongside each other. She immediately recognized the accused as the person who was together with her the previous night. The accused was brought into the office where he denied that it was him, she however told the police that in her mind, she was convinced and believed it was the accused before court. She cannot remember what the accused was wearing at the Police Station that day when she saw him through the window. W/O Kameruao said he can no longer handle the matter because he is the brother to the accused. He handed the case over to W/O Kefas, who proceeded to lock the accused up.

[11.9] At the inspection parade Desmond was unable to point out the accused as the person who was with him, at Paradise Restaurant, and the one who walked away with Veronica. The approach to inspection parades in our law is that from

the time the incident happened the victim should not have had an opportunity to see the suspected assailant again, other than at the parade itself. In this case Veronica had already identified the accused at the Police Station upon which he was arrested. The accused had already made several open court appearances. It means Veronica already knew the accused so well that it was not necessary for her to identify him again at the inspection parade. During the trial of this matter Veronica said the accused appeared to be more slim and slender. He lost weight as opposed to when she saw him the first time during the incident. He was well built, like a sports person. She testified that there are street lights between Paradise Restaurant and Trapietjies, making the area visible. She was able to point out the accused the time she saw him through the window at the Police Station because it was only him and him alone that was with her on the evening of the incident. After the incident she felt very bad, her human dignity has been infringed upon and she feels dirty. She burst into tears and started crying.

[11.10] During cross-examination Veronica confirmed that she was raped on the evening of Christmas day in 2007. She said before the incident she was at home with her boyfriend where they ate, drank only beers, and had a nice time. It was only becoming evening time when they shortly started to drink beers. They had invited their neighbors to a Christmas like sort of party. The two minor children were already asleep when they went to Club Paradise. Had it not been for the fact that she consumed beers, she could not have left the kids at home alone. She said she can take up to ten beers before she can be under the influence of alcohol, and would then be mildly drunk.

[11.11] Veronica conceded it was because she had consumed alcohol, that she danced and walked away with an unknown man ignoring her boyfriend's warning. She is adamant it was the accused who was with Desmond at Paradise Restaurant, that it was him who left with her from there to Trapietjies and later to Collin Foundation when he raped her.

[11.12] According to Veronica, the accused proposed her, saying he wanted her and she said no. He did not further say he wanted to have sexual intercourse with her. She could not explain why after raping her the accused still wanted to go with her to his house.

[11.13] In re-examination she said she did not fight back at the accused but only pushed him during wrestling to free herself.

[12] David Nujoma testified that he is currently a Human Resource Consultant at Ativa Resources Namibia. The accused alleged that he also worked there under the supervision of a certain Mr Brown. At the request of the police he went through all the records and could not trace Mr Brown nor the accused's employment there.

[13] Yana Lesruik testified she qualified as a medical doctor in the Ukraine and has a diploma in HIV and STD infection treatment, obtained in South Africa. She has eight years experience as a general medical practitioner in Namibia. After completing her internship in Windhoek, she was transferred to Swakopmund State Hospital where she worked for four years until 2008. On 26 December 2007 at 12h00 the police brought a girl rape victim, Veronica Garoes to her for examination. She was 27 years old and was generally in good health. She was able to walk into the examination room and her findings were as follows: a small wound on the left palm of her hand; swollen bloodstained lips, a bite mark on the tongue, a subcorneal hematoma (a redish colour bruise on the white layer of the left eye); a periobital swelling of the right eye, and an all swelling red tissue around the left eye.

[13.1] According to the doctor the injuries were caused by a face assault. The victim was hit in the face, bit on the tongue and the force used must have been quite strong. It could be that during the attack the complainant's mouth was closed and she bit herself on the tongue. The examination on her private parts

was painful, the breast, labia majora were normal; the labia minora was swollen, inflamed, painful, a situation the doctor said can be caused by insufficient lubricants, infections, and forced penetrations. According to her observations, rape cannot be excluded. The hymen was absent, the vagina emitted a white discharge. The anus had perinal hemorrhage and laceration. The anus was two centimeters open pointing to a medical condition or anal sexual intercourse. A fecal incontinence may also cause this, but if already in existence it would have been known in the health facility.

[13.2] The doctor ruled the findings to be more likely matched with the circumstances of the alleged incident of rape. He came to that conclusion when she found that the vaginal examination was quite sensitive and painful, the anus was open with laceration, assault marks on the face. There was an indication of fighting. She stated that where lubricants are used inflammations and lacerations are reduced and as such an examination will not be painful.

[13.3] Dr. Yana Lesruik was asked to read the J88 of Linda Kavendji who was examined at 07h00 by Dr. Nikolaas Kasiri at Swakopmund State Hospital on 22 July 2007. The complainant was 18 years old, with a fair general health condition, mental state, and she was calm. Clothing was not changed. She had abrasions at the right thigh, no open wounds, no dislocations and fractures. The examination of her private parts showed minimal hemorrhage at the labia minora plus a bruise with minimal bleeding. This suggests the application of force that can be caused by any object such as a penis, fingers, or any other hard object. All other genital organs were normal. She had a bruising at her right inner thigh, related to the use of force. The conclusion was that the injuries fit with the time and circumstances of the alleged incident of rape. The doctor said the type of injuries on a person kicked, slapped, beaten with a broom stick can sustain different injuries, depending on the force and sensitivity of the skin, the number of clothes he had on. The more clothes a person puts on the less the marks of the beatings and could not rule out the possibility of rape.

[13.4] In cross-examination the doctor testified that he cannot confirm the truthfulness and correctness of the examination done by another doctor. She conceded that it was possible that errors and mistakes could occur in the completion of medical reports. She stated that the abrasion on the inner thigh did not come from a kick but from the pressure that was applied to the area. She said an abrasion remains visible seven to ten days thereafter, depending on thickness and the type of the human skin. According to her sitting, no matter for how long cannot cause a bruise, abrasion or damage to the skin. It is only long lying on the bed by a patient that can cause bed sores. Vaginal discharges occur as a result of semen after sexual intercourse and infections. She conceded that rough sex can cause vaginal injuries. In normal circumstances vaginal fluids are usually clear, invisible, and not excessive. The doctor stated that rape could not be ruled out.

[13.5] In re-examination the doctor testified that forceful penetration by a small penis will normally not result in a painful examination.

[14] Desmond Kamoruao testified that he is a Warrant Officer and is in the police force for seventeen years. He was the Unit Commander of C.I.D. at Arandis between 2003 and 2008 and is a first cousin to the accused, their fathers are brothers. The accused was residing at his house in Arandis in 2007 and he knew him as a boxer. That was the reason he then called him to come and join the boxing club at Arandis.

[14.1] According to this officer the accused was not employed but is knowledgeable in the mechanical sphere and he used to help himself fixing cars here and there, thereby sustaining himself. Besides boxing the accused used to help drive Kaserandu around and sometimes out of Arandis as she did not have a drivers licence. The officer was on duty at the time of the incident and he allocated the docket to W/O Kefas for investigation.

[14.2] This officer was in the Station Commander's office together with W/O Nghaamwa, W/O Kefas and Veronica Garoes whose alleged rape was being discussed. He heard Veronica showing to the window in the direction where two male persons, the accused and the police officer Kandombe were approaching the police station gate. Veronica was talking in Afrikaans saying 'that is the one. It is that man'. Veronica described the accused person as follows, and I quote verbatim at page 498 line 20 of the record:

'... that he was a short person, according to her, Otjiherero speaking, physically fit and he was wearing a camouflage ...'

[14.3] They visited the scene where Veronica was showing them between Collin Foundation and then the Rossing Foundation School now called UB Dax next to the wall. The scene where Veronica was raped was a stony area and as such he was unable to see with a naked eye that there were people there. No tracks were visible at the scene, and there was no footpath. It is a place where people move around and cars drive. According to this officer the accused before court can fit the victim's description that was the reason why as a relative he decided not to get involved in the matter and left the Station Commander's office. He understood the camouflage trouser as reference to those bought in local Chinese shops and he is aware that the accused has such a trouser. The officer used to see the accused wearing the camouflage trouser most of the time, but he cannot say how many time he wore it. He did not have problems with the accused before the incident.

[14.4] In cross-examination he stated that the accused did not tell him each and every small happening in his life, he was not aware that he performed casual work for a person contracted by Uva Mine. The officer conceded the description given by Veronica fits other Namibian citizens and he did not tell anyone whom he had in mind in that regard. At the time the description was made and before

the accused was pointed out he did not think it was him.

[15] Maryn Swart, a permanent employee at the National Forensic Science Institute, a scientist from 2007 until 2009, holds a bachelor's degree in Natural Science from the North Western University in South Africa. She was involved in training medical professionals and members of the Namibian Police, in sexual assault evidence collection.

[15.1] She testified that she received a rape kit for Linda Kavendji and another kit containing the samples of the accused for examination. The rape kit contained two vaginal smears, two vaginal swabs, one saliva swab, one blood sample and one panty or undergarment. In the other kit was one saliva swab, one blood sample, and one white short or pants. She used a microscope to determine the presence of spermatozoa on Linda's vaginal smears, but there was none.

[15.2] In the rape kit of Veronica Garoes were two vaginal smears, two vaginal swabs, one saliva swab, one blood sample, one undergarment in one envelope. The kit for the accused contained one blood sample and one saliva swab in another envelope. A microscope was used and spermatozoa were observed on the vaginal smears. Vaginal swabs tested positive in a presumptive test for semen although the exercise does not confirm its presence. The same test also detected the P30 presence of semen on the complainant's undergarment. However, it is only the DNA analysis that could specifically identify Veronica Garoes's assailant.

[15.3] In cross-examination the doctor conceded in regard to the two complainants that on the tests she conducted she was unable to link the accused person to the commission of the offence.

[16] Chalwa Nyambe testified that she was is an investigation officer since 2008. She is a neighbor to W/O Kameruao, the Unit Commander for C.I.D. at

Arandis at whose house the accused resided at the time of the incident, and it is how she knows the accused before court. She did not send the exhibits to the Laboratory for DNA examination because she was not aware it should be done.

[16.1] In cross-examination she testified that investigations indicated that Veronica Garoes was raped by the man who was together with Desmond on the day of the incident but the latter did not identify him at the identification parade.

[17] Gerson Kavijenene Kameruao testified he was the accused on the matter and the only witness in his own defence. He confirmed his residence at his elder brother's house at Arandis in 2007. He was a boxer. He met Linda Kavendji at her residence on his way to the gym two to three months before the alleged rape on 21 July 2007. From there they would greet each other, sometimes he would ask for water when he walked past. He became interested in her and was proposing her to become his girlfriend. He would sometimes come to Linda's residence, they would sit and have a chat. At times the owner of the house, Bella would be at home, and sometimes not. Bella was aware that the accused used to come at her place. Linda did not give a yes or no answer to his love proposal, she only kept on postponing the answer from time to time. On 19 July 2007 he was told to come back and get his answer on Friday, but did not make it as he went drinking with friends.

[17.1] On Saturday 21 July 2007 he went with a family member Cassius Tjijenda to another house to drink further and they passed Linda's residence. He was not so much drunk. They knocked, Linda opened for them. She said it was good he came, she would like to go to the shop and he could look after her child. Cassius Tjijenda realized the place was quiet and ideal for them to drink without disturbances compared to where they wanted to go. He stayed behind with the child while Linda and Cassius went to the shop and the latter came back with liquor and the two men started drinking there inside the house. They finished between 08h00 to 09h00 in the morning, and Cassius said they should leave but

the accused said he was drunk and cannot walk anymore. He fell asleep on the mattress and does not know when Cassius left the house. He woke up at 17h00 in the afternoon and found himself alone, Linda only came at the house after half an hour. He was laying on his back and Linda told him to stop drinking. When he wanted to go somewhere in the neighborhood she asked where he was going. He said to Tate Joshua for a beer to end his hangover Linda did not want to let him go away. She told him he did not come on Friday as she had requested him. She said if he went away he may go to other girls or if he comes back he would be very drunk. He wanted to put on his T-shirt but Linda took and put it in a bucket of water and then hanged it on the line to dry. Linda's aunt Jacomboka Uushona arrived and the two sat outside. He greeted her. He collected his T-shirt from the line, although it was still wet on the collar he put it on. He asked Linda if he can go to a liquor outlet at Hosia's house and she told him to go and come back. They hugged, he kissed her on the cheek and left and never returned back. While there after two hours a police officer Beukes called him and asked if he knew Linda, and he confirmed. He was asked to escort the officer to the police station as Linda had reported him there for rape. On arrival he was told Linda was at W/O Munyele's office. He was told to wait in the Charge Office. W/O Munyele got him there and asked if he knew Linda and he confirmed. He was arrested but had done nothing wrong whatsoever and knows nothing about the allegations of rape.

[17.2] On the second count involving Veronica Garoes on the evening of 25 December 2007. The accused denied any involvement with her. He stated that he was then working at Rossing Uranium Mine, residing in a room allocated to him by his employer at the workplace. According to the accused he was on standby duty that day from 08h00 in the morning to 22h00 in the evening. From work he went straight to his room to sleep and he spent the night alone. On 27 December 2007 when he knocked off he went to the location where he met with his nephew, a police officer, Kambonde who was working at Arandis Police

Station earlier on and then transferred to Omaruru. He escorted him to the Police Station to collect a key from another police officer, Hamutenya. At the same time he was reporting himself on a bail condition in respect of Linda's case. While there the Station Commander Nghaamwa called him to his office where for his first time he found and saw Veronica Garoes.

[17.3] According to the accused it was during the day, inside Nghaamwa's the office the lights were on, W/O Kefas was also there. He was told to stand there inside and in Afrikaans he was told that Veronica was standing looking through the window when she saw him. W/O Kefas asked Veronica to point out her assailant and she said: 'I do not know whether it is him or not', Veronica was facing in another direction but pointing to the ground in the accused's direction. Veronica was normal and not emotional, she was not crying. The accused was told to go out of the office, and when she was called back into the office, the same officers were still there. W/O Nghaamwa in a loud demanding voice said to Veronica 'point out the person, there is the person point out the person'. W/O Nghaamwa then turned to the accused and said Veronica has laid a charge that he raped her at Collin Foundation School. The officer asked Veronica: 'is it not what you say' and the answer was: 'yes'. The officer asked her whether it was the accused and she said: 'it is him'. He was locked up for raping Veronica Garoes. On 30 January 2008 he was lined up in an inspection parade comprising of nine persons and Desmond looked through and said, 'no the person is not here'.

[17.4] During cross-examination the accused denied having raped the two complainants. According to him the exact words he used to propose love to Linda Kavendji are as follows: I quote verbatim on page 779 of the transcribed record:

'... I say you are attracting me and I want you, I am in love with you. I want you to be my girlfriend, really I like you ... I want you to become my lover. I want you to become my flower. And I want to carry you, and cuddling you and can you

be my flower. ... And then you will be just my bottle because if you fell down you will broke and I will take care of you like a bottle'.

[17.5] The accused did not relate to such words in his evidence in chief and neither were those words put to Linda during her cross-examination in order to give her an opportunity to react to them.

[18] Ms Esterhuizen, counsel for the prosecution, submitted that from the evidence of the Unit Commander for Woman and Child Protection Unit, it is clear that Kavendji did not want to talk, she looked withdrawn. She only told her story after other officers had left and she was with the Unit Commander. She argued that it was inconceivable that Kavendji would embark on a fabricated cry of rape when regard is had to the stigma attached to it; and the effect of going through the harrowing process of cross-examination.

[18.1] On Veronica Garoes Ms Esterhuizen submitted that this complainant was talking to her assailant, the two danced opposite each other (facing each other) and had several beers in a visible lighted place, Club Paradise. From here the street to Trapietjies and to the scene of crime near Collin Foundation were lights and it was visible. Veronica had all the time to look and observe her assailant, and that is the reason she testified that he had a brownish army type of pants obtainable in shops. She submitted that in her opinion all counts have been established and the accused should be convicted as charged.

[19] Mr Uirab, counsel for the accused submitted that Linda Kavendji did not pass the test laid down in *R v Mokoena* 1932 OPD79 at page 80 stating that the uncorroborated evidence of a single competent and credible witness would be sufficient for a conviction. According to this counsel Linda's version contradicted other versions. The doctor who compiled the J88 report where bruising at the inner right thigh with minimal bruising of the labia minora was never called to testify resulting in such evidence not carrying much weight. Police officer

Munyele's evidence that he found a condom in a rubbish bin has not been confirmed by other police officers who were with him, and neither was the condom entered in the Pol.7. According to this counsel Kavendji's cry for rape was triggered when Jakomboka who works with Kahuiha her boyfriend arrived at her residence and found her with a half-naked accused.

[19.1] On the second complainant, Veronica Garoes, this counsel submitted that she was drunk at the time, did not know the accused before, it was dark, her identity of the accused must be seriously doubted. The counsel submitted in the end that both counts have not been established against the accused and should therefore be acquitted on both of them.

[20] I will now briefly discuss the merits on the evidence before court.

[21] When Jakomboka Ushona arrived at the scene she found the accused and Linda sitting outside and they greeted each other. She took the food Linda gave her, and went to eat outside where the two were sitting. When Jakomboka finished she went into the kitchen, Linda followed her and started locking the doors. When asked why, she told Jakomboka the accused wanted to rape her. Linda asked her to go fetch her clothes and spend a night with her. Jakomboka left, did not take long, when she came back she found Linda in the TV room crying. On further inquiry the story was still the same, that the accused wanted to rape her. Although Linda preferred to report the matter only the following day, Jakomboka successfully persuaded her to do so that same day, which they did. On their way to the Police Station Linda told Jakomboka the accused beat her and raped her as well. Jakomboka saw that Linda's right side upper lip was swollen. Mr Uirab, counsel for the accused extensively cross-examined Linda and Jakomboka on this point contending that the story of rape should not be believed because Linda failed to tell Jakomboka straight away that the accused raped her.

[21.1] It is my considered view that in crimes such as assault, attempted murder

and others, a female victim will not hesitate to seek help or to tell any person including those unknown to her that she has been beaten up or assaulted. This is not the case with rape matters because of the extent of the damage, and the devastating consequences it brings to the reputation, dignity, and integrity of the victim among members of the society in which it took place. It is further my view that a rape victim will in most cases always be very slow if not reluctant to open herself up and say she was raped. This will be the case even to close friends, relatives and others known to her.

[21.2] The accused used two condoms, Linda out of ignorance of court processes flushed the first one in the toilet for fear that her child may play with it. She saw the accused throwing the second condom into the rubbish drum from where the police officer Josua Munyele found it. Munyele took it to the Police Station but it was not booked in because he quickly had to take the complainant to hospital in Swakopmund. On its disappearance Munyele testified that it could have been thrown away by one of the accused's friends.

[21.3] The evidence shows that the accused visited the Police Station quite often and has made friends with police officers at Arandis. He is the one who always cut the Station Commander, Nghaamwa's hair at a price. The accused is a boxer and a member of the Arandis boxing gym which was pre-owned by the Arandis Police. In addition to the above the accused's own elder brother was the C.I.D. Unit Commander at Arandis Police Station. In these circumstances the fact that the condom Munyele found in the rubbish drum at the scene went missing does not weaken the credibility of Linda's evidence in this regard.

[21.4] Dr. Nikolaas Kasiri of Swakopmund hospital noted the following injuries on Linda Kavendji: abrasions on her right thigh; minimal hemorrhage at labia minora; a bruise with minimal bleeding, suggesting the application of force caused by any object such as a penis or finger; a bruising at her right inner thigh found to be related to the use of force, concluding that the injuries fit with the time

and circumstances of the alleged incident of rape.

[21.5] However, the doctor conceded that depending on the force used, a kick, slap and beating with a broom stick would cause different injuries to those he found. It follows therefore that Linda Kavendji's cry for rape has been materially corroborated by the following witness: Jakomboka Ushona, Josua Munyele, the Unit Commander of Woman and Child Protection, Selma Kauna Shangula, and Dr. Nikolaas Kasiri. I am therefore satisfied that the following crimes have been proved beyond reasonable doubt: rape, assault, and indecent assault.

[22] After Veronica Garoes was raped and assaulted that night near Collin Foundation, the suspect asked her to escort him to his house. While so underway she escaped and ran back home. Her boyfriend escorted her to the Police Station where she related what happened as well as the description of her assailant to the Unit Commander, Woman and Child Protection Unit W/O Kefas. This officer saw that Veronica appeared worried, was crying while relating to her what happened, her left eye was red, the rest of the left side of her face looked black as if she was beaten up. This officer told Veronica to go home, calm down and come the following day, which she did.

[22.1] The following day W/O Kefas took Veronica to W/O Nghaamwa, the Station Commander, asked her to relate what happened to the officer which she did. W/O Kefas confirmed in her evidence that Veronica in fact repeated what she related to her the previous day. This story included where, how, and who raped her as well as the description of her assailant. While still in Nghaamwa's office, W/O Kameruao, the elder brother of the accused joined them. W/O Kefas saw how worried and afraid the complainant has become and she refused that Veronica should again relate her story to W/O Kameruao for the third time.

[22.2] After listening to Veronica's story the Station Commander found the description of the suspect to fit the accused. While these officers were still with

Veronica in the office, Eric Kandombe and the accused walked in through the gate of the Police Station. Nghaamwa saw them and asked Veronica to look up at them through his office window which she did and when she saw the two men she pointed at the accused and identified him as the person who sexually assaulted her at Collin Foundation the previous day.

[22.3] From the evidence before court it is clear that Nghaamwa's conduct was a reaction to the description of the assailant he and other police officers got from Veronica before Kandombe and the accused came to the Police Station. It does not build up to assisting in the identification of the accused by Veronica. I see no fault in what Nghaamwa did and neither does his conduct make a dent in the truthfulness of Veronica's version regarding who sexually assaulted her.

[22.4] The evidence of the police officers Nghaamwa, Kefas and Kameruao corroborate each other in regard to the fact that Veronica identified the accused as he and another man walked in to the Police Station gate. That is the reason why the accused was arrested there and then.

[22.5] The credibility of Veronica's ability to accurately identify the accused as the person who sexually assaulted her is born out by the fact that the incident was not just a sudden encounter in darkness, where she was quickly grabbed, thrown on the ground and raped, no, not at all. The two were intimately together in a lighted environment for quite some time. At Paradise Restaurant, a well lighted club the two were drinking beer and intimately started a close dance facing each other, such that Veronica's boyfriend asked why she was doing like that, and requested her to stop. From here the two walked along a lighted street to Trapietjies (a lighted facility as well) where they again drank some beer. From there as they walked along a lighted street to Collin Foundation the accused started proposing to have sexual intercourse with Veronica, and she was refusing.

[22.6] Near Collin Foundation the accused started pulling her strongly, assaulted her while she in turn pushed him, the struggle ensued until she was eventually overpowered, and sexually assaulted. Veronica's evidence is credible and I find no reason to discredit it.

[22.7] Both Linda Kavendji and Veronica Garoes as it is normally the case in most sexual offences, are single witnesses in regard to the incidents of rape. After carefully evaluating the whole evidence before court, and in particular that of the two complainants, bearing in mind the following reasons in *S v Katamba* 1999 NR 348 SC at 348D:

“The Court held that the cautionary rule in sexual offences as it had been traditionally applied should be abolished. The Court, however added the proviso that the evidence of any witness, especially a single witness, should be regarded with caution. However, this caution was not related to the fact that the witness was a woman; each case had to be dealt with on its own merits.” my own underlining

The court is satisfied that the following crimes have been proved beyond reasonable doubt:

In respect of Linda Kavendji: rape, assault, and indecent assault;

In respect of Veronica Garoes: rape (two counts) and assault.

[22.8] The accused's evidence of employment has been credibly and convincingly displaced by his own elder brother W/O Kameruao at whose house he resided up to the time the two incidents happened. This officer's evidence is that he only knew the accused as a boxer, unemployed, sustaining himself by fixing other people's vehicles, and driving their unlicensed niece, Kaserandu on payment. The accused's evidence of denials that he did not have sexual intercourse with the two complainants is rejected as false beyond reasonable doubt.

[23] In the result the accused is convicted as follows:

Count 1: Rape

Count 2: Assault

Count 3: Indecent Assault

Count 4: Rape

Count 5: Rape

Count 6: Assault

A M SIBOLEKA
Judge

APPEARANCES

STATE:

K Esterhuizen
Instructed by The Office of the Prosecutor-General

DEFENCE:

Mr. Uirab
Instructed by Directorate of Legal Aid