REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CRI-APP-CAL-2020/00075

In the matter between

SYDNEY HAMBUREE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Hamburee v S* (HC-MD-CRI-APP-CAL-2020/00075) [2021] NAHCMD 147 (7 April 2021)

Coram: USIKU J et CLAASEN J
Heard: 15 March 2021
Delivered: 07 April 2021

Flynote: Criminal Appeal – Appellant convicted on two charges of rape in court a quo – On the facts of this case, the probabilities weighed too heavily in favour of the complainant's version – Effect thereof is that it eliminated any reasonable doubt about the appellant's guilt and the truthfulness of the appellant's version in respect of the sexual acts –No misdirection by court a quo in rape convictions – Appeal against convictions dismissed.

Sentence – Rape – Appeal against mandatory minimum sentence – No substantial and compelling circumstances found – Disagree that the two acts of penetration was a single transaction – Definite interval between the act of penetration of the first and second sexual act – Acts not merely separated by a different condom, but a new location to which complainant was dragged and new position enforced – Furthermore the appellant apart from forcing him on her twice, he discarded her like trash at the remote area, leaving her to walk 3km back to civilisation - In circumstances of case no justification to interfere with the sentences – Appeal against sentences dismissed.

Summary - The appellant was convicted of kidnapping, assault and two counts of rape. He appealed against the rape convictions and sentences only. He was sentenced to 10 years' imprisonment on each of the rape counts.

The complainant and a friend were at a night club in Swakopmund. At closing time they obtained a lift from the appellant. After dropping off the friend, the appellant sped off with the complainant to a remote area on a gravel road 3 km outside of Swakopmund. There two acts of sexual penetration took place. The complainant's version was that she did not give her consent for the sexual intercourse whereas the appellant contends it was consensual sex.

The material averments in the appellant's version is that a girl, whose name he did not know, elected to accompany him to a remote area in the dark of night, she voluntarily pulled of her clothes and laid, back down, on the bare earth, for them to have sex until the condom broke. Then he realised its cold there and suggested that they return to the kombi where she volunteered for sex for a second time and again the condom broke. Thereafter he dropped her off at a house close to the police station.

What are the probabilities that the complainant, who had the comfort and privacy of her own room, will of own accord choose a remote, dark, and sandy area, barefoot and exposed to the elements of nature to have sexual intercourse until the condom broke? Furthermore what is the likelihood of her giving her white jeans a sandy coat,

hit herself on the eye and lip, disarrange her hair and arrange a melancholy face for the moment of laying a charge at the police station at 4h00? The reasons are indicative of the fact that the weighing of the probabilities of the respective versions was at play in the final analysis, by the court a quo.

Held that on the facts of this case, the probabilities weighed too heavily in favour of the complainant's version. The effect thereof is that it eliminated any reasonable doubt about the appellant's guilt and the truthfulness of the appellant's version in respect of the sexual acts. No misdirection by court a quo in rape convictions.

Held that there are no substantial and compelling circumstances that warrant deviation from the mandatory minimum sentences.

Held two distinct acts of penetration was committed. Definite interval between the act of penetration of the first and second sexual act. Acts not merely separated by a different condom, but a new location to which complainant was dragged and new sexual position enforced. In the circumstances of the case no justification exists to interfere with the sentences. Therefore the appeal against sentences dismissed.

ORDER

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1. The appeal against the rape convictions on count 3 and count 4 is dismissed.
2. The appeal against the sentences imposed on count 3 and count 4 is dismissed.

JUDGMENT

CLAASEN J (USIKU J concurring):

Introduction

[1] The appellant was charged in the Regional Court for kidnapping, assault and two counts of rape, read with the provisions of sections 1, 2(3), 3, 4, 5, 6 and 7 of the

Combating of Rape Act 8 of 2000. On 14 October 2016, after a trial, he was convicted of all the charges.

[2] The appeal lies against the rape convictions and the sentences only. The appellant was sentenced to 10 years' imprisonment on each of the rape counts, which sentences were ordered to run consecutively.

Grounds of Appeal

[3] The appellant itemised seven grounds of appeal against the convictions, which I will summarise. They are: (a) An error in the finding that the State had proven its case beyond reasonable doubt despite significant contradictions between the complainant and her friend Monika Angula's evidence and an error in the dismissal of the accused's version as improbable and false even though he consistently advanced that version to the state witnesses and testified about it; (b) An error by the Magistrate to have based part of its conclusion on the accused's failure to provide a motive as to why the complainant would lay a rape charge; (c) Discrepancies pertaining to the complainant's injuries by the doctor and the police officer and that the court erred in accepting the accused caused the injuries thought there was a 12 hour lapse in time until the complainant was examined at the hospital; (d) An error by the court a quo in concluding that the headset of the accused that was found on the scene fell off in the wrestling and not considering that the headset could also have fallen off during consensual sexual intercourse.

[4] As far as sentencing was concerned the grounds were the court a quo erred by considering that both counts happened during the course of a single transaction and the personal circumstances of the appellant gave rise to substantial and compelling circumstances.

Summary of facts

[5] The charges originate from events that occurred on 29 November 2011 on the road to Henties bay in the district of Swakopmund. The complainant, Marceline ! Gares testified that on the night in question she and a friend Monika was at 'Ekando

bar.' At closing time she and Monika were outside, and she asked the owner for a lift. A kombi of 'Townhoppers' arrived, and the accused, who was in the passenger seat, offered them a lift. The driver of the kombi disembarked and left whilst the accused got behind the steering wheel.

[6] The girls climbed in the kombi. The accused handed 'Townhoppers' business cards to them, saying that it was his new job. Monika was dropped off first. As they got nearer to the complainant's place, she told him to stop, but he did not adhere. Instead he sped off. He drove pass several places, which she named, onto the Henties bay road. He stopped at a deserted spot, where there are bushy desert plants, close to the salt pans. Whilst driving he uttered words to the effect that today he was going to have sex with her, which words were not said in respectable terms.

[7] He jumped out of the kombi and pulled her out of the vehicle. Outside, they wrested. He hit her on her eye and mouth and dragged her into the bushes. He kicked her feet, which led her to fall, and then he pulled off her clothes. He pinned her down on her back in the sand and whilst on top of her he inserted his penis in her vagina. He had sex with her until the condom burst. He uttered a swear word about the broken condom and got up. He pulled her up and dragged her back to the kombi. He threw her inside and pulled her to the backseat where she landed face down. She testified that he again had sex with her, penetrating her vagina from behind. When he was done, he pushed her out the kombi and threw out her shoes. He dressed himself and drove off, leaving her at the scene.

[8] Once he left, she got up, urinated, wiped herself and got dressed. She walked back to Swakopmund, straight to Mondesa police station, where she laid charges. When asked who raped her she said that it's a guy that drove a vehicle from 'Town hoppers' and that she will recognise him, as there were street lights at Ekandjo bar and the small light of the kombi was on when they got in.

[9] At the police station she remained in a small room until the next day. Later that day, she was taken to the State Hospital for a medical examination. She sustained an injury on the lip, which left a scar, and her eye was injured. She also

testified that she was called to an identification parade where the accused was angry when she identified him.

[10] She furthermore identified points at the scene of crime as depicted in the photoplan. It turned out that the scene was a distance of 3-km away from Swakopmund. The scene exhibited tyre tracks, bare foot prints, headsets, shoe prints, a used condom, opened condom wrappers, and a piece of toilet tissue.

[11] During cross-examination, the complainant was confronted with the defence's version that it was consensual sexual intercourse. Particular averments were put to her, such as that she asked the accused for money. She replied that it is a lie as she had money. It was also put to her that she asked him if he had a room. She refuted that by saying 'I had my own ghetto,'[1] and that she lives alone in her room. Furthermore it was advanced that the accused bought her a beer at a certain Shell service station on the way to Henties bay road. Again she said that the accused lies about that. She said they did not drive the route of the Shell service station but rather a road that passed the cemetery and Nampower, and that if there was beer, such bottles would have been on the scene. It was furthermore put forward that she started to kiss the appellant. She denied it and countered it with a question of: 'How can I kiss with a person I did not agree with?'[2] Counsel for the appellant contended that photo 15, which shows many footprints in close proximity, indicates the place where they smooched on the scene, which she denied and stated it was the place where they wrestled. It was also advanced that the appellant dropped her off in the vicinity of the police station but she maintained her version that she walked back from the scene.

[12] The court a quo also heard testimony of her friend Monika Angula who was with the complainant at Club Ekandjo that night. Around closing time, she wanted to go home. Outside she started walking, but the complainant stalled her, saying there is a guy with a car that she knows will take them. The complainant came forth with the accused. They walked to the kombi and the person in the driver seat got out and entered the club. The girls climbed into the kombi and the drive commenced. Ms Angula noticed cards in the vehicle. She make a remark that appellant used to be

[1] Page 40 of record.
[2] Page 47 of record.

employed at a security company and asked him if he now works at this place. He answered in the affirmative and then she put the card in her pocket. At her house she disembarked and the accused and the complainant drove off. During cross-examination she stated that she concluded that the complainant and the accused knew each other. As for the accused's version that he parked in front of the bar, that he greeted Mr Ekandjo, and that it was Mr Ekandjo who told him to provide a lift to the ladies, she answered that she did not observe that.

[13] Sergeant Ndinomwaameni Shingenge, corroborated the complainant's evidence that at around 04h00 of the relevant date, the complainant arrived at the police station. She reported the ordeal to him and laid criminal charges. He narrated the details as she relayed it. As for her external appearance, he described that her hair was disorderly and a mess, like someone who was in a fight and that she wore white jeans that looked so dirty with sand like someone was dragged though the sand. As for her state of mind, he testified that she was hurt and looked like she wanted to cry. He testified that he observed a wound on her upper lip. When he enquired if she knew the culprit, she said that she did not know him personally, but that she could identify him, that he was Otjiherero speaking and drove a white mini bus with the name 'Townhoppers' printed on the side.

[14] Dr Steve Kambamba testified that he examined the accused he observed a urethral discharge which he noted down in the medical-legal report. Dr Kennedy Manando testified that he examined the complainant. According to him there was no bruising on the genitalia but there was a vaginal discharge. Furthermore he made a note of the bruising that he observed on her right eye but did not make a note of an injury on the complainant's lip. When questioned about the feasibility of the bruise on the eye only appearing later and not immediately the physician said it's possible and it depends on the nature of the trauma and the skin complexion of the person that was assaulted.

[15] The appellant testified. According to him, he parked the kombi in front of the owner of Club Ekando's car. The owner requested him to give a lift to the girls and he agreed. When asked whether he knew the names of the girls, he answered in the

negative and explained that he just saw them previously at Ekandjo's. During the drive he gave them business cards of the company. He firstly dropped off Ms Angula. Thereafter the complainant expressed that she wishes to move around a bit. He then asked her if she does not want them to spend the night together, to which she responded by asking if he had a room. He had none and he asked her if she had a room, to which she answered in the negative. He was then asked by his counsel if anyone had mentioned money and he answered that the complainant asked him if he had money and he answered in the negative. In an effort to buy beer for the complainant he drove to 'Strong Bar' but it was closed. He nevertheless managed to buy a beer at the last service station in Ocean View. The complainant made a remark that they cannot stand there because the vehicle bears a company name. He then drove towards the road to Henties bay and after a short distance he pulled off.

[16] They drank the beer and they started kissing. They both got off the kombi, walked a bit and continued with the kissing. They walked a bit further and then the complainant laid down on the ground. He put on a condom and while they had sex the condom burst. When he saw that, he proposed that they return to the car as it was a bit cold outside. They walked back to the kombi which he then closed. He put on a condom, they had sex and again the condom ruptured, and he put on another one. Upon completion of the act, she went to urinate, and returned to the car. She sat in front with her shoes in her hands. He drove back to Swakopmund, and offloaded her at a maroon house near the police station. He waited until she entered the yard after which he departed. Three days thereafter he heard from his employer that the police were looking for him, where-after he was arrested.

[17] During cross-examination by the prosecutor he denied the complainant's version, that the complainant was dragged in the sand or that he assaulted her in any way, that a struggle ensued or that he left her in that remote area. According to him the complainant herself opened her jeans up to the knees before the sexual acts. When asked whether he can dispute that the complainant actually had a room of her own and she stayed alone, he answered in the following terms: 'That is correct your worship I cannot, because I did not know.'[3] As for the earphones he did not dispute

[3] Page 90 of the record.

that it was his. He had no recollection of the circumstances how he lost it and attributed it to his state of intoxication.

Discussion of grounds of appeal

[18] We start to consider the appellant's second ground of appeal that the court a quo based part of its conclusion on the fact that the appellant was unable to provide a motive why the complainant would make false rape charges. During argument counsel contended that it was tantamount to placing a reverse onus on the appellant.

[19] The respondent argued that there is nothing in the record indicative of a reverse onus being placed on the appellant. He further argued that the magistrate was alive to the legal principle that there is no duty on the appellant to give a reason why the complainant would lay rape charges.

[20] In returning to the trial record, during cross-examination the appellant's counsel postulated that the reason why she reported the rape was the possibility that when she got home, her boyfriend wanted to know where she was. Secondly she laid the charge because appellant did not pay her as she initially requested. The complainant refuted both these averments, saying that they had no conversation about money and that she stays alone as her boyfriend resides in Walvisbay.

[21] Reflecting on the above, one of the observations by the court a quo in its analysis of the evidence was that the claim by the appellant of the reason why she laid the false charges was because her boyfriend wanted to know where she was, is baseless because the appellant conceded that he did not know whether she had a boyfriend or not. The court a quo merely explained why the hypothesis of the possibility of an irate boyfriend demanding an answer as to her whereabouts did not arise in the circumstances, as the boyfriend did not stay at her place in Swakopmund, but resided in Walvisbay. It does not amount to a reverse onus invoked by the Magistrate.

[22] Secondly we turn to ground 6 wherein the Magistrate is censured for attaching weight to the appellant's earphones that was discovered on the scene. It is not in

dispute that the earphones found on the scene belong to the appellant and that he had no recollection of when or how it came off his head. The appellant's view was that the Magistrate erred in failing to considering that the headset could also have fallen off during consensual sex. On this issue the responded replied that it was a mere observation in passing and the conviction does not rise or fall on that point alone.

[23] The Magistrate in her reasons referred to testimony by the complainant who described photo 17 in the photoplan, which depicted the headset of the appellant on the scene. The complainant attested that during the time that she and the appellant wrestled, while he held her down, she pulled off the headset from his head. During cross-examination of the complainant, there was not a single question to gainsay this evidence that it was pulled off by the complaint during the physical struggle. As such the Magistrate cannot be faulted for this impression, which she captured as one of the many considerations in the weighing of the evidence. It does not constitute a misdirection.

[24] Grounds 3, 4 and 5 will be dealt with together as it pertains to issues regarding the complainant's physical injuries. The appellant construed the failure by the police officer to have included the lip and eye injury in his witness statement as a sign that he lied about it. The respondent made this off as nothing, saying that the police officer remembered the lip injury whilst he was on the stand and explained it. In looking at the evidence, the officer rebutted the fabrication allegation by saying that on the night in question, 'I saw she used her tongue to clean the blood. I ask what happened she said maybe he bite her.'[4] As regards to omissions in witness statements, we associate ourselves with what's been stated in *S v Gariseb*[5] that a police statement is often than not the mere bare bones and the fact that an aspect is omitted in the statement that features in oral evidence, that does not in itself means that the event did not take place or that it is fabricated by the witness.

[25] The appellant also complained that the J-88 did not refer to the lip injury but only to the eye injury. That is opposed to the evidence of the police officer which

[4] Page 62 of the record.
[5] *S v Gariseb* (CC 18/2011) [2013] NAHCMD 136 (21 May 2013).

spoke of a lip injury and not an eye injury. The counsel for the respondent negated this point by drawing the appellant court's attention to the explanation given by Dr Manande that the injury may have bled internally and that it may take time for the blood to become dark at which time the bruise will start showing. Furthermore the complainant was steadfast that she was injured on both her lip and her eye, and the fact that the police officer and the doctor did not register the one or the other does not necessarily mean that lies were told. In this regard we refer to *S v Auala*[6] wherein it was stated that it is not uncommon for witnesses to differ in minor respects, that there can be various reasons for that and that minor contradictions may simply be indicative of an error.

[26] The final qualm about the injuries was the suggestion by counsel for the appellant that the injuries to the complainant could have been caused by a person other than the accused, as there was a lapse of 12 hours between the time she say she was assaulted and the time that she was seen by the doctor. I agree with counsel for the State, that this ground is disingenuous as there was not an iota of evidence on the record wherein it was hinted or where a basis was laid that the complainant was assaulted by another person after the ordeal. None of the grounds as enumerated in ground 3, 4 and 5 bear any success on appeal.

[27] We move on to ground 1 and ground 7 which both parties addressed collectively in their respective heads of argument. The main trust of the appellant's points herein were that the Magistrate erred in arriving at the conclusion of guilt beyond reasonable doubt despite significant discrepancies between the evidence of Ms Angula and the complainant and furthermore that the Magistrate should not have dismissed the appellant's version because he consistently advanced his version and gave to it under oath.

[28] Firstly we agree with the respondent that these grounds, as formulated, leave much to be desired. It does not specify the discrepancies and amounts to conclusions by the drafter. For the sake of finality on the rape charges we briefly revert to these issues and start with the issue that pertains to the purported material

[6] *S v Auala* (1) 2008 (1) NR 223.

discrepancies. The main disparities between the complainant and Ms Angula related to who initiated the lift with the appellant and whether the appellant and the complainant ‘’knew’ each other. The court a quo held that these discrepancies were not material.

[30] During arguments, the appellant’s counsel was asked why the discrepancies were material or significant for the outcome of the matter. He stated that if the complainant and the appellant knew each other, that validates the appellant’s version that it was not rape, but rather consensual sex. The respondent argued to the contrary and stated that whether complainant and appellant knew each other has no bearing on the rape allegations. There is no principle that one can only be raped by an unknown assailant and therefore such fact is immaterial.

[31] In perusal of the relevant portions of the record, the evidence of the complainant was that she did not ‘personally’ know the accused but that ‘I only used to see him driving the vehicle of ‘G4s’ but that day I saw him physical in his face.’[7] This is at variance with Ms Angula’s testimony that she got an impression that the complainant and the appellant knew each other. The extent of familiarity was not clarified when Ms Angula testified and it does not stand an un-controvertible fact that the complainant and the appellant ‘personally’ knew each other. Moreover the appellant in his own version, testified that he did not know the girls and only used to see them at Ekandjo’s,[8] which does nothing to advance his argument. The question arises, even if the complainant and the appellant knew each other on a personal basis, does that fact necessarily boils down to consensual sex? In our view it does not. We agree with the respondent that it’s a fallacy to think that a sexual violation can be committed only by a person unknown to a complainant.

[32] Before we step off this issue, it is apposite to consider the notion advanced by the appellant that these were ‘material’ discrepancies. The Merriam-Webster’s Dictionary of Law[9] defines a ‘material fact’ as ‘a fact that affects decision making.’ We already referred to the misconception in the previous paragraph and that it did not amount to material discrepancies.

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[7] Page 41 of record.
[8] Page 83 of the record.
[9] Merriam-Webster’s Dictionary of Law, (1996) Merriam Webster Incorporated.

[33] We move to the contention that the Magistrate erred in rejecting the defence that it was consensual sex as improbable and false beyond doubt, in view of the fact that the version was consistently put to state witnesses and given under oath. During argument it appears that the main qualm was that the appellant's counsel could not gauge from the court a quo's reasons for judgment why the appellant's version was rejected. Counsel cited *Diergaardt v S*[10] that lay down the approach when there is conflict of fact between the state and the accused, it is wrong to reject the defence's version simply because the court regard the state witnesses are credible, that instead, the court must apply its mind to the merits and demerits of the state and defence witnesses but also to the probabilities of the case.

[34] It was the respondent's argument that the fact that an accused testify in his defence does not mean that his version must be upheld and that the court must always look at the holistic picture before coming to a conclusion, which the court a quo did.

[35] In our view, the reasons by the court a quo, leave no doubt that apart from the direct evidence by the witnesses respectively, the matter was also weighed on the probabilities of the respective versions. The crux of the issue herein pertains to whether it was forced or consensual sexual intercourse. The material averments in the appellant's version is that a girl, whose name he did not know until the court case, elected to accompany him to a remote area, in the dark of night. Furthermore, she voluntarily pulled off her clothes and laid, back down, on the bare earth, for them to have sex until the condom broke. Then he realised its cold out there and suggested that they return to the kombi where she volunteered a second time to have sexual intercourse, again until the condom broke. He then, conveniently, dropped her off at a house close to the police station.

[36] What are the probabilities that the complainant, who had the comfort and privacy of her own room, will of own accord choose a remote, dark, and sandy area, barefoot and exposed to the elements of nature to have sexual intercourse until the

[10] *Diergaardt v S* HC-MD-CRI-APP-CAL-2017/00023 NAHCMD 51 (15 March 2019).

condom broke? Furthermore what is the likelihood of her giving her white jeans a sandy coat, assault herself on the eye and lip, disarrange her hair and arrange a melancholy face for the moment of laying charges at the police station at 04h00? The reasons are indicative of the fact that the weighing of the probabilities of the respective versions was at play in the final analysis, by the court a quo. It our view that the probabilities cumulatively considered favor the State's case.

[37] Counsel for the appellant also appears to be oblivious to the record where the question of lack of consent pertinently featured. The issue was canvassed by the prosecutor in cross-examination. The appellant was asked at which point did he ask consent, and he said as soon as he dropped off the other girl. The exchange went as follows: 'So she never told you that it was then fine we just could have sexual intercourse? --- No she just told me that we can go together because she still wants to move around.'[11]

It continued further in the record: 'And when you got to outside and you went to a place that was dark, is that correct? --- That is correct.
When you went to this place you guys did not agree that you were going to have sex, is that correct? --- That is correct.' [12]
Based on the above account on the issue, the complainant never gave consent to consensual sexual intercourse.

[38] In the final analysis the court a quo was satisfied that the single evidence as regards to the sexual acts was credible and satisfactory in all material respects, it found corroboration for aspects such as the injuries and clearly the probabilities weighed too heavily in favour of the complainant's version. In our view the effect thereof is that it eliminated any reasonable doubt about the appellant's guilt and the truthfulness of the appellant's version in respect of the sexual acts. Thus there was no misdirection by the court a quo in reaching the conclusions of rape and the convictions are upheld.

[39] That takes us to the appeal against sentencing. The appellant's counsel prayed for a partially suspended sentence alternatively that the sentences on the

[11] Page 91 of record.
[12] Page 95-96 of record.

rape charges be served concurrently. The nub thereof was that the appeal court ought to interfere with each of the 10 year terms as it was a single intention that was interrupted only by the breaking of the condom. The second contention was that the court a quo failed to consider substantial and compelling circumstances.

[40] The respondent, argued that there was no reason to interfere with the sentences imposed on the rape counts. According to him the court a quo properly exercised the discretion to not order the sentences to be served concurrently against the backdrop of an increase in sexual offences perpetrated against women and children in this country. As for the second leg he emphasized that the court merely imposed the mandatory minimum sentence for the particular category. He reminded the court that it is not at liberty to deviate from the mandatory sentences if the circumstances does not meet the criteria.

[41] In light of the quest for suspension of the mandatory minimum sentences, when asked what factors constitute substantial and compelling circumstances, counsel for the appellant conceded he was not so much relying on that ground. It is a concession properly made as we do not find the existence of substantial and compelling circumstances in the personal circumstances of the appellant.

[42] As for the contention that the cumulative effect of the sentence is too much because it was a single intent transaction, we respectfully disagree with counsel for the appellant. There was a definite interval between the acts of penetration of the first and second sexual acts. The acts were not merely separated by a broken condom. After the first encounter which occurred on the bare sand at point H, the complainant was dragged some distance back to the kombi where she was shoved into the backseat, and another act in a different sexual position was enforced on her. It amount to two distinct acts of penetration.

[43] The court a quo in the reasons for sentence referred to the severity of rape in general, the prevalence thereof and the degrading and dehumanising effect it has on women. We fully concur with these sentiments. We further agree that this case was aggravated by the callous behaviour of the appellant that night. Not only did he rape her once, but he did so twice, and thereafter discarded her like trash in that remote

area, whilst he comfortably drove away. She had to walk back to civilization, in the dark, a distance of 3 km. According to the complainant she had seen the appellant before in a ‘G4S’ vehicle, a security company, which ease she may have had that this person can be trusted. Instead he shattered that, as he turned out to be a sexual predator.

[44] On the facts of this case, there is no justification to interfere with the sentences imposed on count 3 and count 4. The sentences of 10 years’ imprisonment on each count, to be served consecutively, are upheld.

[45] In the premises, the following order is made:

1. The appeal against the rape convictions on count 3 and count 4 is dismissed.
2. The appeal against the sentences imposed on count 3 and count 4 is dismissed.

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CM CLAASEN

JUDGE

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D N USIKU

JUDGE

APPEARANCES:

APPELLANT:	Mr Titus Directorate of Legal Aid Swakopmund
RESPONDENT:	Mr Malumani Office of the Prosecutor General Windhoek