REPUBLIC OF NAMIBIA **NOT REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 20/2016

THE STATE

versus

JAN GEMENG **FIRST ACCUSED**

TJAAVA EBSON **SECOND ACCUSED**

Neutral citation: *S v Gemeng & 1 Other* (CC 20/2016) [2022] NAHCMD 145 (29 March 2022)

Coram: SHIVUTE, J

Heard: **1 – 3 October 2019, 9 March 2020, 16 March 2020, 3 September 2020, 9 March 2021, 11 March 2021, 15 March 2021, 19 March 2021, 19 July 2021, 25 October 2021, 2-5 November 2021, 30 November 2021, 1 -3 February 2022.**

Delivered: **29 March 2022**

Fly note: Evaluation of circumstantial evidence – Court must not consider every component in body of evidence separately – Court must look at cumulative effects of all evidence together when deciding whether accused's guilt has been proved beyond reasonable doubt.

Summary: The two accused persons are charged with rape in contravention of sections 2(1)(a), 2(1)(b) of the Combating of Rape Act (the Act) and assault with intent to do grievous bodily harm. The State rests its case on circumstantial evidence. When evaluating circumstantial evidence to determine what weight should be accorded to it, a court must not consider every component in the body of evidence separately, but it must look at the cumulative effect of all the evidence together in order to determine whether the accused's guilt has been proved by the State beyond reasonable doubt. The court, by inferential reasoning, concluded that accused 1 and 2 raped complainant in contravention of s 2(1)(a) of the Act and convicted each accused. However, the court acquitted each accused person for contravening s (2) (1)(b) as the inferences sought to be drawn were not consistent with the proved facts.

JUDGMENT

Count 1, in respect of accused 1: Guilty of rape, contravening s 2(1)(a) read with sections 1, 2(2) 3,5,6,7 and 18 of the Combating of Rape Act 8 of 2000.
Count 2 in respect of accused 2: Not guilty and acquitted.

Count 4, in respect of accused 2: Guilty of rape, contravening s 2(1)(a) read with sections 1, 2 (2) 3,5,6,7 and 18 of the Combating of Rape Act 8 of 2000.

Count 5, in respect of accused 1: Not guilty and acquitted.

Count 8, in respect of accused 1: Not guilty and acquitted.

Count 9, in respect of accused 2: Not guilty and acquitted.

Count 10, in respect of both accused persons: Each not guilty and acquitted.

SHIVUTE J:

[1] The accused persons appeared on indictment containing several counts. In respect of accused 1: (a) Count 1 – Rape, contravening section 2(1)(a) read with sections 1, 2(2), 2(3),3,5,6, and 18 of the Combating of Rape Act 8 of 2000. (b) Counts 5 and 8 – Rape, contravening section 2(1)(b) read with sections 1, 2(2), 2(3), 5, 6, and 18 of the Combating of Rape Act 8 of 2000.

[2] In respect of accused 2: (a) Count 4 – Rape, contravening s 2(1)(a). (b) Counts 2 and 9 – Rape, contravening s 2(1) (b) read with sections 1, 2(2), 2(3), 3, 5, 6 and 18 of the Combating of Rape Act 8 of 2000.

[3] In respect of both accused: Count 10 – Assault with intent to do grievous bodily harm.

[4] The particulars of offences are as follows:

Count 1: (In respect of accused 1)

Rape – contravening section 2 (1) (a) read with sections 1, 2 (2) 3,5,6,7 and 18 of Act 8 of 2000 as amended.
In that upon or about 17 June 2014 and at Otjorukune Reserve in the district of Gobabis, the accused did wrongfully, unlawfully and intentionally commit a sexual act under coercive circumstances with Bertha Kheinamises, by inserting his penis into her vagina and the coercive circumstances are that:

The accused applied physical force to the complainant; and/or the complainant was affected by intoxicating liquor or drug which mentally incapacitated her; and/or circumstances where the presence of more than one person, namely Tjaava Ebson and Godlieb Repanka Katuuo was used to intimidate the complainant.

Count 2: (In respect of accused 2)

Rape – Contravening section 2(1) (b) read with sections 1, 2(2), 2 (3), 5, 6, 7 and 18 of Act 8 of 2000.
It is alleged that upon or about 17 June 2014 and at or near Otjorukune Reserve in the district of Gobabis, the accused did, wrongfully, unlawfully and intentionally cause Jan Gemeng to commit a sexual act under coercive circumstances with Bertha Kheinamises, by beating her until she was too weak to resist and removing her clothing while Jan Gemeng had sexual intercourse with her and the coercive circumstances are that:

The accused applied physical force to the complainant; and/or the complainant was affected by intoxicating liquor or drug which mentally incapacitated her; and/or circumstances where the presence of more than one person namely Jan Gemeng and Godlieb Repanka Katuuo was used to intimidate the complainant.

Count 4: (In respect of accused 2)

Rape – Contravening section 2(1)(a) read with sections 1, 2(2), 2(3), 3, 5, 6 and 18 of Act 8 of 2000.

In that upon or about 17 June 2014 at or near Otjorukune Reserve in the district of Gobabis, the accused did wrongfully, unlawfully and intentionally commit a sexual act under coercive circumstances with Bertha Kheinamises, by inserting his penis into her vagina and the coercive circumstances are that:

They applied physical force to the complainant; and/or the complainant was affected by intoxicating liquor or drug which mentally incapacitated her; and/or circumstances where the presence of more than one person namely Jan Gemeng and Godlieb Repanka Katuuo was used to intimidate the complainant.

Count 5: (In respect of accused 1)

Rape – Contravening section 2(1)(b) read with sections1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000.

It is alleged that upon or about 17 June 2014 at Otjorukune Reserve in the district of Gobabis, the accused did wrongfully, unlawfully and intentionally, cause Tjaava Ebson to commit a sexual act under coercive circumstances with Bertha Kheinamises, by beating her until she was too weak to resist and removing her clothing while Tjaava Ebson had sexual intercourse with her and the coercive circumstances are that:

They applied physical force to the complainant; and/or the complainant was affected by intoxicating liquor or drug which mentally incapacitated her; and/or circumstances where the presence of more than one person namely Tjaava Ebson and Godlieb Repanka Katuuo was used to intimidate the complainant.

Count 8: (In respect of accused 1)

Rape – Contravening section 2(1)(b) read with sections 1, 2(2), 3, 5, 6 and 18 of Act, 8 of 2000.

In that upon 17 June 2014 in the district of Gobabis the accused did wrongfully unlawfully and intentionally cause Godlieb Repanka Katuuo to commit a sexual act with Bertha Kheinamises under coercive circumstances by beating her until she was too weak to resist and removing her clothing while Godlieb Repanka Katuuo had sexual intercourse with her and the coercive circumstances are that:

They applied physical force to the complainant; and/or the complainant was affected by intoxicating liquor or drug which mentally incapacitated her; and/or circumstances where the presence of more than one person, namely Tjaava Ebson and Godlieb Repanka Katuuo was used to intimidate the complainant.

Count 9: (In respect of accused 2)

Rape – Contravening section 2(1)(b) read with sections1, 2(2) 3, 5, 6 and 18 of Act 8 of 2000.

The allegation is that upon or about 17 June 2014 at Otjorukune Reserve in the district of Gobabis, the accused did wrongfully, unlawfully and intentionally cause Godlieb Repanka Katuuo to commit a sexual act under coercive circumstances with Bertha Kheinamises, by beating her until she was too weak to resist and removing her clothing while Godlieb Repanka Katuuo had sexual intercourse with her and the coercive circumstances are that:

They applied physical force to the complainant; and/or the complainant was affected by intoxicating liquor or drug which mentally incapacitated her; and/or circumstances where the presence of more than one person, namely Godlieb Repanka Katuuo and Jan Gemeng was used to intimidate the complainant.

Count 10: (In respect of both)

Assault with intent to do grievous bodily harm.
It is alleged that upon or about 17 June 2014 at or near Otjorukune Reserve in the district of Gobabis, the accused persons did wrongfully, unlawfully and intentionally assault Bertha Kheinamises by kicking and beating her thereby causing her some injuries with intent to do grievous bodily harm.

[5] There was an 11th count of assault that was withdrawn against the accused persons. The accused persons pleaded not guilty to all the counts contained in the indictment. Initially the accused persons were jointly charged with a third co-accused who was discharged in terms of s174 of the Criminal Procedure Act 51 of 1977 at the close of the State's Case.

[6] In order for the State to prove its case against the accused persons, it called several witnesses. What follows is the summary of the evidence.
Dawid Hijamutiti testified that on 17 June 2014, he saw Bertha Kheinamises, the wife of the late Naab Selebe, at Marina's place. She was in the company of her husband Selebe. They were busy drinking tombo. Whilst they were at Marina's, place they were joined by Jan, Repanka and Tjaava. Jan and Tjaava are accused 1 and 2. Bertha Kheinamises left Marina's place. It did not take long after she left Marina, her husband and the witness at Marina's place when they heard a person screaming. Marina advised Selebe to go and check who was screaming because it could be his wife. At the time the witness heard a person screaming, he did not know where the accused persons were.

[7] Selebe followed his wife. The witness with his girlfriend Maria also went home. The next day on 18 June 2014, Naab Selebe came to Marina's place inquiring about the whereabouts of his wife. They were joined by the village forelady with some people. Together with the village forelady, they went to look for Kheinamises. They followed her footprints and they came across a pair of underpants. They took the underpants and they walked further and they found a lady's scarf. They proceeded and they saw some marks on the ground that looked like there were people wrestling. At that place, they found Naab Selebe's hat or cap. They followed Kheinamises' footprints as well as other footprints for other people until they found Kheinamises. She was in a bad condition because she was injured. Her face was swollen as well as her eyes.

[8] They asked her what happened to her and she reported to them that she was raped by Repanka, Tjaava and Jan. They found the complainant Kheinamises near the

river side. At the scene where they found a cap and a scarf, they also found one shoe or a tekkie that belonged to accused 1. The witness recognised the shoe because the previous day, accused 1 was wearing that shoe. The witness knew accused 1 and 2 before this incident. Accused 1 is a brother-in-law to the witness. The witness was a boyfriend to Maria, accused 1's sister. The shoe appeared light brown in colour. When the witness found the complainant, she was lying in a pool of blood. Her dress was soaked with sand. The people who were at the scene called the police. The police instructed the people to take the victim to the clinic. The witness identified a cap as that of Naab Selebe and a shoe as that of accused 1. The witness further testified that Naab Selebe and Maria are now deceased. Complainant had also sustained injuries on the face.

[9] Through cross-examination by accused 1's counsel, the witness testified that apart from the complainant's footprints, they had also followed three other different shoeprints up to the place where they found the complainant. It was put to the witness that accused 1 did not know the shoe and he never wore it. The witness replied that he wore it most of the time. The shoe had a green and light brown shoe lace. The shoe also appeared greyish.

[10] Marina Tjiunde testified that she sells home brewed liquor. On 17 June 2014 Bertha Kheinamises, her husband Naab Selebe, Dawid and his wife came to her residence. Accused 1 and 2 as well as Repanka came to her place in the afternoon. Around 19h00 she informed the complainant and her husband, Dawid and his wife that the liquor they were consuming was finished. The complainant Kheinamises left her residence first. After a while they heard a person screaming. She informed Selebe to go and investigate because the person screaming might be his wife. Selebe walked to the direction where the screaming sound was coming from. Dawid and his wife also went home.

[11] The following day, she was approached by the head of the village accompanied by some people. She informed her that Selebe was looking for his wife. Selebe led the

witness and the village head lady's group to the place where he said he found his wife the previous night. They went to a place where they found marks on the ground that looked like a commotion had taken place. Around that place, they also found an underwear and a shoe. They further observed drag marks. They followed the drag marks up to a place where they found the complainant lying. She was bleeding profusely from her face. Her eyes were closed. She was also swollen. Her head was full of sand and grass. She informed them that she was raped by Jan, Tjaava and Repanka. They had also assaulted her.

[12] Inspector Ervin Kavehijo testified that he received a report concerning this matter and he went to the scene at Otjorukune accompanied by Sgt. Ndiyofa. Before they reached Otjorukune they met Ms Tjiunde transporting the victim to the clinic. The victim was assaulted because her face was full of dry blood and she was not able to move. Ms Tjiunde and the driver proceeded to take the victim to the clinic. The witness and his colleague proceeded to the scene. At the scene, they met Naab Selebe and Dawid Hijamutiti. The witness was informed by Naab Selebe that when he followed the victim, he wanted to take her along but he was approached by three men who assaulted him and threatened him not to go with the victim. According to him, he was drunk and he left the victim. The following day, he went to the place where he left the victim but he did not find her there.

[13] The witness was led to the scene. There he found a cap, scarf, a left shoe and other clothes of a lady behind the bush. The items were found apart. There were struggling marks on the ground. They followed drag marks up to a place where the victim was allegedly found. The witness was informed of the names of the people who were responsible for the commission of the crimes. Police officer Ndiyofa photographed the scene and the witness went together with Selebe to look for the culprits. Selebe pointed out accused 1 and 2 as the culprits. Selebe also identified another shoe that looked similar to the one found at the scene. It was a right shoe. The shoe was on top of the shack where accused 1 and 2 were found. He then confiscated both shoes.

[14] The witness explained to the accused persons the reason why he was at their place; that there were allegations that they raped Bertha Kheinamises and assaulted her. He also informed them of their legal rights. Thereafter, he arrested them. They all went to Warrant Officer Ndiyofa at the scene. The exhibits collected were put in the bag and later sent to the Forensic Laboratory. From the scene, the witness went to take a statement from the victim at the hospital. Blood samples were obtained from the victim as well as from the accused persons for DNA purposes. The matter was thereafter handed over to Sergeant Jantjies. The exhibits and blood samples were dispatched to the National Forensic Institute by Sgt Jantjies.

[15] The witness identified the cap and the shoe found at the scene. He also identified the shoe that was found on top of the roof. The left shoe was marked as exhibit 1, the right shoe as exhibit 2 and the cap was marked as exhibit 3. The witness further testified that there was also an underpants found at the scene as well as a head cloth and another cloth that were also sent to the laboratory.

[16] Through cross-examination by counsel for accused 1, the witness said the cap and shoes were not sent to the laboratory. Among the items confiscated, they only sent the victim's items to the laboratory. Furthermore, the witness testified that he was informed by Hijamutiti that the shoe belonged to accused 2.

[17] Hilja Ndapewa Ndiyofa, testified that she is a Warrant Officer in the Namibian Police. On 18 June 2014 she went to Otjorukune village where the incident took place. At the scene she found a head scarf, petticoat and underpants belonging to the victim as well as a left shoe. The items were identified to her by Naab Selebe. The left shoe was identified as that of accused 1 by Hijamutiti. Points were indicated to her and she took photographs and measurements of the scene. The Key to the photo plan was marked as exhibit G.

[18] On 9 March 2020, Mr Siyomunji counsel for accused 1 withdrew as counsel of record and Mr Andreas from Andreas Hamunyela Legal Practitioners was appointed by the Director of Legal Aid to represent accused 2.

[19] Maryn Swart, a forensic expert, testified that DNA for accused 1 was detected on a swatch from the complainant's underpants. Therefore, so she testified, accused 1 cannot be excluded as a possible contributor to the said haplotype. She further testified that accused 2's DNA was identified on the vaginal vault swab, vestibule swab and the vulva swab of the complainant. It was put to Ms Swart through cross-examination by accused 2's legal representative that accused 2's DNA was found in the complainant's genital area because on the previous day he had consensual sexual intercourse with the complainant. Ms Swart responded that DNA can be detected if samples are collected within a 96 hour period if there was no condom used.

[20] Detective Warrant Officer Herman Jantjies testified that a docket was assigned to him by the Unit Commander for him to charge the accused persons as he was not the initial investigator. The witness produced two death certificates for the witnesses in this matter. One of the deceased persons is the complainant in this matter and the second deceased was the complainant's husband, Edebard Soda, who was also known as Naab Selebe. The witness had also identified an application for scientific examination whereby exhibits that he forwarded to the laboratory were recorded. The form with a list of exhibits was admitted in evidence and marked as exhibit 'N'. The witness continued to testify that further samples were taken from the accused persons and the complainant for DNA analysis and the samples were forwarded to the laboratory.

[21] The witness formally charged all three accused persons and he obtained warning statements from them. The State moved an application for the warning statement in respect of accused 1 to be produced as part of its evidence. The application was opposed to. However, after a trial-within- a trial the warning statement of accused 1 was ruled to be admissible and produced as exhibit 'R'. Accused 1 in his warning statement stated among other things:

'On our way we met with Bertha. She was also under the influence of alcohol. When we approached her she fell by herself and I then undressed her and had sexual intercourse with her while she was screaming. After I finished…I again had sex and ejaculated into her vagina. Me [and another person] went home and left Bertha naked.'

[22] The state had also produced the State's pre-trial memorandum as well as replies to pre-trial memorandum by accused persons.
When asked in the State's pre-trial memorandum whether the complainant consented to the sexual act, accused 2 replied that, that issue was not applicable because he did not have sexual intercourse with a certain Bertha Kheinamises.

[23] After the close of the State's case, accused 1 exercised his right to remain silent and to not call witnesses whilst accused 2 decided to give evidence under oath and called no witnesses.

[24] Accused 2, Ebson Tjava, testified that he resides in Otjorukune village. He never attended school. He had no concept of months, dates and years. The accused testified that they were drinking at Marina's place in Otjorukune village. He was in the company of accused 1. They drank until the evening. He went back home to take the goats to the kraal and he came back to Marina's place to drink further. He and accused 1 moved to another drinking place. From that place they went to a certain shop. On their way to that shop, they heard a woman screaming and she was being assaulted. They went to the place where the screaming was coming from. They found Naab Selebe assaulting the woman who was screaming. This woman was the complainant in this matter, Bertha Kheinamises. Accused 2 was with accused 1. When they tried to stop the man from beating his girlfriend or wife, the man also wanted to attack them because he was saying accused 2 and accused 1 were the ones who wanted to beat the woman. They left Bertha and Selebe and proceeded to the shop. Thereafter, they went to his place where he and accused 1 spent the night

[25] In the morning, they heard people saying they were looking for them because they allegedly assaulted Bertha and raped her. It is accused 2's version that he did not

assault Bertha neither did he rape her. The accused further testified that prior to 17 June 2014 he knew the complainant. They resided in the same village. He only knew her as a person from the same village. When his counsel informed him that there was evidence from Ms Swart that accused 2's semen was found at the genitalia of Bertha, the complainant, accused 2 testified that before the rape took place he and the complainant 'were sleeping together'. By 'sleeping together' he meant that they had sexual intercourse. Sometimes she is the one who wanted him because she came to him. He last had sexual intercourse with her on 16 June 2014. That day they were drinking their alcohol. As drunken people, they had a sexual encounter as they normally did. The sexual intercourse took place at his house. However, no one knew about their affair. On 16 June 2014 they did not use any protection like a condom.

[26] With regard to count 4, the accused testified that those were false allegations against him. Accused 2 also denied counts 2, 9 and 10 he is facing. It is his evidence that he did not commit the offences alleged in those counts. Concerning the shoe that was found at the scene, accused 2 said he could not recognise it as he did not know to whom it belonged.

[27] Through cross-examination, accused 2 was asked if it was true that he had an intimate relationship with the complainant, why did he give instructions to Mr Siyomunji, his former legal representative, to put it to Mr Hiyamutiti that by then Bertha had a relationship with accused 1. Accused 2 responded that he heard about that. It was further put to him that if his legal representative by then knew that accused 2 was in a relationship with Bertha, why did he say it was accused 1 who had a relationship with the complainant. Accused 2 replied that he had no comment to make. It was further put to the accused that if accused 2 and 1 met the complainant whilst she was allegedly being assaulted by Selebe why was it not put to the witnesses. Accused 2 replied that he had no comment either.

[28] It was again put to the accused that at the time Bertha was screaming, Naap Selebe was still sitting at Marina's place with Marina and Hiyamutiti. The accused

responded that he did not know the reason why Selebe was assaulting Bertha. It was further accused 2's testimony that he and accused 1 did not leave one another from the time of the incident when they found Bertha. It was further put to accused 2 that if he was with accused 1 when they found Bertha, according to accused 1's warning statement he had sexual intercourse with Bertha. Accused 2 replied that if he had sexual intercourse with her, he did not know.

Submissions by counsel

[29] Ms Shikerete, counsel for the State, argued that accused 1 decided to exercise his right to remain silent. However, he runs the risk of being convicted in light of damming evidence against him. It was testified to that a shoe belonging to him was found at the scene. One shoe was found at accused 2's house where he was also found by the police. The shoe that was found at the scene was identified by Hiyamutiti who said he was the brother-in-law to accused 1 and he had seen him wearing these shoes the previous day. The version of Hiyamutiti was corroborated by Sgt Ndiyofa. Although the initial investigator, Kavehijo, testified that the shoe belonged to accused 2, a reading of his cross-examination by Mr Tjituri and Siyomunji makes it evident that he was mistaken as to what he was informed regarding whose shoes they were. Accused 1's DNA was found on the underwear of the complainant more specifically on 'the panty' of the complainant. Furthermore, there are admissions made in the warning statement that accused 1 had sexual intercourse with the complainant on 17 June 2014, the evening hours whilst she was screaming. Accused 1 did not offer a reply to the State case, which means there is only the State's version before court which is uncontested. Questions posed during cross-examination are not viewed or deemed as evidence before court. Counsel urged the court to find the accused guilty as charged.

[30] With regard to accused 2, he testified that he had an intimate relationship with the complainant and they had sexual intercourse on 16 June 2016 before this incident. By these means, he tried to justify the presence of his DNA in the genitalia of the complainant. Accused 2 further testified that whilst he was with accused 1, they found

the complainant being assaulted by Naap Selebe. They tried to stop him but he retaliated against them. The accused's entire defence came out at the time he was giving his testimony. Some aspects of the accused's version were not put to the witnesses, especially where there is a version that at the time complainant started to scream, Naap Selebe was still at Marina's place. After the complainant passed on, it was raised with forensic expert witness, Ms Swart, that accused 2 had sexual intercourse with the complainant. This was an afterthought tailoring the evidence to fit the trial as it progressed.

[31] Hijamutiti was confronted by Mr Siyomunji with the fact that the complainant was in a sexual relationship with accused 1. Had the version of a sexual relationship with the complainant been true and communicated to Mr Siyomunji, the erstwhile legal representative of accused 2, he would have put that to Hijamutiti as well. It is argued that this is an afterthought since the complainant was deceased and could not rebut such alleged relationship. Accused 2 was trying to justify the presence of his DNA unto her person. Counsel in supporting her proposition, stated that accused 2 in his reply to the State's pre-trial memorandum marked as exhibit F2, stated that he would admit that he was with co-accused but later got separated before the alleged incident, which is contrary to his testimony in court. In respect of the question 4.3 of the pre-trial memorandum, his response was that he took note of it, but maintains that he was not at the alleged scene. Counsel submitted that accused's version is tainted with lies and it may be rejected as being false. The version of the accused falls short in the sense that it corroborates the version portrayed by accused 1 in his warning statement when he said the two were together when they found the complainant that evening and also together when they left the complainant. Accused 1 admits that it was at that stage he had sexual intercourse with the complainant, however accused 2 was silent on that point.

[32] The question, according to counsel is: what happened to accused 2 when accused 1 was having sexual intercourse with the complainant? Counsel continued to argue that accused 2 avoided to answer the question under cross-examination,

because he was present and in fact also had sexual intercourse with the complainant the day of the incident. Counsel argued that the second version of accused 2 is riddled with holes that he could not patch up or explain. Therefore, this version should be rejected as being false beyond a reasonable doubt and the version of the state witness who were consistent, credible and corroborated each other upheld. According to counsel, the state in which the complainant was found and the scene as described by the State witnesses bears evidence to the fact that these sexual acts by accused 1 and 2 unto the complainant were not consensual. There were struggle marks on the ground; items were scattered all over; accused 1's shoe was found and drag marks that led to the complainant's discovery were also visible.

[33] The facts that her face was swollen; her eyes closed and swollen and she was bleeding from the head if viewed in light of the scene as described it is evident that the accused person had assaulted the complainant severely. Counsel argued that both accused persons should be convicted of assault with intent to do grievous bodily harm.

[34] Counsel for accused 1 argued that police officer Erwin Kavehijo testified to inadmissible hearsay as his evidence was not corroborated by Bertha or Naap. Therefore, any evidence which was given to establish the truth of what he was told should be disregarded. Furthermore, the witness testified that he found a shoe at the scene that matched the shoe found at accused 2's house. He testified that he was informed that the shoe belonged to accused 2 which is in contrast to what Hijamutiti testified who said the shoe belonged to accused 1. With regard to the expert evidence, counsel argued that it should be rejected for lack of clarity; coherency and the process was tainted with irregularity in the way the samples were taken.

[35] Concerning accused 1, although there had been admissions that were ruled to be admissible after a trial-within-a trial was conducted, the accused opted not to testify, making the statement to stand as the probable truth of what the accused had done in accordance with the admissions contained in the warning statement. Accused 1 may be convicted on count 1 of rape on the strength of the admissions he has made. However,

the State had failed to prove counts 5, 8 and 10 against accused 1. It was not established through evidence that accused 1 had done anything that amounted to assisting the other accused persons to perpetrate the offence of rape on the victim. In respect of count 8, it was alleged that accused 1 assisted accused 3 to commit a sexual act with the victim. Since accused 3 was discharged in terms of s 174 of the Criminal Procedure Act, accused 1 cannot be convicted in respect of that account.

[35] With regard to count 10, counsel argued that no single evidence was presented to show that accused 1 perpetrated the alleged assault on the victim. The victim fell by herself on the ground. Furthermore, the fact that the victim slept the entire night even after the rape was perpetrated it is more probable that the victim was heavily intoxicated. The court should also not exclude, the possibility that the victim may have fallen and injured herself on her way to wherever she was heading prior to meeting the accused persons.

[36] Counsel for accused 2 argued that there is no DNA evidence that incriminated accused 2. With regard to the evidence of Hijamutiti and Marina when they saw Bertha leaving, none of the accused persons were at Marina's place. The version of accused 2 was that after they left Marina's place, they were going to a certain shop and they heard a woman screaming. They went to the place where a woman was screaming and they found the complainant being assaulted by Naap Selebe. Accused 2 with accused 1 wanted to stop Selebe but Selebe turned against them. They then left to go home and sleep. Accused 2 denies that he assisted Godlieb Katuuo and accused 1 to rape the complainant. He also disputes that he assaulted the complainant. Counsel further argued that accused 2 had consensual sexual intercourse with the complainant on 16 June 2014. They did not use a condom. This evidence remains undisputed. Accused 2 was vigorously cross-examined but his evidence remained intact. Accused 2 knew nothing about the event of 17 June 2014 and he did not rape the complainant. This was put to Mr Hijamutiti through cross-examination.

[37] Concerning the criticism that it was not put to the witness that accused 2 had consensual sexual intercourse with the complainant prior to the 17 June 2014 and that it is probably an afterthought, counsel argued that when Hijamutiti testified, accused 2 was under the impression that the complainant would come and testify. Furthermore, counsel argued that accused 2 was also criticised for his reply to the pre-trial memorandum concerning the admissibility of his warning statement when he said he took note of it but maintains that he was not at the scene. There is no evidence against accused 2 that he was at the scene on 17 June 2014.

[38] Counsel argued that accused 2's version was not a fabrication because at the time Ms Swart testified that the accused was not yet furnished with the complainant's death certificate. No evidence that accused 2 was aware that the complainant had passed on. It was again counsel's argument that the DNA of accused 2 found in the vagina of the complainant was as a result of the consensual sexual intercourse that took place between them on 16 June 2014. Therefore, accused 2's version that he had a consensual sexual intercourse with the complainant should be accepted as a true version of what transpired. According to Ms Swart, DNA can be detected up to 96 hours. No DNA found on the complainant's underpants that was found at the scene of crime that incriminated accused 2. If accused 2 was at the scene, he would have come into contact with the complainant's underwear or panty.

[39] Concerning the admissions made by accused 1 those are not admissible against accused 2, so counsel argued. In respect of count 10 of assault with intent to do grievous bodily harm, counsel submitted that the State did not prove its case against accused 2. The State had also failed to lead sufficient evidence with regard to counts 2, 4 and 9 to prove beyond a reasonable doubt that the accused committed or assisted another person to commit rape with the complainant. Counsel prayed that accused 2 should be acquitted on the charges proffered against him.
All counsel referred me to authorities which I have duly considered.

[40] The State rests its case on circumstantial evidence as well as on admissions made by accused 1 in the warning statement.

Applicable Law

[41] The proper approach to circumstantial evidence is set down in *S v HN* 2010 (2) NR 429 (HC) in the headnote as follows:

'Where the court is required to draw inferences from circumstantial evidence, it may only do so if the "two cardinal rules of logic" as set out in *R v Blom* 1939 AD 188, have been satisfied. These rules were formulated in the following terms: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inferences from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct. The law does not require from a court to act only upon absolute certainty, but rather upon just and reasonable convictions. When dealing with circumstantial evidence, as in the present case, the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it. It is the cumulative effect of all the evidence together that has to be considered when deciding whether the accused's guilt has been proved beyond reasonable doubt. In other words, doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation, but those doubts may be set at rest when it is evaluated again together with all the other available evidence. There is thus no onus on an accused to convince the court of any of the propositions advanced by him and it is for the state to prove the propositions as false beyond a reasonable doubt. Caution must be exercised not to attach too much weight to the untruthful evidence of the accused when drawing conclusions and when determining his guilt.'

[42] In determining whether the State has proved its case on inferences made from circumstantial evidence, I will approach the evaluation of the evidence in light of the above principles.

[43] I find it necessary to first deal with count 8 in respect of accused 1 and count 9 in respect of accused 2. As earlier stated, the two accused persons were jointly charged with a third accused who was discharged in terms of s174 of the Criminal Procedure

Act. The allegations in respect of the two counts is that each accused compelled the third co-accused who was discharged to have sexual intercourse with the complainant. The successful prosecution of these two counts depended on the verdict against the third accused. Since there was no prima facie case found against accused 3, count 8 in respect of accused 1 and count 9 in respect of accused 2 also fall away.

[44] Having disposed of the two counts, I proceed to deal with count 1 in respect of accused 1. Accused 1 did not testify under oath. He exercised his constitutional right to remain silent. The accused person appearing before court is guaranteed a fair trial in terms of Article 12.

[45] Although the accused has a constitutional right to remain silent, he however risks being convicted if he decides to remain silent in the face of damning evidence against him. The State led evidence from which an inference can be drawn. The accused did not contradict this evidence by way of testimony under oath. The version of the State remains uncontested. In *S v Sidzija &* others, 1995 (12) BCLR 1626 (DK) at 1648I to 1649B the following remarks were made:

> 'The right…means no more that an accused person has the right of election whether or not to say anything during the plea proceedings or during the stage when he may testify in his defence. The exercise of this right like the exercise of any other must involve the appreciation of the risks which may confront any person who has to make an election. In as much as skilful cross-examination could present obvious dangers to an accused should he elect to testify, there is no sound basis for reasoning that, if he elects to remain silent, no inference can be drawn against him.'

[46] Accused 1 placed himself at the scene of crime and admitted to have had sexual intercourse with the complainant when he made extra-judicial admissions in his warning statement that was admitted in evidence after a trial-within a trial was conducted. At the pain of being repetitive, accused 1 stated in his warning statement that:

'On Tuesday 2014.06.17 at about 20h00 at Otjorukune Reserve, I was accompanied by Godlieb and Tjaava enjoying home brewed beer at the mall. I then asked Tjaava to go get tobacco at one house. On our way, we met with Bertha. She was also under the influence of alcohol. When we approached her she fell by herself and I then undressed her and had sexual intercourse with her while she was screaming. After I finished Tjaava got on her too and had sex with her for some minutes. After he finished, I again had sex and ejaculated into her vagina. Me and Ebson together went home and left Bertha naked. Godlieb was left behind at the mall by us and we did not assault Bertha.'

[47] Marina and Hijamutiti testified that after Bertha left, they heard a person screaming. Marina informed Naap Selebe to go and investigate if it was Bertha screaming. The version that Bertha was screaming had been corroborated by accused 1 who said he had sexual intercourse with her whilst she was screaming. There is also DNA evidence from Ms Swart that accused 1's DNA was found on the 'panty' of the complainant. The complainant was found without her underwear and some of her clothing was found lying around the scene. Since the complainant was found half naked, this corroborates what accused 1 said in his warning statement. Furthermore, there is evidence that a shoe belonging to accused 1 was also found at the scene and another one similar to the one found at the scene was found at the shack where accused 1 was found with accused 2. Although police officer Kavehijo testified that he was informed by Hijamutiti that the shoe belonged to accused 2, Hijamutiti himself testified that he recognised the shoe as that of accused 1. His version was corroborated by the version of Sgt Ndiyofa in that respect. It is highly likely that Kavehijo was mistaken as to what he was told regarding who the owner of the shoe was.

[48] This court having considered every component in the body of evidence in its totality, the cumulative effect of all the evidence evaluated together as well as the evidence concerning the scene of crime and the condition in which the complainant was found, a reasonable inference can be drawn that accused 1 committed a sexual act with Bertha, the complainant, under coercive circumstances. Accused 1 said the complainant was under the influence of alcohol and she was falling. Although accused 1 said he had sexual intercourse with the complainant twice where he inserted his penis

into her vagina, unfortunately he was not charged with the contravention of section 2(1)(a) of the Rape Act twice.

[49] I will proceed to count 4 in respect of accused 2. It is common cause that accused 2 had sexual intercourse with the complainant. His DNA was found in the genital area of the complainant. The accused said his DNA was in the genital area of the complainant because he had sexual intercourse with the complainant on 16 June 2014, the day preceding the incident. According to expert evidence, DNA may be present in the genital area for 96 hours if when the sexual intercourse took place the parties did not use a condom. The accused said that he did not use a condom. In determining whether the sexual intercourse between the complainant and accused 2 was consensual, I have to look at the circumstances of the case by closely examining the version of the State as well as the version of the defence. There was no eye witness who could testify on behalf of the State, the court will have to rely on circumstantial evidence.

[50] Although the accused said he had consensual sexual intercourse with the complainant, the accused never mentioned this in his reply to the State's pre-trial memorandum. He never stated it as a basis of his defence. Instead, he put it to the State to prove all the allegations against him as he was rightfully entitled. He revealed his defence as the trial progressed. When the accused responded to the pre-trial memorandum concerning the admissibility of his warning statement, he said he took note of it but maintained that he was not at the scene. However, when he testified in his defence he changed his version and said that on the day of the incident he was with accused 1 at Otjorukune village. They were going to a certain shop when they heard a woman screaming and she was being assaulted. They investigated the matter and found the complainant being assaulted by Naap Selebe. However, this version of the accused cannot reasonably possibly be true in the circumstances, because at the time the complainant was screaming Naab Selebe was still with Hijamutiti and Marina Tjiunde. It was accused 2's version that after he and accused 1 left Bertha, they went to spend a night at his place.

[51] Accused 2, like his co-accused person, placed himself at the scene. They were both together at the same place and same time. Although accused 1 in his warning statement incriminated accused 2, what was said by accused 1 against accused 2 cannot be used as evidence against accused 2.

[52] When accused 2 replied to the question in the State's pre-trial memorandum whether the complainant consented to sexual intercourse, he said that that issue was not applicable because he did not have sexual intercourse with the complainant. As a normal reaction, people normally profess their innocence right at the beginning. However, the accused waited until the time when it was revealed that his DNA was found in the genital area of the complainant. He also waited to put his defence to the witness for the State after he learned that the deceased had passed on. Although it was argued on behalf of the accused that they were only provided with the complainant's death certificate at the late stage of the proceedings, the accused does not need to have a death certificate to know that the complainant was no more. Accused 2 was not in custody as he is on bail. He resides at the village where the complainant was residing. And if it was true, that he used to have an intimate relationship with her, obviously he would have known about her death. Furthermore, if it was true that accused 2 had consensual sexual intercourse with the complainant, accused 2 was not going to instruct his erstwhile legal representative to put to Mr Hijamutiti that the complainant was in a sexual relationship with accused 1 instead of himself. He was also not going to testify in his defence that he only knew the complainant as a person from his village. It was only after he was informed by his legal representative that Ms Swart testified that his DNA was detected on complainant's genitalia that he changed his version to say that he had sexual intercourse with the complainant on 16 June 2014.

[53] In my considered view, the omission by accused 2 to state in his reply to the pre-trial memorandum or to disclose the basis of his defence timeously by saying that he did not rape the complainant but had a consensual sexual act with her on the day preceding the incident is not consistent with the conduct of a person who had consensual sexual

act with the complainant the previous day or who normally had sexual intercourse with her as he claimed. When one looks at the circumstances of this case, the law does not require the court to act only upon absolute certainty, but rather upon just and reasonable convictions.

[54] In light of the facts that accused 2 was together with accused 1 at the scene of crime and his DNA was found in the genital area of the complainant, an inference can be drawn that accused 2 had sexual intercourse with the complainant on 17 June 2014 and not on 16 June 2014 as he is claiming. Accused 2's evidence that they had a consensual sexual act the previous day was a fabrication tailored to fit the evidence since the complainant is no longer there to dispute it. Again the argument had accused 2 had sexual intercourse with the complainant on 17 June 2014 his DNA was going to be detected on the complainant's 'panty', cannot be correct. The reason why his DNA was not detected on the 'panty' could be because the complainant was stripped naked by accused 1 before she was raped. Therefore, it is reasonable to infer that accused 2 may not have come into contact with the complainant's underwear for his DNA to be deposited on it. The scene of crime, as described by witnesses and the physical condition in which the complainant was found, demonstrate the application of physical force on the complainant. I am, therefore, satisfied that coercive circumstances were present.

[55] Accused 2's version that he had consensual intercourse with the complainant is rejected as a fabrication as it cannot reasonably possibly be true in the circumstances. It is therefore my finding that the State has proved its case on count 4 beyond a reasonable doubt against accused 2.

[56] I turn to count 2, in respect of accused 2, count 5 in respect of accused 1 and count 10 in respect of both accused persons. Both counts 2 and 5 deal with a contravention of section 2(1)(b) of the Act in that the two accused persons compelled or caused each other to have sexual intercourse with the complainant. However, there is no sufficient evidence adduced that they indeed did so. This court is not satisfied that

counts 2 and 5 have been proven beyond reasonable doubt. Accused 1 and 2 are therefore, entitled to the benefit of the doubt as the inferences sought to be drawn were not consistent with the proved facts. With regard to count 10 of assault with intent to do grievous bodily harm, no direct evidence was adduced as to whether the assault preceded the sexual acts or it was committed thereafter. If the complainant was assaulted prior to her being raped, which is highly probable, then the assault amounts to coercive circumstances and it can be said that there has been a duplication of charges. Therefore, this court is not satisfied that the State has proved its case against accused 1 and 2 with regard to count 10 beyond reasonable doubt.

[57] In the result the following verdicts are made:

Count 1, in respect of accused 1: Guilty of rape, contravening s 2(1)(a) read with sections 1, 2(2) 3,5,6,7 and 18 of the Combating of Rape Act 8 of 2000.

Count 2 in respect of accused 2: Not guilty and acquitted.

Count 4, in respect of accused 2: Guilty of rape, contravening s 2(1)(a) read with sections 1, 2 (2) 3,5,6,7 and 18 of the Combating of Rape Act 8 of 2000.

Count 5, in respect of accused 1: Not guilty and acquitted.

Count 8, in respect of accused 1: Not guilty and acquitted.

Count 9, in respect of accused 2: Not guilty and acquitted.

Count 10, in respect of both accused persons: Each not guilty and acquitted.

NN Shivute

Judge

APPEARANCES:

THE STATE:	Ms Shikerete Office of the Prosecutor-General

FIRST ACCUSED:	Mr Tjituri (Of Tjituri Law Chambers) Instructed by the Directorate of Legal Aid
SECOND ACCUSED:	Mr Andreas (Of Andreas Hamunyela Legal Practitioners) Instructed by the Directorate of Legal Aid