

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CC NO: 15/2020

In the matter between:

THE STATE

and

JACKSON KATJOMBE

ACCUSED

Neutral citation: *The State v Katjombe* (15/2020) [2020] NAHCMD 330 (16 June 2023)

Coram: **JANUARY J**

Heard: 01 to 05 March 2021, 17 to 20 May 2021, 07 to 09 June 2021, 26 July 2021, 18 October 2021, 06 June 2022, 09 June 2022, 13 to 17 June 2022, 08 to 12 August 2022, 05 September 2022, 30 September 2022

Delivered: 16 June 2023

Flynote: Criminal law – Rape in contravention of s 2(1)(a) read with ss 1, 2(2), 3, 4, 5, 6, 7 and 18 of Act 8 of 2000-Rape, read with s 94 of the Criminal Procedure Act 51 of 1977, further read with ss 1, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003 – Assault with intent to do grievous bodily harm – Assault by threat.

Criminal Procedure – Proof beyond reasonable doubt – Plea of not guilty – Bare denial – Afterthought of consensual sex.

Summary: The accused stayed on a farm called Willem Pos in the Otjimbingwe area in the district of Karibib. Three complainants were also staying at the same farm but at a different residence. The allegations are that the accused on diverse occasions visited the complainants, forced himself on them and forcefully and under coercive circumstances had sexual intercourse with them. One of the complainants is physically and mentally handicapped, disabled and in a wheelchair. Another one was a minor of eight years old at the time and the third complainant, although attending school, was not emotionally well developed. In addition, the accused assaulted two of the complainants and threatened to kill them if they would have told anyone about the incidents. The court found that the threats were part of the coercive circumstances of the crimes of rape. The State did not prove the intent to cause grievous bodily harm. The accused was convicted of three counts of rape under coercive circumstances, two counts of common assault and he is acquitted on three counts of assault by threat and one of assault with intent to do grievous bodily harm.

ORDER

The accused is convicted on the following counts:

1. Count 1: Rape in relation to Wilhelmina Katambo;
2. Count 2: Rape in relation to Julia Katambo;
3. Count 3: Rape in relation to Queen Nuses;
4. Count 4: Assault (common) in respect of Wilhelmina Katambo;
5. Count 5: Assault (common) in respect of Julia Katambo

The accused is acquitted on counts 6, 7, 8 and 9.

JUDGMENT

JANUARY J:

Introduction

[1] The accused is indicted for nine counts as follows:

Count 1.

Contravening section 2(1)(a) read with sections 1, 2(2), 3, 4, 5, 6, 7 and 18 of Act 8 of 2000-Rape, read with section 94 of the Criminal Procedure Act 51 of 1977, further read with sections 1, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003;

In that during or about January 2018 until September 2018, on diverse occasions and at or near Otjimbingwe, in the district of Karibib, the accused person Jackson Katjombe, hereinafter called the perpetrator, did wrongfully, unlawfully and intentionally commit a sexual act under coercive circumstances with Wilhelmina Katambo, hereinafter called the complainant, by inserting his penis into the vagina of the complainant and the coercive circumstances are that:

The perpetrator applied physical force to the complainant and/or;

The complainant was affected by physical disability or helplessness. At the time of commission of the offence, the perpetrator and victim had an underlying domestic relationship.

Count 2

Contravening section 2(1)(a) read with sections 1, 2(2), 3, 4, 5, 6, 7 and 18 of Act 8 of 2000-Rape, read with section 94 of the Criminal Procedure Act 51 of 1977, further read with sections 1, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003;

In that during or about January 2018 until September 2018, on diverse occasions and at or near Otjimbingwe, in the district of Karibib, the accused person Jackson Katjombe, hereinafter called the perpetrator, did wrongfully, unlawfully and intentionally commit a sexual act under coercive circumstances with Julia Katambo, hereinafter called the complainant, by inserting his penis into the vagina of the complainant and the coercive circumstances are that:

The perpetrator applied physical force to the complainant and/or;

The complainant was affected by physical disability or helplessness. At the time of commission of the offence, the perpetrator and victim had an underlying domestic relationship.

Count 3.

Contravening section 2(1)(a) read with sections 1, 2(2), 3, 4, 5, 6, 7 and 18 of Act 8 of 2000-Rape, read with section 94 of the Criminal Procedure Act 51 of 1977, further read with sections 1,3 and 21 of the Combating of Domestic Violence Act 4 of 2003;

In that during or about January 2018 until September 2018, on diverse occasions and at or near Otjimbingwe, in the district of Karibib, the accused person Jackson Katjombe, hereinafter called the perpetrator, did wrongfully, unlawfully and intentionally commit a sexual act under coercive circumstances with Queen Nuses, hereinafter called the complainant, by inserting his penis into the vagina of the complainant and the coercive circumstances are that:

The perpetrator applied physical force to the complainant and/or;

The complainant was affected by physical disability or helplessness. At the time of commission of the offence, the perpetrator and victim had an underlying domestic relationship.

Alternative to count 3

Contravening section 14(a) of the Combating of Immoral Practices Act 21 of 1980 as amended- Commit or attempt to commit a sexual act with a child under the age of sixteen years, read with section 94 of the Criminal Procedure Act 51 of 1977, further read with sections 1, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003;

In that during or about January 2018 until September 2018, on diverse occasions and at or near Otjimbingwe, in the district of Karibib, the accused did wrongfully and unlawfully commit or attempt to commit a sexual act with a child under the age of sixteen years, to wit; Queen Nuses and the perpetrator was more than three years older than the complainant, who was aged eight years and the perpetrator 33 years of age. At the time of commission of the offence the perpetrator and victim had an underlying domestic relationship.

Count 4

Assault with the intent to do grievous bodily harm, further read with sections 1, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003;

In that during, upon or about January 2018 until September 2018 at or near Otjimbingwe in the district of Karibib, the said accused did wrongfully, unlawfully and maliciously assault Wilhelmina Katambo by hitting her with a belt giving her wounds, bruises or injuries with intent to cause the said Wilhelmina Katambo grievous bodily harm. At the time of commission of the offence the perpetrator and victim had an underlying domestic relationship.

Count 5

Assault with the intent to do grievous bodily harm, further read with sections 1, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003;

In that during, upon or about January 2018 until September 2018 at or near Otjimbingwe in the district of Karibib, the said accused did wrongfully, unlawfully and maliciously assault Julia Katambo by slapping her hard giving her wounds, bruises or

injuries with intent to cause the said Julia Katambo grievous bodily harm. At the time of commission of the offence the perpetrator and victim had an underlying domestic relationship.

Count 6

Assault with the intent to do grievous bodily harm, further read with sections 1, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003;

In that during, upon or about January 2018 until September 2018 at or near Otjimbingwe in the district of Karibib, the said accused did wrongfully, unlawfully and maliciously assault Julia Katambo by suffocating her with the pillow giving her wounds bruises or injuries with intent to cause the said Julia Katambo grievous bodily harm. At the time of commission of the offence the perpetrator and victim had an underlying domestic relationship.

Count 7

Assault by threatening, further read with sections 1, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003;

In that during, upon or about January 2018 until September 2018 at or near Otjimbingwe in the district of Karibib, the said accused did unlawfully and intentionally assault Wilhelmina Katambo by threatening then and there to kill her in the event she reported that he had raped her thereby causing the said Wilhelmina Katambo to believe that the said accused intended and had the means forthwith to carry out his threat. At the time of commission of the offence the perpetrator and victim had an underlying domestic relationship.

Count 8

Assault by threatening, further read with sections 1, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003;

In that during, upon or about January 2018 until September 2018 at or near Otjimbingwe in the district of Karibib, the said accused did unlawfully and intentionally assault Julia Katambo by threatening then and there to kill her in the event she reported that he had raped her thereby causing the said Julia Katambo to believe that the said accused intended and had the means forthwith to carry out his threat. At the time of commission of the offence the perpetrator and victim had an underlying domestic relationship.

Count 9

Assault by threatening, further read with sections 1, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003;

In that during, upon or about January 2018 until September 2018 at or near Otjimbingwe in the district of Karibib, the said accused did unlawfully and intentionally assault Queen Nuses by threatening then and there to kill her in the event she reported that he had raped her thereby causing the said Queen Nuses to believe that the said accused intended and had the means forthwith to carry out his threat. At the time of commission of the offence the perpetrator and victim had an underlying domestic relationship.

[2] The summary of substantial facts are reflected as follows:

'During January 2018 until September 2018, the accused on diverse occasions at Otjimbingwe, raped Wilhelmina Katambo, Julia Katambo and Queen Nuses. The three victims are sisters. All three victims state that the accused who is a family member raped and assaulted them on diverse occasions. Wilhelmina, being wheelchair bound, was allegedly raped six times. Juliana Katambo an epileptic sufferer, alleges being raped twice by the accused and Queen, a minor child aged 8, also claims to have been accosted and raped twice by the accused.'

[3] The State initially was represented by Ms. Meyer and the accused by Mr Kaurivi. Mr litula took over when Ms Meyer was no longer available.

[4] The accused pleaded not guilty on all counts. Mr Kaurivi confirmed that the pleas are in accordance with his instructions. He placed on record that the accused explained that it is a bare denial of all allegations. In relation to Wilhelmina Katambo and Queen Nuses the accused stated that he did none of the things alleged in the indictments/charges. In relation to Julia Katambo, he stated that he had a sexual relationship with her and that in all the counts alleging sexual intercourse, they had a sexual relationship.

The merits/evidence

[5] The following documents were handed up as exhibits in court by agreement: A- Pre-trial memorandum; B-Reply to the pre-trial memorandum; C-A certified copy of the identity document of the accused person; D-statement by Jacqueline Nuses in relation to the date of birth of Queen Nuses; E-Photo plan by Cst Mathys depicting the house where the incidents allegedly happened.

[6] The first witness for the State is Pefimbo Shipunda who is a senior social worker. She completed her studies at the University of Namibia and obtained an Honours degree in social work. After university, she was attached to the Ministry of Gender and was based at the Gender Based Violence Unit. She is currently with One Economy Foundation as a senior social worker.

[7] The witness knows all three the complainants from the time that the incidents were reported to her at Gender Base Violence Unit by one Ms. Eva Katambo on 5 October 2018. The complainants were brought by Eva Katambo who reported that they were sexually and physically abused. The witness reported the matter to the police who called a doctor for medical examinations. On the first day of the report, the complainants came with Eva Katambo and on the second day, one called Harmony a family member, also accompanied them for consultations.

[8] The witness spoke to the complainants but faced a challenge as they had a language barrier in that they spoke in Otjiherero. Julia spoke a little English and was more expressive. The witness made use of an interpreter. She was informed that Wilhelmina was 25 years old, Julia 19 and Queen 8 years old. Wilhelmina was in a

wheelchair. The witness determined that Wilhelmina did not attend school as she did not know dates, days or months. She had a developmental gap compared to her age and seemed to be mentally challenged with a low intellect. Julia and Queen showed no abnormalities. Julia attended primary school whereas Queen did not attend school. Both Julia and Queen displayed a slight impairment for their ages and have low IQ's.

[9] Julia is on medication since after the alleged events. The witness referred the complainants to the psychiatric hospital. They informed the witness that they experience sleepless nights without their medication. The witness had four to five sessions of consultations with the complainants. They appeared to be traumatised and scared. They said that they were threatened by the accused and appeared emotional when talking about the incident.

[10] Wilhelmina reported that she was raped and beaten but could not tell how many times although it was more than once. The complainants said that they lived with a sickly aunt who from time to time had to travel to Windhoek. On those occasions, a neighbour took care of them.

[11] Julia narrated about three different occasions of sexual assault. Queen allegedly witnessed sexual abuse of the other two complainants. Julia, who was more expressive, told the witness about one occasion in a shower where she was naked and being raped. She also mentioned other occasions. The witness did not detect that the incidents were fabricated. As a professional, she would have detected that. Queen told her of an incident where the accused attempted to rape her however, she managed to run away and informed her aunt. The aunt arrived and interrupted. The accused then told Queen to keep silent about what happened.

[12] The witness also interviewed Eva Katambo to gather information as the incidents were first reported to her. She was more specific about the incidents. The interviews of the complainants were done individually and separately. As far as the witness knows, the matter was not reported to Harmony. The witness compiled a report in relation to her interaction with the complainants. She classified them as vulnerable

witnesses and made recommendations that the court should make special provisions on how and where they should testify.

[13] The witness in cross-examination materially confirmed her evidence. She testified about one occasion where Queen intervened and bit the accused when he attempted to rape Julia. The accused allegedly put a pillow on the head of Julia as if to suffocate her. The witness denied the allegation that sexual intercourse with Julia could have been by consent as Julia never said so.

[14] Dr Josef Haingura Siremo is the medical doctor who examined Queen Nuses on 20th May 2019. He compiled a medical examination report (J88) on the examination. The patient appeared to be 9 years old. He found the hymen to be perforated but suspected that it was not from sexual intercourse because the hymen was not completely ripped off. He testified that Queen was examined a year earlier in 2018 by another doctor, Jameson Chiswe on 05 October 2018. At that time the hymen was found to be intact but there was a small incomplete old scar or tear in the hymen membrane. Dr Chiswe at the time doubted if the tear was a result of sexual intercourse. That report was also handed up as exhibit by consent.

[15] Another medical examination was also conducted by Dr Jameson Chiswe on 05 October 2018 on Julia Katambo. This report was by agreement handed up as an exhibit through Dr Siremo. Dr Chiswe was no longer available in Namibia. This patient appeared to be 19 years of age. The hymen was absent, appeared ragged and torn circumferential. The conclusion was that the patient was sexually active. Dr Siremo remained neutral to this finding because he did not receive any history and there are other activities that can cause a hymen to be torn.

[16] A third medical examination report was compiled by Dr Jameson Chiswe on Wilhelmina Katambo. This report was also presented through Dr Siremo. This patient appeared to be 25 years old. She was in a wheelchair. The hymen was completely torn. The vagina allowed penetration of two fingers, although the examination was painful. There was a creamy white curled-like discharge. The conclusion was that the patient

had been sexually active concurring with the history of sexual assault given. Dr Siremo concurred with this finding.

[17] Constance Tjapaka is the sister to the grandma of the complainants. She knows the complainants as Julia, Wilhelmina and Queen. She is staying at farm Willem Pos. Her house is about 100 meters away from the house where the complainants stayed at farm Willem Pos. The accused used to visit the house where the complainants stayed, sometimes visiting the mother of the complainants, Ester. Ester fell ill at some stage and had to frequently go to hospital. During such times the complainants used to stay alone at home. The witness then used to visit and take care of them. She found the accused at least on two occasions at the house of Ester.

[18] At one stage Julia requested the witness to reprimand the accused to leave them alone as he was naughty to the kids. The accused was inside at their house. The witness told the accused to stand up and leave. He complied. The witness had to reprimand the accused on a second occasion when he was again at the house. Wilhelmina was the eldest of the girls but wheelchair bound, mentally impaired and disabled. Julia in the circumstances took care of them. The witness's blind brother lived close to the house where the complainants stayed.

[19] In cross-examination, the witness confirmed her evidence. She denied that Julia or any of the other complainants ever reported any incident of rape to her or about an incident where the accused put his finger into the vagina of Julia. She denied that a brother of the complainant called Seun was staying with the complainants at the time.

[20] Harold Hangula is a police officer who became involved with the case when the case docket was transferred from Windhoek to Otjimbingwe. He arrested the accused on 07 December 2018 after he went through the statements in the docket. He transferred the docket to the Gender Based Violence unit in Walvis Bay. The accused denied that he engaged in any sexual activities with the complainants.

[21] Nothing material turned up during cross-examination.

[22] Eva Katambo is an elder sister of Julia and Wilhelmina Katambo. Queen is the daughter of one of the witness's sisters, Jaqueline Nuses. The three complainants are currently staying with the witness in Goreangab, Windhoek. Before that, the complainants stayed at Willem Pos, Otjimbingwe. Wilhelmina is disabled and did not attend school. She is currently 29 years old but her mental capacity is like that of a child.

[23] The mother of the witness, Julia and Wilhelmina also stayed at Willem Pos but eventually became sick and had to come to Windhoek for treatment in hospital. At that time the three complainants were left alone at the farm Willem Pos. At some stage, her mother instructed that the complainants should be brought to Windhoek. The witness collected them to stay with her in Goreangab at the end of July 2018.

[24] The witness accommodated the complainants in a room. She testified that during some night times she could hear the complainants talking and crying. It was mostly Wilhelmina that was crying. The witness went to them and enquired. Wilhelmina, although she did not want to respond told the witness that she had bad dreams and experienced fear at night. The witness detected that Julia became short tempered and easily got angry whereas she was previously fine and obedient. Emotionally, Julia showed frustration. Queen, though, did not show frustration or anger but started to double wear clothes in layers. All of them stated that they experienced nightmares.

[25] When the witness noticed the behaviour changes, she brought the complainants into the main house to sleep in the kitchen. Their fears and nightmares thereafter became less, although, they still experienced dreams at night. The witness had to assist Wilhelmina to bath. At some stage during the first bathing incident, the witness noticed that the opening of her vagina was enlarged. The witness enquired from Wilhelmina if somebody slept with her. Wilhelmina responded that Kamademi (referring to the accused) slept and had sexual intercourse with her. She further told the witness that the accused found her at the house at the farm, undressed, used force, holding her hand and mouth and had sexual intercourse with her on various occasions. The witness was shocked and upset by the information.

[26] She reported the matter to a certain Pethimbo, a social worker at their unit of Gender Base Violence in the absence of Wilhelmina. Thereafter she went to her sister in law, one Harmony Sithole and decided to call the complainants together. They called them and confronted them about what the accused allegedly did at Willem Pos.

[27] The witness interviewed Queen firstly. Queen told her that when the accused was drunk, he came and had sexual intercourse with them. Queen said; 'he came to do us.' She further narrated about a day when she went to a certain Vedehapi where the accused stayed, to ask for milk. She was given porridge and milk. After eating she went around the house. The accused grabbed her hand, held her mouth and took her to his bedroom. Once in the bedroom, the accused undressed her panty and had intercourse with her.

[28] Queen further said that, on another day, the accused came to the house where the children stayed. Only Queen and Wilhelmina were present. The accused started calling Queen; 'Queen, Queen, my woman come!' She went to him in the house into a room. The accused undressed himself and Queen. Whilst Wilhelmina was outside, the accused had sexual intercourse with Queen again. A certain Madonna arrived at the house. When the accused heard the voice of Madonna outside, he instructed Queen not to go outside. Queen, however, went outside. Madonna told the accused to leave the children alone. The accused went out and left.

[29] Queen also informed the witness about yet another incident where the accused came and entered their house. Queen was lying beside Wilhelmina. Once inside, the accused started having sexual intercourse with Wilhelmina. Wilhelmina was crying and screaming. On another incident the accused again arrived at the house and instructed them to open the house. When they refused, he put a pipe through a window and tried to beat them while he was outside. He swore and screamed at them. The witness did not ask questions, but just listened when Queen narrated about the incidents. Queen spoke easily but was shy as she was related to the witness. When Queen narrated her version the other two complainants and Harmony were present.

[30] Secondly, the witness interviewed Wilhelmina. The witness testified that the house at Willem Pos is a corrugated iron structure with two rooms. One bedroom for the father and mother and a kitchen where the children slept. She asked Wilhelmina as to what the accused has done to them (the complainants) in the presence of Julia and Queen. Wilhelmina said that the accused used to come to her whenever she was alone and had sexual intercourse with her. Further, the accused had sexual intercourse with her by force in the presence of Julia and Queen. Wilhelmina further told the witness about another incident when the accused came there and attempted to rape Julia. The accused told them that he can do whatever he wanted as his family will bail him out. The accused on that day assaulted Wilhelmina with his hands on her buttocks.

[31] The witness thereafter asked Julia what the accused did. Julia narrated about an incident one day when they finished cooking and wanted to go to bed. The accused came inside the house and pushed Julia onto the bed. Julia told the witness that she started to scuffle with the accused. The accused undressed himself, undressed her panty, took a pillow and pressed it on the face of Julia. Thereafter he had sexual intercourse with Julia. She screamed and asked Queen to bite the accused. Queen bit the accused on his back. The accused loosened a bit enabling Julia to run away. She ran to the house of Madonna, their grandmother, and knocked on the door. Madonna, however, did not open. Julia and Queen then ran to an uncle who is blind and reported the incident. They lead the uncle to their house but the accused was already gone. The uncle said that they should inform him when the accused returns to the house. Thereafter they took the uncle home.

[32] Julia narrated about yet another incident when she was taking a bath. The accused came into the house whilst Julia was naked. She told the accused not to enter but he said he doesn't care. He pushed Julia on the bed and started raping her.

[33] The witness thereafter decided to take the complainants to the social worker, Ms Pefimbo Shipunda, the first State witness. The social worker recommended that the complainants should be taken the psychiatric hospital. Julia and Wilhelmina were admitted early October 2018 into the said hospital for two and a half weeks but Queen only had to visit the hospital once a week for counselling. They were taken for medical

examination by Harmony. The witness only joined later. The complainants are still living with the witness. Queen does not focus well and performs poorly at school, not passing her school examinations. Wilhelmina frequently cries without any explanation. Julia has improved somewhat but is still on stress medication. She no longer attends school.

[34] The witness is not aware of any relationship between Julia and the accused. Julia also informed her that the accused used to threaten them that he will kill them once they tell anyone about the incidents.

[35] In cross-examination the witness confirmed that their mother was HIV positive. She also confirmed that Wilhelmina is HIV positive. She does not know since when she tested positive. Queen only told her that the accused had sexual intercourse and said nothing about intercourse to herself. She testified that when she interviewed the complainants, there was no influence between them. The witness initially denied the possibility of consensual sex but later conceded that she cannot dispute. She confirmed her evidence in cross-examination on material aspects.

[36] Julia Katambo is one of the complainants in this matter. She gave her testimony in a victim friendly environment with a close circuit TV monitor for the court and all parties to follow. The witness did not know her age although she attended school until grade five. She lives currently in Goreangab with the previous witness, Wilhelmina, Queen, Seun, Jaqueline and one Papa Tee. She stated that she previously lived at Willem Pos farm with her parents, Wilhelmina, Queen, Seun and others. She knows the accused as a person from farm Willem Pos who used to help her mother and visited them frequently.

[37] She testified that the accused at some stage came to their house at the farm stating that he was looking for his thing or possession between her legs (referring to her vagina). He pushed her onto a bed, undressed himself, undressed her panty and inserted his penis into the vagina of the complainant. At this stage the witness became emotional. The court had to adjourn for ten minutes for her to recuperate. Before he inserted his penis the accused forced a pillow onto her face causing her to breathe with difficulty. She instructed Queen to bite the accused on his back. Queen bit the accused

enabling the witness to run away. She returned with Madonna but the accused was already gone.

[38] The witness testified that on another day the accused again arrived whilst she was bathing. She told him not to enter. Queen and Wilhelmina were also present. The accused, however entered by force. He pushed her onto the bed, inserted his penis into her vagina. The witness started to cry, jumped up and went to Madonna. Madonna was not there but when the witness returned she met Madonna halfway. Madonna went to their house and reprimanded the accused to leave the children alone. The accused said that if they tell Madonna all of them will be killed. This he said while he was on top of the witness.

[39] Madonna left after reprimanding the accused whereupon the accused slapped the witness twice on the cheek very hard. Thereafter he left.

[40] The following day, the witness went to collect wood. She found Wilhelmina crying inside their house on her return. Wilhelmina informed her that the accused had sexual intercourse with her in the presence of Queen. Queen confirmed it and that it was by force. The witness stated that she informed her mother upon her return from Windhoek about the incidents although her mother was ill at the time.

[41] The witness testified about yet another day when the accused arrived when he was intoxicated. He carried a pipe and started swearing at the complainants even referring to their vaginas. He pushed the pipe through a window and stated: "Open, your vaginas." They did not open the door. The witness again became emotional.

[42] She testified that the accused had sex with her on two occasions. These incidents happened about a week apart during the course of 2018, the same year that her mother passed away. The accused came to their house between the incidents where she was raped. The witness went to fetch water when the accused arrived. On her return, Wilhelmina was crying. On enquiry, Wilhelmina showed her a pink bruise on her back and stated that she was beaten with a belt after he raped her. There was also a report that Queen was raped after the accused forced himself on Queen during an incident at sunset on a certain day.

[43] During her testimony, she became very emotional and stated that; the incident affects her psychologically and emotionally. She always regarded the accused as her brother as he used to come to their house. She is now very disappointed in him. She stated that her mother was not at the farm when the incident occurred but was in Windhoek with her serious illness for long periods of time.

[44] The witness also testified about an incident where she witnessed in the presence of Queen that the accused raped Wilhelmina. The accused came into the house, undressed himself, flexed the legs of Wilhelmina and inserted his penis into her vagina. At the time, the accused did not say anything. The witness and Queen beat the accused with a broom stick. They went to report the incident to Madonna but she was not there. They went to report to the uncle after which they took the uncle to their house. The accused, however was already gone when they arrived at their house. The witness never witnessed that Queen had been raped. She only observed Queen crying at one time when she (the witness) arrived home from the shop.

[45] The witness confirmed that she feels disheartened about the incidents. She confirmed further that she experienced bad dreams and received counselling. She also went to a doctor and receives stress medication. She confirmed having informed Eva and Harmony about the incidents at Willem Pos in the presence of Queen and Wilhelmina.

[46] During cross-examination, the witness stated that she is HIV negative but confirmed that Wilhelmina is HIV positive. She confirmed that she went to school up to grade five but failed. She struggles to read and can only count to five. She was asked how she remembers the incidents if she is forgetful on her own admission. She responded that when she experienced traumatic events, she will remember. She is now also afraid of boys. She denied having had a relationship with the accused. The witness further confirmed her evidence in chief and no material contradictions emerged.

[47] Sitole Thandiwe Harmony is the sister in law of the complainants and referred to as Harmony by Eva Katambo. She knows the complainants and where they stayed during 2017 to 2018. She confirmed that Wilhelmina is disabled. She confirmed that she

is staying in Goreangab with the complainants, Eva, Seun and other children. She confirmed that after the death of Ester, the mother of Julia and Wilhelmina, Eva informed her about the rape of Wilhelmina. She informed her that she obtained the information from Wilhelmina after she noticed that Wilhelmina's private parts were open. The witness further informed her that she had reported the matter to a social worker who gave a date to speak to Wilhelmina. The witness was asked to accompany Eva to the social worker. The appointment with the social worker, however did not materialise. The witness then suggested that they should speak to all the complainants together.

[48] They started with Queen, the youngest, and asked what Jackson, the accused did to them without telling about the information from Wilhelmina. The complainants got frightened and Julia started laughing. Queen informed them that every time that their mother was not around, the accused had sex with them. Queen explained that the accused raped Wilhelmina, Julia and herself stating: 'he do me'. She explained that she was raped when she went to the house of the accused to ask for milk. At this incident she was given porridge and milk to eat. After eating she wanted to return home. The accused, however grabbed her, took her into a room and held her mouth not to scream. He undressed himself, undressed her and she put it, 'yes he did do me at his mother's house on his bed.'

[49] Queen further narrated about another day when the accused found her and Wilhelmina at the house. The accused went into the house and called; 'my wife my wife'. When Queen entered the accused stated that she must not tell anyone, otherwise he will kill her. He undressed her and himself and had sex with her. Whilst busy, Madonna spoke to Wilhelmina outside. The accused held Queen's mouth and told her not to jump up. She however jumped up and ran outside. Madonna saw them and told Jackson to stay away from the children.

[50] The witness also testified about Queen having narrated that one day whilst she was asleep with Wilhelmina the accused had sex with Wilhelmina in the presence of Queen. Wilhelmina cried the whole night whilst Queen was next to her. Queen remembered that the accused at one stage hit Julia with a fist. The accused came soon after Julia finished eating. Julia chased him away. He punched her, took a pillow and

put it on her face, took off her panties and do her as the witness put it. Julia was fighting all the way, took the pillow off and instructed the witness to bite the accused on the back. She did that and Julia got the chance to get up and run outside.

[51] Queen further told the witness that Julia found Wilhelmina with fresh marks on the back. Wilhelmina reported that it was caused by Jackson, the accused who hit her with a belt. Further, during cross-examination, the witness confirmed her evidence in chief.

[52] Julia confirmed and narrated the same story as Queen. Julia also told them that the accused raped her. She confirmed the incidents about the pillow and the bathing incident. In relation to the bathing incident, Julia told them that all three of them were in one room, bathing and naked. The accused entered despite the fact that he was told not to enter.

[53] The witness thereafter informed Eva that they should take the complainants to the Women and Child Abuse Centre's social worker. One of the reasons was that the witness and Eva detected personality changes in the complainants. Queen would double or triple dress with dresses and jerseys in summer. When bathing, she got angry when small children came in the bathroom. She did not allow her mother to bath her. Previously Julia was very responsible, so much so that she could take care of small babies. Now she easily got angry with everybody. She displayed tantrums and had outburst of anger. She played the blame game to make the persons around her aware that she was abused. Wilhelmina acted like a four year old. Previously she could reason, was playful and nice. After the alleged incident she was nervous and watched television but when she is alone she was withdrawn, cried a lot about things and did not make sense. She did not eat properly.

[54] The witness and Eva attempted to get an appointment with Pathimbo, the social worker, but did not succeed because she was on a training course. Eventually statements were taken from the witness, the complainants and Queen with the assistance of the social worker. The complainants were examined by a doctor. The complainants were also taken for HIV tests on recommendation of the doctor.

Afterwards, Julia was put on preventative HIV medication. Julia and Wilhelmina were afterwards admitted in the psychiatric hospital for some time. Queen was also seen by a psychiatrist or psychologist and had to attend counselling sessions every Monday.

[55] During cross-examination her evidence was mostly confirmed and no material contradictions emanated. The witness testified on a question, if the six year old would tell about sexual encounters, that she was abused at a very young age and could not tell anybody about it. It is according to her not something to easily talk about. She further testified during cross-examination that even though the Dr stated that Queen was still a virgin, whatever sexual act occurred, Queen would take it as sexual intercourse because she does not know what sex is.

[56] Jaqueline Nuses is the mother of Queen. She used to stay in Goreangab Dam since 2000. She knows the accused person from Otjimbingwe. Eva, Julia and Wilhelmina are the children of her stepmother, in other words they are her stepsisters. Queen does not have a birth certificate but is now 12 years old. Queen stayed at farm Willem Pos with Ester Katambo, the stepmother of the witness, since the age of two years old.

[57] The witness became aware of the allegations of rape in 2019 after the children came to Windhoek. Eva and Harmony told her about the rape and assault allegations. The victims did not tell her at the time but only afterwards. She observed changes in the behaviour of Queen after she came to Windhoek. She confirmed that the complainants went to the mental hospital for treatment. Queen still has to go there. The witness is not aware of any sexual relationship between Julia and the accused.

[58] Wilhelmina Katambo is one of the complainants and was supported in court by Eva Katambo. She testified that she is 29 years old. She is residing with Eva Katambo at Goreangab. She stated that Queen is her daughter but later confirmed that she is her step niece. She stated that Julia is her sister. She knows the accused from the cattle post, Willem Pos. She testified that the accused came at their residence and requested the witness to go into the house. She refused whereupon the accused took a belt and

hit her twice on the body. The accused was angry and went away after hitting her with the belt. He told the witness that they will meet again.

[59] On another occasion, the accused came and entered the room. She was playing with a doll. He asked her to lay down. She refused and he pushed the witness onto a mattress, undressed her and inserted his penis into the vagina of the witness. The witness did not want to have sex and she experienced pain. Thereafter the accused went away and said for a second time that he will meet with her again.

[60] On a certain night Julia was in Otjimbingwe, Queen was sleeping next to the witness. The accused came inside the house and whilst the witness was sleeping, removed the blankets. He undressed himself and the witness and had sexual intercourse with her by inserting his penis into her vagina for the second time. She did not want to have sexual intercourse with him. She told the accused that they will meet in court. The witness testified that she is disabled and cannot walk but only crawl on her knees.

[61] The witness testified that she knows of incidents of sexual intercourse with Julia and Queen. In relation to Queen, she was sitting outside washing dishes. The accused arrived and said 'my wife, my wife! He just went inside the house with Queen and closed the door. Queen came out crying and informed her that the accused had sexual intercourse with her.

[62] In relation to Julia, the witness testified that Julia was taking a bath. The accused came and said he came to collect his things in the house. The witness was playing with her doll. The accused pushed Julia on the bed and undressed her. He thereafter put his penis into her vagina. The accused held Julia by force. The door was open and the witness could observe what happened. She testified about quarrels and assaults on Julia where the accused told Julia that one day he will take Julia by force. The accused eventually, according to the witness, did that. The witness denied that Julia and the accused ever slept in a separate room. The witness confirmed that she and Julia reported the incidents to Eva.

[63] She further confirmed that she went to a clinic where samples were taken from her and that she was diagnosed with aids. She met with a social worker and eventually was taken to the Psychiatric Hospital for examination. She was mentally affected by the incidents and was consequently placed on treatment. She confirmed that she is no longer on the medication.

[64] During cross-examination, she confirmed that she contracted the virus from the accused as she has not had sexual intercourse with anyone other than the accused. The defence put it to her that the accused is HIV negative and that her evidence is consequently a fabrication. The witness remained constant in her evidence. The defence further put it to the witness that she is mentally challenged, because she could not remember her age in cross-examination and more so because Pethimbu Shipunda, the social worker, testified to that earlier. The witness stated that she was mentally stable. Defence counsel questioned the witness as to whether she knows a certain Usiel Kanguvi, to which she responded in the negative. The defence put it to the witness that the said Usiel Kanguvi stayed close to Willem Pos, Otjimbingwe area. Defence counsel further, stated that Usiel Kanguvi is HIV positive and takes medication for it. It was put that the former had sexual intercourse with the witness and that he was the one who infected her with the virus. The witness denied the version put to her by the defence.

[65] Queen Nuses, another one of the complainants, testified in camera. She testified that she is 12 years old and in grade 4. She schools at Hill Side Primary School and resides in Kanipa Street in Windhoek. She is the daughter of Jacqueline Nuses. She testified that she knows both Julia Katamba and Wilhelmina and that both women are her mother`s sisters. She indicated that she has been staying in Kanipa Street all her life and further indicated that she knows the farm Willem Pos. Her grandmother, Tuteumune Katamba used to stay there and that she stayed with her grandmother at Willem Pos for a period of time. She is not certain for how long. She testified further, that she knows the accused before court, and that the said accused used to rape her, Julia and Wilhelmina. She indicated that the rape took place at Willem Pos at their residence as well as at the accused`s house.

[66] The witness testified that she went to the accused`s residence which belonged to his mother. She then asked for sugar from accused`s mother. The latter provided the witness with sour milk and porridge. When she finished eating, on her way back, the accused grabbed her hand and covered her mouth with his hand. The accused took her to his house where he undressed her, then himself and had sexual intercourse with her. The witness testified that the accused`s house is different to theirs, but that the houses are in the same yard. She described sexual intercourse as a man inserting his penis into a woman`s cookie.

[67] The witness testified further that on a different occasion, while she and Wilhelmina were washing dishes, the accused came to their residence. The accused did not insert his penis into her, but only opened her legs. She testified that the accused threatened to kill her, after which she opened her legs. She stated that the accused performed a sexual act at the front. The witness testified that the accused`s penis touched her `cookie`, but she could not remember how long it lasted, only that it took a little longer. She indicated that it might have taken less than 5 minutes. The witness testified that she asked the accused to stop but he did not want to stop. While the accused was dressing himself, she ran away.

[68] The witness testified that, when accused was touching her cookie, she felt very bad, and did not want him to do what he did to her. She further indicated that she did not feel any pain.

[69] The witness further testified that on a different day, while she and Wilhelmina were washing dishes at their residence, the accused came into their residence and called her `my wife, my wife go inside house, I will give you a good thing`. When she went into the house, the accused undressed her and himself and had sexual intercourse with her. She indicated that the sexual intercourse was the same as before. The accused told her to keep quiet, undressed her and did the same thing as before. The witness indicated that they were washing dishes inside the house whereas the room accused took her into was also inside the house.

[70] The house referred to by the witness consists of one yard and one house with different rooms, a sitting room and a bedroom. The kitchen is not part of the house. The witness and the accused went into the former's grandmother's room. The witness indicated that the incident made her feel bad and that she did not want the accused to do that to her.

[71] With regard to the alleged rape against Wilhelmina, the witness testified that, on a different day, sometime during the night, while she and Wilhelmina were about to sleep, the accused came into their residence. She indicated that the door was sometimes closed, and sometimes not. The accused started undressing Wilhelmina, where after Wilhelmina started crying and shouting. Accused then inserted his penis into Wilhelmina's cookie. The witness stated that she saw the accused inserting his penis and that the accused was on top of Wilhelmina.

[72] She testified that, during the time the accused undressed her, Wilhelmina was seated outside. When she got outside, Wilhelmina was still outside. She described her relationship with the accused as one where the accused would collect wood for her grandmother and would look at the three of them (the witness, Wilhelmina and Julia).

[73] During cross-examination, the witness testified that she saw the accused having sexual intercourse with Wilhelmina and there were movements on the mattress. The accused climbed on top of Wilhelmina and inserted his penis into her cookie and had sexual intercourse with her. The accused told Wilhelmina to open her legs where after he inserted his penis. Wilhelmina stated that she does not want, but the accused pushed her. She then started screaming and crying. The accused then let her go, dressed himself and ran outside to collect the cattle. The accused was not on top of Wilhelmina for long, it was less than 5-10 minutes. The witness indicated that those were the only incidents relating to Wilhelmina.

[74] During cross-examination, the witness testified that, in relation to Julia, she was having a bath when accused arrived at their residence. Julia told the accused not to come in as she was having a bath. Julia was taking a bath in their grandmother's room and the witness was in the living room. The accused then deliberately went into the

grandmother's room. The accused started scuffling with Julia. She started crying. The witness then went to peep through the door after opening it. She saw the accused undressing himself and having sexual intercourse with Julia.

[75] Further she testified that she was not aware of any romantic relationship between the accused and Julia and that during the incident she witnessed that the accused held Julia by force and had sexual intercourse with her. The witness described that the accused was holding Julia on her body at the breasts.

[76] In addition, she testified that there was another incident, late one afternoon while Julia was cooking, the accused went into the house and the door was not closed. The witness indicated that they were making the bed, when accused came into the house and pushed Julia onto the bed. The accused started scuffling with Julia. Accused then took a pillow and covered Julia's face with it. The witness states that she was in the house with Wilhelmina while this was happening.

[77] After the accused covered Julia's face with the pillow, he undressed himself, then undressed Julia and proceeded to have sexual intercourse with her. The witness testified that, during the first incident of rape, Julia told the accused not to do it and she was crying. The accused told Julia, if she ever told anyone, he would kill her. The witness stated that she did not enter the room during the first incident, however accused spoke loud enough for her and Wilhelmina to hear.

[78] During the second incident involving the pillow, Julia and the accused were scuffling. Julia was on the bed, covered with the pillow, her hands were on her stomach and accused leaned on her hands with his body. Julia told the witness to bite the accused on his back, which she did. They then ran to a certain uncle Kamundu's house. When they arrived at said house, Julia told the uncle that the accused had sexual intercourse with her. The uncle then told both Julia and the witness to hold his hands (he was blind) and to take him to their residence. Upon their arrival at the residence, they only found Wilhelmina at the house who told them that the accused ran away. The uncle told them to inform him, should the accused return.

[79] The witness testified that she reported the incident concerning herself to Eva while Wilhelmina was being washed by Eva. Eva saw that Wilhelmina was beaten and asked who had beaten her. Wilhelmina began crying where after Eva called the witness and enquired from her why Wilhelmina was crying. The witness was together with Eva and a certain aunty Harmony in Eva`s room in Windhoek.

[80] The witness informed Eva that the accused was having sexual intercourse with herself, Julia and with Wilhelmina and that it occurred at the cattle post.

[81] After the witness disclosed this to Eva, Wilhelmina and Julia were crying, but she proceeded to tell Eva the truth. Eva then went to report the incidents. The witness testified that she knows Pethimbo as a social worker. She told Pethimbo what the accused did to her, Julia and Wilhelmina .

[82] The witness remained consistent and confirmed her evidence of events during cross-examination.

Defence Case

[83] The accused testified in his defence and called a witness, Imelda Beukes, in his defence.

[84] The accused testified that he resides and was raised in Otjotungwe at the cattle post, Willem Pos, his grandmother`s place. He knows all three the complainants. He testified that all three the complainants stayed at their grandparents`, Ester Katambo`s and Simon Titus` residence at Willem Pos. The accused further stated that the residence of Ester and Simon is a short distance from where he resided.

[85] The accused testified that Julia was his girlfriend from January 2018, but that the relationship only lasted for about 3 months. He described the relationship between himself and Julia as a romantic relationship. According to the accused, he would inform Julia prior to him coming to their house, so it was for her to say if it was okay or not. He used to go to Julia between 19h00 and 20h00. He would sometimes phone her and sometimes they would see each other face to face.

[86] Further, he testified that he and Julia did what people normally do in a romantic relationship; they had sexual intercourse by consent. He further testified that Julia used to open the door for him. He denied ever raping Julia because they were in a romantic relationship.

[87] The accused recalled that once when he got to the residence where Julia stayed, there was another female who used to come and stay there. The name of the female was Imelda. The latter was afraid of staying alone at her place. She normally stayed with her two brothers, but when her brothers were away, she stayed with Julia.

[88] The accused testified that Imelda also stayed at Willem Pos, but at a different residence. In relation to raping Julia, the accused testified that it was not true, that he was never physically abusive towards Julia and that he never threatened her.

[89] The accused testified that, he knows Wilhelmina as a child who used to stay with Ester Katambo and Titus Simon. He stated that he does not know how old she is, but that he only heard in the counts that she was 23 then, but now 29 years old. Regarding her HIV status, the accused indicated that he only learned in court that she is HIV positive. The accused further testified that he heard in the lower court that he allegedly raped and infected her with HIV, but that there is no truth about that.

[90] The accused further testified that he had blood samples taken in February 2019 to be tested for diseases, upon learning of the accusations made against him. He indicated that his blood was taken, after which he was given 15 minutes of counselling and then told that he would be placed on medication. He testified that he was then later told that he has no diseases, which is recorded in his medical passport. The accused further indicated that the testing of his blood samples was to determine whether he had HIV. The accused stated further that this was not the only time he went to have his blood tested. He went for testing again when Wilhelmina was testifying. He testified that he went back to the same person who took his blood previously; this was on 28 June 2022. The accused testified that he was instructed to wait and after a while his blood was drawn. He was counselled again and informed that he would be placed on

medication. The same process was followed as on the previous occasion. The results came back negative for HIV/AIDS.

[91] The accused testified that the testimony that he raped Wilhelmina is not true. He stated that it is also not true that he found Wilhelmina and Queen at the Katambo residence and started having sex forcefully. The accused testified that he was in love with the younger sister. Therefore there was no need to sleep with Wilhelmina. The accused further testified that the testimony that he found Wilhelmina at home, threw her out of the wheel chair and had sexual intercourse with her is also not true. The accused stated that he never assaulted or threatened Wilhelmina.

[92] Further, he testified that he knows Queen as the girl who was also staying with her father, mother, Julia and Queen. He did not know her age. He testified that in 2018 she looked like a little girl, he estimated her to be 5 years old. She was also not attending school. The accused testified that the testimony that he had sexual intercourse with Queen was not true. The testimony that Queen saw him having sexual intercourse with Wilhelmina and Julia is also not true. The accused testified that, even when he and Julia were having sexual intercourse, they did not do it in the presence of the others. The accused stated that they slept in the front room, while the others slept in another room.

[93] The testimony that Queen bit him on his body because he was raping Julia was also not true. According to him, it did not happen. The accused also denied ever threatening Queen. He stated that he only came to know in court that Queen is afraid of him because of threats. The accused stated that he used to meet Queen and the others at their grandmother`s place and sometimes he went to Kamundu`s place when the latter called him. Kamundu and her parents sent Julia to call the accused to Kamundu`s place when assistance was required.

[94] The accused described the Katambo residence that there are in fact two residences close to each other, one residence was for Kamundu`s late brother, where Kamundu is staying, and the other residence was for Ester. Kamundu is Ester`s uncle. The accused indicated that there is not a big space between the residences, and that

the residences are adjacent to one another. Ester came to live there because of their late uncle. The accused indicated that, when one is in Ester`s residence, someone in the other residence will be able to hear if someone shouts or speaks loud.

[95] He denied Julia`s testimony that he inserted his penis into her vagina by force. The accused testified further, that the testimony of Julia that he on one occasion allegedly found her in the bath and forced himself on her is also not true. The accused stated that he has never seen Julia`s naked body and that she has never seen his. He testified that, when they were engaging in sexual intercourse they always had the lights off and that it was in the darkness under a blanket on the same bed. He never inserted his penis by force. The accused thinks that the accusations are because it is alleged that he infected Wilhelmina with the HIV disease. He however, denies that he is infected.

[96] The accused testified that, had that happened, the allegations and information would have reached the elders, or those who visited them. The accused testified further that the complainant`s parents used to visit them to bring food. Julia and Queen took care of the livestock, they were regularly asked about the livestock and about how they were doing and they had a phone to communicate regularly.

[97] He testified that the story emanated from Wilhelmina when she was bathed by her big sister Eva. Eva realized that she had sexual intercourse and that there were pimples on her genitalia. When Eva asked Wilhelmina about the men who had sexual intercourse with her, she said that accused forcefully had sexual intercourse with her. The issue of infection originated from that. The accused further testified that the complainants were allegedly afraid to tell their visiting parents about the alleged rape, assault and threats, which he finds strange.

[98] The accused testified further that the people moved a long time ago, around May of the year in question. When their mother was released from the hospital in Windhoek, she went to her uncle, Gebhardt, to go and stay there. The whole homestead was then left and the homestead or the house was closed. The accused only heard about the allegations when he was arrested on 07 December 2018. About

the complainants being afraid, the accused testified that they did not tell the elders there or their parents.

[99] Concerning Julia and Wilhelmina, the accused stated that when the two were living with their parents, they were afraid of their parents, but as soon as the parents left, they started meeting men. Wilhelmina had a boyfriend, she was afraid to tell about the boyfriend and that is why she accused him. According to the accused, after he and Julia separated, Julia wanted to restart the romantic relationship, but the accused refused. Julia felt offended and because of the things she heard from Wilhelmina, that the accused slept with the latter and infected her with HIV that is why the whole thing came up.

[100] During cross-examination, the accused was questioned as to why he did not put the alleged duration of his relationship to Julia when she was on the stand, to which he responded that he did not see the need to do so as Julia had already denied the relationship between them. He similarly indicated that he did not know that it was important to put the duration of the relationship to Julia nor was he asked about the duration of the relationship, as he had already mentioned that they were in a relationship. The State further asked the accused whether Julia was a sickly person, someone with ailments or illnesses, as the accused informed the court earlier that, he used to call Julia prior to going to her residence to establish if she did not feel well and she would consequently inform him and he would not go to her. The accused responded that Julia was not a sickly person, but she would inform him if she was on her menstrual cycle and he would consequently not go. Upon being questioned as to whether Julia informed him of anything else, particularly when she was hungry, or when someone mistreated her, the accused responded in the negative. The latter later changed his version to indicate that, while he was in a relationship with Julia and she had a problem, she used to tell him or he would provide her with money so that she could buy whatever she wants. However, in the event that she did not tell him what was wrong, he just kept quiet.

[101] The accused was questioned as to why he was hesitant to inform the court what he and Julia did, as he previously answered that they did what people in relationships

normally do as opposed to blatantly saying they had sexual intercourse. The accused testified in cross-examination that he regards sexual intercourse as a shameful thing to say in front of people; because it is something he does not do in the presence of other people. It is a secret thing. It was put to him that, in the face of the allegations against him, he would want to clear his name, and mention that they had consensual sexual intercourse. The accused responded by saying that he has never done that before, that even during past relationships he would not speak about having sexual intercourse with past girlfriends, that it is something he simply would not do, and that is why he informed the court that he and Julia did things that people in relationships normally do. The State then questioned him that despite him being accused of rape by Julia, he would not be comfortable saying that they had sexual intercourse because according to him it was shameful. The accused indicated that it is not a secret because he mentioned to court that they were in a relationship and were having sexual intercourse, he would just not mention it in the presence of other people.

[102] The accused was confronted with his reply to the state`s pre-trial memorandum during cross-examination, specifically his denial of ever having had sexual intercourse with Julia Katambo, consensual or otherwise. The accused stated that this statement was not true and that he has not denied sleeping with Julia. The accused further denied having any knowledge of the document titled `Accused`s reply to State`s Pre-Trial Memorandum`. The accused did however admit that his name reflects on the reply to the memorandum and that he in fact affixed his signature thereto, the accused went on to state that the document before him is not the document his lawyer gave him to sign and the signature on said document is different from how he signs. Accused later confirmed that it is in fact his signature and that he is just not sure about the document.

[103] Upon being questioned as to the identity of the document he alluded to, he indicated that there was a specific document, with lines on it which he was made to sign by his legal representative. This document contained the information that he was in a relationship with Julia. According to him, that is why he disputed the point in his reply to the State`s pre-trial memorandum that he denied having sexual intercourse with Julia. The accused however stated that he was not sure about the reply and could thus not

comment on it. The State posed the question whether the accused's legal representative fabricated the response in the accused's reply to State's pre-trial memorandum, to which he responded that he does not know anything about that.

[104] When being questioned as to whether, opening a door for someone meant that the person has given consent to have sexual intercourse, the accused conceded that simply opening a door for someone, does not mean that said person consented to sexual intercourse. The accused further indicated that, because he was in a relationship with Julia and he had an agreement with her, all he needed to do was knock on the door. The accused later clarified and stated that there was no agreement between him and Julia, they were only in a romantic relationship.

[105] Based on Wilhelmina and Queen's testimonies, it was put to the accused that they never made mention of an Imelda ever being present at the house, while accused was there. It was further put to the accused that his legal representative never questioned Julia, while she was on the stand, as to whether Imelda used to sleep at Julia's residence, when her brothers were away.

[106] The accused was further confronted with his bail record of proceedings in the lower court, in which no reference was made by either himself or his legal representative at the time, that the accused had any romantic relationship with Julia. The accused conceded that he did not mention the relationship with Julia during his bail application in the lower court. The accused further stated that he did not see the need to mention said relationship in the lower court, because he was under the impression that they are only dealing with the bail application.

[107] In relation to the allegation that all three complainants alleged that the accused raped them, he responded that all three complainants reside at the same residence, they stay together and they talk about the case almost every day. It was further disclosed by the accused during cross-examination that, the reason he allegedly broke up with Julia was because he found her with another man. The accused was questioned as to why the evidence of him finding Julia with another man was only brought up at this

stage and not during his evidence in chief, to which he responded that he provided the information concerning Julia to his legal representative.

[108] The accused was questioned as to the identity of Wilhelmina`s alleged boyfriend since the accused previously informed the court that Wilhelmina had a boyfriend, the accused responded that the alleged boyfriend is named Skoro. The accused further indicated that there was a day he found Wilhelmina and Skoro at Wilhelmina`s house and described them as being man and wife. He further indicated that he found the two of them in their little kitchen having sexual intercourse. The accused was questioned as to why he was only disclosing this information now and not during his evidence in chief to which he responded that he was simply responding to the questions that were raised to him.

[109] In re-examination the accused made it clear that Skoro and Usiel Kanguvi were different people.

[110] The witness was generally evasive in answering questions put to him by the State and often dwelled on issues unrelated to the questions posed to him. The court had to occasionally remind him to concentrate on questions asked and not just answer for the sake of answering.

[111] The defence called Ms Emelda Beukes as their second witness. She testified that she is 47 years old and resides at farm Willem Pos since childhood. She testified that she knows the accused before court for a long period of time. They reside at Willem Pos. She testified that she does not know what the accused is charged with. She further testified that she knows the girls, Wilhelmina, Julia and Queen. She knows that the accused and Julia were in a relationship, Julia herself informed the witness that she was in a relationship with the accused, and the witness also saw them together.

[112] The witness testified that the accused used to visit Julia`s residence and Julia, in return, used to visit the accused`s residence. At some point while the witness was in their presence, the accused and Julia were acting friendly towards each other, there were no arguments between them.

[113] The witness recalls an evening that while she was at Julia`s residence, the accused also arrived there. The accused knocked where after Julia opened the door for the accused. The witness was friends with Julia at the time and spent the night with the latter since she was alone.

[114] The witness testified that the residence consisted of two bedrooms. She indicated that all of them were in one bedroom. The witness testified that, after the accused arrived, Julia took a blanket and a pillow and went to sleep in the other room. Julia was not forced. This was the only incident the witness was aware of.

[115] The witness never saw Julia being threatened by the accused, nor did she see Wilhelmina being raped or that Queen was threatened or raped.

[116] In cross-examination, the witness stated that the accused and Julia used to exchange visits. She further testified that the accused sometimes brought gifts with him for Julia when he visited her. She indicated that she does not know why Julia denied having been in a relationship with the accused person. The witness indicated that she asked Julia whether she was in a relationship with the accused because of the manner the two of them stayed together. She stated that the question was prompted because she saw the accused and Julia holding hands, visiting each other and the sleeping over. The witness indicated that on the night in question, Wilhelmina and Queen were also present at the house, but that Wilhelmina was awake while Queen was asleep. The witness testified that all three of them were in the same room, while Julia and the accused were in Julia`s mothers room. She indicated that there were no adults at home, the only older person at home was Julia. She confirmed that she never saw the accused and Julia having sexual intercourse. She could also not confirm or deny whether Julia was raped. The witness indicated that she only slept over at Julia`s residence that one time. The witness indicated that the relationship between the accused and Julia lasted for approximately two months and she knows this because Julia informed her that she got a new boyfriend afterwards.

The law

[117] It is trite that the onus to prove the case beyond reasonable doubt rests on the State in criminal proceedings. A fair trial is a constitutional right and every person is to be presumed innocent until proven guilty.¹ The objective is to protect the innocent and only those proven to be guilty beyond reasonable doubt, will be punished. The reasons for this presumption was examined in the Canadian case of *R v Oakes*² and referred to with approval in *Hendricks and others v Attorney General, Namibia, and others*³. It was held that the presumption contains three fundamental components;

- a) The onus of proof lies with the prosecution;
- b) The standard of proof is proof beyond reasonable doubt;
- c) The method of proof must accord with fairness.

[118] There is ample authority that proof beyond reasonable doubt, does not mean proof beyond a shadow of doubt.⁴ In other words, the proof need not reach certainty but must carry a high degree of probability.

Analysis of the evidence

[119] This court must determine if the State provided sufficient evidence to prove the different charges beyond a reasonable doubt. I will deal with the evidence in respect of each of the counts in this exercise.

Count 1 Rape

[120] This count relates to the alleged rape of Wilhelmina Katambo who according to the observations of the court and the evidence, is of diminished capacity, handicapped and disabled. Despite that she is 29 years old, she needed a support person during her testimony. She appeared to be a reliable witness. Although she could not provide definite dates, she was adamant that the accused had non-consensual sexual intercourse with her on different dates. Some of the incidents took place in the presence

¹ Article 12(1)(d) of the Namibian Constitution.

² *R v Oakes* (1986) 26 DLD (4th) 200.

³ *Hendricks and others v Attorney General, Namibia, and others* 2002 NR 353 (HC) at 372.

⁴ *S v Simon* 2007 (2) NR 500 at 512 B-D.

of two other alleged victims and other times in their absence. The witness's evidence was corroborated in respect of incidents that they witnessed, where the accused forced himself onto Wilhelmina. There was also consistency when she narrated the incidents to her sister Eva, one Harmony and a social worker to whom it was reported.

[121] The medical doctor who examined Wilhelmina found her hymen to be absent. He concluded that the patient had been sexually active, concurring with a history of sexual assault.

[122] The accused's defence is a bare denial. He did not give a plea explanation. During cross-examination, his defence also emanated as a bare denial. However, upon testifying, he came up with an allegation that Wilhelmina had a boyfriend by the name of Skoro with whom she was in a sexual relationship. During cross-examination by his legal representative, it was however put to witnesses that the boyfriend was one with the name Usiel Kanguvi. It appears from the accused's evidence that these are two totally different persons. The accused, furthermore, testified that he was accused by Wilhelmina because she was afraid that her sister, Eva would find out that she was sleeping with Skoro, a person with whom the accused allegedly saw Wilhelmina sleep with. This alleged fact was never raised during the cross-examination of witnesses or during the testimony of the accused and is found to be an afterthought. It is further not supported by the evidence. The accused was further evasive and often spoke about issues that he was not asked to answer.

[123] In the circumstances, his evidence in relation to this count is rejected. It is clear that the complainant in this count is impaired and in addition, the evidence reflects that force was used. He stands to be convicted of rape under coercive circumstances.

Count 2 Rape

[124] This count relates to the alleged rape of Julia. She appeared to be the more emotional developed one of the three complainants. She testified about two incidents where the accused forced himself on her and had sexual intercourse with her without her consent. She testified that the incidents took place about a week apart. The witness became very emotional when she testified about how the accused forced himself on

her. Her testimony was clear and detailed. Her evidence was corroborated by the other two complainants and her reports to Eva, the social worker and Harmony proved to be consistent with her testimony in court. This court finds her evidence reliable and credible.

[126] The doctor who examined her found that her hymen was absent. It appeared ragged and torn circumferential. He found her to be sexually active.

[125] The accused testified and admitted that he had sexual intercourse with this complainant at a time when he was allegedly in a romantic relationship with her. The accused similarly testified in a bail hearing in the lower court. In those proceedings he admitted that Julia was just a person that he knows and he just greeted her when they met. No mention was made that at some stage she was his girlfriend or that he had consensual sex with her. In his reply to the State's pre-trial memorandum, the accused emphatically denied that he had sexual intercourse with Julia.

[126] Julia testified about an incident where the accused forced himself on her, where the accused took a pillow smothered her, put his penis into her vagina and had sexual intercourse with her. She testified that Wilhelmina and Queen were present during the incident. During this incident, Julia instructed Queen to bite the accused. Queen bit him on the back. Both Queen and Wilhelmina corroborated Julia in relation to this incident. There was also consistency in that it was reported to Eva and Harmony.

[127] The evidence of the accused, on the other hand, was as already alluded to, not credible. It appears that his defence of consensual sexual intercourse with Julia is a fabrication and it is found as such. He initially denied having had sexual intercourse with Julia and only, as the trial progressed, came up with this allegation. The evidence of both Queen and Wilhelmina refutes consensual sexual intercourse even if the accused was in a romantic relationship with Julia. The defence of the accused in this regard is rejected and he ought to be convicted as charged.

Count 3 Rape

[128] Queen Nuses is the third complainant. She was 12 years old at the time of her testimony. She knows Julia, Wilhelmina and the accused. She stated that the accused raped her. She described the sexual intercourse as follows; the accused did not insert his penis into her vagina but that the accused performed a sexual act at the front of her vagina after opening her legs touching her 'cookie'. She asked the accused to stop but he did not stop. On another occasion while she and Wilhelmina were washing dishes, the accused came into the house and called her: 'My wife, my wife, go inside the house, I will give you a good thing!' When she went into the house, the accused undressed himself, undressed her and had sexual intercourse with her in the same manner as before. At the time Wilhelmina was outside the house.

[129] Wilhelmina corroborated Queen`s evidence about the incident when the accused called Queen by saying; 'My wife, my wife!'. She testified that the accused went inside a room with Queen and closed the door. Queen came out crying and informed Wilhelmina that the accused had sexual intercourse with her.

[130] The medical examination conducted on 20 May 2019 on her proved the hymen to be perforated. The doctor opined that the perforation was not necessarily from sexual intercourse because it was not completely ripped off. Queen was also examined earlier on 05 October 2018 and the hymen was then intact but there was a small incomplete old scar or tear in the hymen membrane. At the time there was also doubt if it was caused by sexual intercourse.

[131] The evidence, however, proved that the accused committed a sexual act with Queen as envisaged in the Act, in that he performed some genital stimulation or cunnilingus. Further, there is evidence of physical force and the complainant is under the age of 14 years whilst the accused was 33 years old at the time. He further threatened to kill her if she would tell anyone about the incident.

[132] I am satisfied that the witness, although still young, is credible in her testimony about the events. In addition she is not a single witness and was corroborated by Wilhelmina. There is also consistency in what she testified and reported to Eva, the

social worker and Harmony. The bare denial of the accused, in the circumstances is rejected. I find the accused to have been evasive and untruthful. He therefore stands to be convicted on this charge of rape under coercive circumstances.

Count 4 Assault with intent to cause grievous bodily harm

[133] Wilhelmina testified that the accused at one time requested her to go into the house. When she refused, the accused became angry, hit her with a belt and thereafter went away saying that they will meet again. The State conceded that it did not succeed to prove that the accused had the intention to cause grievous bodily harm. I agree with the concession. In my view, the state proved common assault and the accused stands to be convicted as such.

Count 5 Assault with intent to cause grievous bodily harm

[134] Likewise, the State conceded that it could not prove intent to cause grievous bodily harm when the accused slapped Julia hard twice on the cheek at one time. I likewise agree with this concession and find that common assault was proven beyond reasonable doubt.

Count 6 Assault with intent to cause grievous bodily harm

[135] This count relates to the suffocation of Julia with a pillow before he committed a sexual act with her. In my view that act was committed to exert force in order to commit the sexual act. I am of the view that, to convict on this count, will amount to a duplication of convictions. Thus, the accused will be acquitted on this count.

Counts 7, 8 and 9 Assault by threatening

[136] These counts relate to the allegation that the accused threatened to kill the complainants if they were to report the incidents to anyone. The State conceded that these counts also amount to a duplication of convictions. It was submitted that the threats were uttered to further the incidents of rape and for the accused not to worry that the complainants would expose him. In addition it was, in my view, also not proven beyond reasonable doubt that the complainants believed that the accused intended and

had the means forthwith to carry out the threats. Therefore, the accused ought to be acquitted on these charges. In any case, according to the complainants, they have reported the incidents to Eva and at least two other adults at the time. This is an indication that they did not take the threats seriously.

[137] Further, it was not proven that the accused and the complainants were in a domestic relationship as provided for in s 3 of the Combating of Domestic Violence Act 4 of 2003. The evidence is that he was just a neighbour. The State also, correctly so, conceded to this.

[138] In the result, the accused is convicted on the following counts:

1. Count 1: Rape in relation to Wilhelmina Katambo;
2. Count 2: Rape in relation to Julia Katambo;
3. Count 3: Rape in relation to Queen Nuses;
4. Count 4: Assault (common) in respect of Wilhelmina Katambo;
5. Count 5: Assault (common) in respect of Julia Katambo

The accused is acquitted on counts 6, 7, 8 and 9.

H C JANUARY
JUDGE

APPEARANCES

STATE:

T T Iitula

Of the Office of the Prosecutor-General, Windhoek.

ACCUSED:

T K Kaurivi

Of the Directorate Legal Aid, Windhoek.