

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

JUDGMENT

Case no: CC 20/2012

In the matter between:

**THE STATE**

v

**SIMON NAMBULI**

**ACCUSED**

**Neutral citation:** *S v Nambuli* (CC 20/2012) [2019] NAHCNLD 69 (25 July 2019)

**Coram:** SALIONGA, J

**Heard:** 4 -12 and 18 February 2019, 4 March 2019, 7 March 2019, 15 and 29  
April 2019

**Delivered:** 25 July 2019

**Flynote:** **Criminal Law** — Rape — Assault with intent to do grievous bodily harm — House breaking with intent to rape and rape read with Combating of Rape Act, Act 8 of 2000 — Defeating or obstructing the course of justice — Accused pleaded not guilty

— Onus on State to prove accused guilty — No prejudice to reveal the defence at plea explanation stage or during cross examination — Withholding the defence might prejudice the state.

**Criminal Procedure** — Delays in reporting — Not a weapon to draw adverse inference against complainant — Must be considered against the totality of evidence — Prior knowledge of perpetrator important factors — Defence of consensual sex — Coercive circumstances present — Corroboration — Defences rejected.

**Summary:** The accused stands charged with four counts of rape in terms of the provisions of the Combating of Rape Act, Act 8 of 2000, a count of housebreaking with intent to rape and rape read with the provisions of the Combating of Rape Act, two counts of assault with intent to do grievous bodily harm and obstructing the course of justice. He pleaded not guilty to all charges. The basis of his defence was not consistent throughout the trial. In the plea explanation the basis of his defence was that he did not fuck anybody and only slapped the complainant once but had permission to assault her. Accused denied having defeated or obstructed nor did he attempt to defeat or obstruct the course of justice. Withholding the defence might prejudiced the State, by denying the State an opportunity to call witness to the contrary. The accused during the trial unrelenting that if complainant was raped on various occasions she should have reported the matter to her brother who is a police officer. The fact that the complainant delayed reporting the matter should not be used as a weapon to draw adverse inference against her.

*Held;* that the State has proved its case beyond reasonable doubt and the court convicts the accused accordingly.

---

**ORDER**

---

In the result the accused is convicted on all eight counts as follows:

1. Count one: Rape – guilty;
  2. Count two: Rape – guilty;
  3. Count three: House breaking with intent to rape and rape read with the provisions of Act 8 of 2000 – guilty;
  4. Count four: Assault with intent to do grievous bodily harm – guilty;
  5. Count five: Rape – guilty;
  6. Count six: Rape – guilty;
  7. Count seven: Assault with intent to do grievous bodily harm – guilty;
  8. Count eight: Attempt to defeat or obstruct the course of justice – guilty.
- 

## JUDGMENT

---

SALIONGA J:

[1] Accused an adult male is arraigned before this court on the following counts:

**COUNT ONE: CONTRAVENING SECTION 2(1)(a) READ WITH SECTIONS 1, 2(2), 3, 5, 6 AND 7 OF THE COMBATING OF RAPE ACT, ACT NO. 8 OF 2000-RAPE.**

In that upon or about the **5<sup>th</sup> day of July 2010** and at or near Oshitambi village in the district of Eenhana, the accused, referred to as a perpetrator did unlawfully and intentionally commit or continue to commit a sexual act with Vistolina Beata Mathias (the complainant) aged 50 years old by inserting his penis into the vagina of the complainant under the following coercive circumstances:

1. by the application of physical force to the complainant; and/or.
2. threatening by word or conduct to apply physical force against the complainant; and /or
3. threatening by word or conduct to cause harm to the complainant under circumstances where it was not reasonable for the complainant to disregard the threats; and /or

4. under circumstances where the complainant is affected by a permanent physical disability to such an extent that the complainant is deprived of the opportunity to communicate unwillingness to submit or commit a sexual act.

**COUNT TWO: CONTRAVENING SECTION 2(1)(a) READ WITH SECTIONS 1, 2(2), 3, 5, 6 AND 7 OF THE COMBATING OF RAPE ACT, ACT NO. 8 OF 2000-RAPE**

In that upon or about 5<sup>th</sup> day of July 2010 and at or near Oshitambi village in the district of Eehnana, the accused, referred to as a perpetrator did wrongfully and intentionally commit or continue to commit a sexual act with Vistolina Beata Mathias (the complainant) by inserting his penis into the vagina of the complainant, under the following coercive circumstances:

1. by the application of physical force to the complainant; and/or.
2. threatening by word or conduct to apply physical force against the complainant; and /or
3. threatening by word or conduct to cause harm to the complainant under circumstances where it was not reasonable for the complainant to disregard the threats; and /or
4. under circumstances where the complainant is affected by a permanent physical disability to such an extent that the complainant is deprived of the opportunity to communicate unwillingness to submit or commit a sexual act.

**COUNT THREE: HOUSEBREAKING WITH INTENT TO RAPE AND RAPE READ WITH ACT 8 OF 2000**

In that between **6 - 7 July 2010** and at or near Oshitambi village in the district of Eehnana the said accused did unlawfully and intentionally break and enter the house and or /room of Vistolina Beata Mathias with intent to rape and did then unlawfully and intentionally have sexual intercourse with Vistolina Beata Mathias, a female person, without her consent.

**COUNT FOUR: ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM**

In that upon or about or between **6-7 July 2010** and at or near Oshitambi village in the district of Eehnana the said accused did wrongfully, unlawfully and maliciously assault Vistoriana Beata Mathias by stepping her on the face and head and pulled out the ear rings from her ear giving her certain wounds, bruises or injuries with intent to do the said Vistolina Beata Mathias grievous bodily harm.

**COUNT FIVE: CONTRAVENING SECTION 2(1)(a) READ WITH SECTIONS 1, 2(2), 3, 5, 6, AND 7 OF THE COMBATING OF RAPE ACT, ACT NO. 8 OF 2000-RAPE**

In that upon or about **8 July 2010** and at or near Oshitambi village in the district of Eenhana, the accused, referred to as a perpetrator did wrongfully and intentionally commit or continue to commit a sexual act with Vistolina Beata Mathias, (the complainant) by inserting his penis into her vagina under the following coercive circumstances:

- (a) By the application of physical force to the complainant; and/or
- (b) Threatening by word or conduct to apply physical force to the complainant against the complainant: and/or
- (c) Under circumstances where the complainant is affected by permanent physical disability to such an extent that she is deprived of the opportunity to communicate unwillingness to submit to or commit a sexual act.

**COUNT SIX: CONTRAVENING SECTION 2(1)(a) READ WITH SECTIONS 1, 2(2), 3, 5, 6 AND 7 OF THE COMBATING OF RAPE ACT, ACT NO. 8 OF 2000-RAPE**

In that upon about **8 day of July 2010** and at or near Oshitambi village in the district of Eenhana, the accused, referred to as a perpetrator did wrongfully and intentionally commit or continue to commit a sexual act with Vistolina Beata Mathias, (the complainant) by inserting his penis into her anus under the following coercive circumstances:

1. By the application of physical force to the complainant; and /or
2. Threatening by word or /conduct to apply physical force against the complainant; and /or
3. Threatening by word or conduct to cause harm to the complainant under circumstances where it was not reasonable for complainant to disregard the threats; and /or
4. Under circumstances where the complainant is affected by permanent physical disability to such an extent that she is deprived of the opportunity to communicate unwillingness to submit or commit a sexual act.

**COUNT SEVEN: ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM**

In that upon or about the **08** day of **July 2010** and at or near Oshitambi village in the district of Eenhana the said accused did wrongfully, unlawfully and maliciously assault Vistolina Beata Mathias by stepping her all over the body, dragged her in the room and took the mattress put it on top of her and set it alight giving her there and thereby certain wounds, bruises or injuries with intent to do the said Vistolina Beata Mathias grievous bodily harm.

**COUNT EIGHT: DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE**

In that during the periods **9 - 10 July 2010** and at or near Oshitambi village in the district of Eenhana the accused did unlawfully and with intent to defeat or obstruct the course of justice:

1. took Vistolina Beata Mathias to Onekwaya clinic and threaten to kill her if she told the nurses that he is the one who assaulted her; and /or
2. told Vistolina Mathias that she must inform the nurses that she was assaulted by robbers who robbed her of her money during the night; and/or

Whereas the acts were perpetrated by the accused and that this information was to the accused's knowledge false and knew or foresaw the possibility that:

1. His conduct may frustrate and /or interfere with police investigation into the injuries and sexual assault of the complainant; and /or
2. His conduct may conceal the cause of physical injuries perpetrated on the complainant; and/or
3. His conduct may protect or safeguard him from being prosecuted for the crimes in connection with the sexual assault and physical assault on the complainant.'

[2] The charges preferred against the accused relate to an incident that took place during the period of 5 to 10 July 2010 at Oshitambi village in Ohangwena region. It is alleged, that on 5 July 2010, the accused went to the house and/or room of the complainant, a physically disabled woman of Oshitambi village at night and raped her twice. After the first incident, the perpetrator returned to the house of the complainant

between the dates of 6 and 7 July 2010. He demanded entry into the house and/or room and when the entry was denied by the complainant, he broke, entered the house and raped her by inserting his penis into her vagina without her consent. It is further alleged that after the perpetrator raped the complainant, he physically assaulted her and threatened to kill her if she made any noise. The accused pulled out the earrings from the ears of the complainant causing her injuries to the ear.

[3] On 8 July 2010, the perpetrator returned to the house of the complainant and demanded entry into her house and/or room. The accused forcefully gained entry into the house and/or room and raped the complainant or committed two sexual acts with the complainant by inserting his penis into her vagina and her anus. The perpetrator left and returned later and physically assaulted the complainant.

[4] Thereafter, on 9 July 2010 the perpetrator together with Ndeufewa the complainant's niece took the complainant on the wheelchair to Onekwaya Clinic. Whilst en-route to the clinic, the perpetrator threatened to kill the complainant if she tells the nurses that it was the accused who assaulted her. At that point accused had a knife when he told the complainant to tell the nurses that she was assaulted by robbers who robbed her of her money during the night. Due to fear, the complainant informed the nurses what she was told by the accused.

[5] Mr Pienaar appeared for the State, and accused was previously represented but counsel withdrew representation before the start of the trial. The accused is now conducting his own defence. When the charges were put to him, accused pleaded not guilty to all eight counts. In his plea explanation accused denied raping the complainant in respect of all four counts. He however admitted to having slapped the complainant once save to say he got consent to assault her. Notwithstanding the admissions on the assault charge recorded during a section 119 of the Criminal procedure Act 51 of 1977 herein referred to as CPA plea, accused objected same to be recorded in terms of section 220 of the CPA. He also denied assaulting the complainant twice. On defeating and obstructing the course of justice, accused stated that he did not tell the complainant to inform the nurses that she was robbed neither did he threaten her with a knife.

[6] The State called Vistolina Mathias who is the complainant in seven counts, she is 59 years old and physically disabled. She testified that she grew up together with the accused in the same village and they are neighbours. The first incident happened in July 2010 when she went to sleep in her room. Around midnight, she heard accused knocking at her door. He was calling her to open. She ignored him at first but later crawled and opened the door. She was shocked as she did not expect the accused. She was under the impression that he wanted to tell her something. When the accused entered her room, he had a knife in his hand, which he gave to the complainant to put on the table. Complainant stated that she was scared because accused was a dangerous person. Accused undressed himself and asked the complainant to remove her panty which she did. Accused put on a condom and he inserted his penis into her vagina and had sexual intercourse with her. She did not give him permission to have sexual intercourse with her.

[7] After having sex with the complainant against her will, accused was there for a while and again put his penis into her vagina and had sexual intercourse with her for the second time without her consent. She stated that this time she could not do anything because she had already removed her panty and accused had a knife. He threatened her not to tell anybody of what had happened that night. Despite the warning given, complainant informed her niece Ndeufewa about the incidents, the next morning.

[8] It was Mathias's evidence that sometime in July 2010, accused again came into her room. He called her to open but this time she refused. The accused forced the door open, entered the room and came to the bed. The door was closed and hooked. He forced it open. He was still having a knife which he put on the table. He undressed himself and asked her to remove her panty but she refused. The accused pulled her panty out and once more put his penis into her vagina and had sexual intercourse with her. She did not give the accused permission to have sexual intercourse with her. After having sexual intercourse with her, he left the room. In cross examination complainant stated that the door was hooked from inside and accused forcefully kicked it open.



[9] According to Mathias, after a day, still in the same month of July 2010, accused came back at night while she was lying on her bed. He called her but she did not respond. He unhooked the door, entered the room and sat on the bed. He still had a knife with him and put it on the table. He undressed himself and inserted his penis into her vagina and raped her. According to the complainant, this time she was laying with her back facing the accused. Accused in that process stood up wanting to have sex but complainant resisted him. After she refused accused took a knife put it in the hole of her earring she had on and pulled off the earring from her ear. She sustained an open wound as a result of the pulling. Accused thereafter held her from behind and had sexual intercourse with her through her anus. Upon enquiring what he was doing and why, accused responded it was his new style. At that stage complainant told the accused to never come into her room ever again instead he must go to the children.

[10] Mathias further testified that after she told him not to come to her room, accused started beating her on the face threatening to kill her. He held her hands and legs and threw her down. He threatened to kill her if she was to make noise. Accused told her he was going to tell her mother and her children that he was going to kill her and he went outside. He was calling the children but they were quite as it was only Beata the junior who was in the house. After he left the room complainant quickly moved out of the room and went hiding under the grass. Complainant only came out of hiding in the morning at around six o'clock and went back to the room. Accused at that stage saw her and walked fast to her. He got hold of her arm and pulled her outside in the field. He pulled her up to the place where people normally prepare mahangu. The accused stepped and kicked her all over her body. She was crying loud and Tomas from accused's house could hear and came to them. According to the complainant accused had shoes on whilst stepping and kicking her. He only stopped assaulting her when Tomas arrived at the scene and took the accused away. She crawled back home and that night she slept in Alpheus's room. The next day accused came and told complainant's mother that he was in the house wanting to kill her. However after complainant mother pleaded with him, promised he will not do it again.

[11] Mathias further testified that a day before she was taken to the hospital, accused returned and entered her room whilst she was lying in the room. It was in the same month of July 2010. He came in the night, kicked the door and hooked it open. He entered the room and had a knife which he put on the table. Accused undressed himself and had sexual intercourse with her without her consent by inserting his penis into her vagina. After having sexual intercourse against her will, the accused passed out. She tried to escape to no avail because whenever she tried to move he was also moving. Accused only left her room the following morning.

[12] According to the complainant, accused left the house and came back looking for his hat. He demanded that complainant should look for it. She tried to search for a hat without success. He slapped her, lifted her up from the bed and threw her down. He again stepped on her and kicked her all over the body while lying on the ground. He later took his knife, opened it and stabbed the complainant on the forehead. She was heavily bleeding. Whilst she was lying on the ground accused took a curtain and mattress put them on top of her body and set them on fire. When he saw the mattress was not catching fire, he went to fetch the grass and threw it in the room.

[13] Matheus further testified that she extinguished the fire and managed to close the door by hooking it. Thereafter accused gathered the grass in front of the door lit it but luckily it did not get inside the room. She was able to see outside because the door was made of wood and there was a hole. After the fire burned out, accused demanded her to open, threatening to get an axe if she was not opening. When complainant heard about the axe, she opened the door and went out. Accused at that stage took a spade and hit her on her back. She screamed loud that Tuuliki her neighbour came but could do nothing. Betty junior and Ndeufewa also after hearing the scream jumped over the fence. Thereafter she crawled to his parents 'house as instructed by the accused. When his mother noticed the injuries on her, she wanted to take her to the hospital but accused insisted he will take her.

[14] She was taken to Onekwaya clinic on 9 July 2010 by the accused and Ndeufewa. On the way to the clinic accused threatened to kill the complainant if she was to tell the nurses that it was the accused who perpetrated the assault on her. The accused further

told her to tell the nurses that she was assaulted by robbers who robbed her of her money during the night. Due to fear that was installed on her she informed the nurses as she was told. She was given painkillers and referred to Engela hospital where the accused was arrested. It was at Engela hospital where the complainant reported the incidences of rape, assaults and the obstruction of the course of justice. She was examined by a doctor in connection with the rape and assault cases. She later received medical treatment and a J88 was handed up in court and marked exhibit K. She maintained that she did not give permission to the accused to rape and assault her.

[15] Kristofina N. Teofelus was the second State witness to be called. She testified that she knew complainant from Omatundu and accused from Oshitambi village. She however was not at home when the first incident happened but was informed that the accused was at their house. She was at home when complainant was assaulted by the accused the morning before complainant was taken to the hospital. That day herself and Beata jumped the fence and went outside after they heard their aunt screaming. They were afraid of the accused. According to Teofilus, complainant screamed saying 'Simon leave me don't beat me anymore'.

[16] Teofilus further testified that after they jumped the fence they stayed outside until the morning hours when they saw complainant crawling from the room in an underwear skirt. By then accused was also in their house. They could see clearly as it was about sunrise. She could see complainant in the corridor near where the accused was. She also saw accused taking a spade and hitting the complainant on the back. She could hear accused ordering her to go to his parents' house so that he could kill her. She saw complainant crawling and bypassed them in the field. They only moved back the house after the accused and complainant left the house.

[17] It is further her evidence that she came to see accused when he returned later to their house telling them to take a wheelchair and get the complainant from accused's parents' house. When the witness took a wheelchair to the accused's house, she found her aunt not in a good condition. She was bleeding on her face and one eye could not

see properly. It was the witness and accused who took complainant to the hospital. On the way to the hospital, accused demanded to go to Ohangwena instead of Engela hospital. He also threatened complainant to tell the nurses that she was beaten by robbers. At the clinic she remained outside when accused took her inside. She was present when complainant was taken to Engela hospital where accused person was arrested. She only came to see other injuries on the complainant when she took her to the hospital. In cross-examination the witness was unable or hesitant to answer simple question like in which room she was staying at the time of the incident.

[18] Thomas Mutota is the accused's nephew who witnessed the assault on the complainant on 7 July 2010. He testified that he was awakened by his grandmother. When he went outside he could hear the accused talking in the direction of Mukwahepo's house in the mahangu field. He went and found accused and complainant in the field. The complainant was crying and insulting. He could hear the accused asking the witness what she wanted from him. At that moment, accused was kicking the complainant in the chest and was saying 'do you want to bring me problems or do you want me to kill you'. Complainant was telling the accused to leave her alone. Later the witness managed to take the accused in the house.

[19] Beata Nakangulu shared the same residence with the complainant in July 2010. Her testimony was no less than just confirming the complainant's evidence that accused was at her room one particular night in July 2010. She did not know accused but could hear the accused and complainant talking. She testified that accused came to her room knocking and calling, but she did not respond. She only responded the second time accused knocked. She saw the accused through the hole of the door. Accused told her to go call her grandmother. She went to the grandmother who did not respond. Accused left to the grandmother's room and was calling to no avail. It was her evidence that at around six o'clock in the morning Kristofina arrived home. They were scared of the accused who was shouting 'Beata I will kill you' referring to the complainant. When she came closer she saw accused hitting the complainant with a spade on her back saying 'I will kill you'. Complainant crawled with a face full of blood towards the accused's

parents' house. Thereafter complainant was taken to the hospital by the accused and Ndeufewa.

[20] Tuuliki H. Jonas is a neighbour to both accused and complainant. During the month of July 2010 she was awakened up by someone crying in the direction of Magdalena's house where complainant stays. She stated that because the owner of the house had requested her to look after her house while she was away she went to inspect. She found Vistolina, the complainant in the field nearby their house. The complainant was with the accused person and could hear accused saying let us go to my parents' house. She tried to enquire what problem they had but none of them responded. She then left home as she could do nothing.

[21] Elise Hanghome is a nurse staying at Okakwa village. During July 2010 she was employed at Onekwaya clinic. She knew complainant by sight. She testified that on the 9 July 2010 she was on duty at Onekwaya clinic. At around 10-11 o'clock a woman in a wheelchair found them there. It was the complainant who was brought by a girl. She wore a white t-shirt full of blood, and she observed a wound on her forehead, on her ear and underneath her stomach. She described the wound on the forehead as clear and was still bleeding. The patient also complained of chest pain. The one on the ear was a big wound and was down the ear where people wear earrings. She then asked the woman what happened. The woman responded that she was beaten by two guys, robbers who took her out from the house to a place in the field where people normally prepare mahangu. They cleaned the wounds, gave her antibiotics and sent her to the police to make a case.

[22] Martha Shikolalye of Onekwaya west was employed at Onekwaya clinic as an enrolled nurse and midwife. She knows the complainant as a patient who use to collect medicine from the clinic. She testified that at around 12 o'clock in July 2010 a lady carrying a baby on her back came in a room and told her there is a patient outside who was not feeling well. The witness looked outside and saw a woman in a wheelchair and also a tall black guy she didn't know. She told the girl to bring the patient inside because

she looked like somebody who was in pain. She examined the woman in a wheelchair and observed a wound on her forehead and another one underneath her ear. The witness took the patient in to her colleague. When asked the patient, who beat her, she said she was beaten by robbers who took her out of the house to a place where they normally prepare mahangu in the field. They then told her to go to the police, get a document to take it to the doctor. They only gave her first aid and cleaned the wound as they were of the opinion it was a police case.

[23] Paulus Silas is a Detective Sergeant in the Namibian police currently a Unit Commander of CID at Okongo. He had 17 years' experience in the force with 13 years of experience at criminal investigation. In 2010 he was stationed at Ohangwena police station. He knew the accused as the person he arrested on the 10 July 2010. That day he was on duty when he received a report of an assault on a lady in a wheelchair. The report was made by a member of the public at Ohangwena police station. According to the report the patient was at Engela hospital together with a suspect. The witness departed to attend to the report and was with Constable Namando. Upon their arrival at the hospital he found the victim seated outside the hospital with a girl and the accused person. He observed bruises on her face and a fresh wound on her ear. When he asked her what happened she said she was beaten by criminals who wanted to rob her money. By then accused was seated near the complainant. Since it was reported that the suspect was a male person and was with the complainant the witness put the suspect in a police van.

[24] It was only after the suspect was removed, the victim had told him that the person he put in the police van was the one who assaulted her and had sexual intercourse with her in her vagina and anus. The victim also told the witness that accused said she should not tell anyone about the rape and if asked she should tell them she was beaten by a criminal that wanted to rob her of money. He threatened to kill her if she said it was the accused. The witness thereafter asked the complainant if she wanted to open a case to which she confirmed. He arrested the accused on charges of rape, assault with intent to do grievous bodily harm and obstructing the course of justice. The witness

stated that during the arrest his legal rights were explained. These are the rights to a lawyer, to apply for legal aid and to conduct own defence were explained and accused opted to remain silent. He further, searched the suspect and found a pocket knife in his trouser. It was 15 cm long, gold and black in colour. The witness booked it in as an exhibit and was marked Exh 1.

[25] Josephine Sobilile is employed in the Ministry of Safety and Security under the department of Gender Based Violence Protection Unit as a police officer and investigated the matter. She has 15 years' experience in the police of which 9 years' were in sexual assault. She knew accused as a suspect in a case she investigated on 10 July 2010. On that day she was in Eenhana and was called to the police station where a rape case was reported. Together with Sergeant Namholo they drove to Ohangwena police station where they met Detective Sgt Silas the arresting officer. He informed her that cases of assault, rape and obstructing the course of justice were reported to have happened at Oshitambi. Further that the suspect was already arrested and was at the police station but the victim was still at the hospital. She investigated the matter and in doing so she interviewed the complainant and obtain a statement from her. The victim was sitting in a wheelchair as she was physically disabled. The witness observed injuries on the victim on the face and the right ear was cut open at the place where the earring is worn and was a fresh wound. The victim narrated to her that she was raped and physically assaulted. The suspect threatened to kill her if she tells anyone about her ordeal. She visited the scene which was about 50 metres from Ohangwena police station. She found bundles of grass on the bed inside the room of the victim. The room was in a mess as there were clothes and curtains lying on the floor. She also observed a mattress in the room which appeared to her as if it was burnt on the side. She further observed the door which can lock from outside with a padlock and can be hooked from inside.

[26] After the State had closed its case, accused gave evidence under oath and called two witnesses. Accused testified that during the month of July he came home at Shandumbala in Oshitambi village from Windhoek. After two to three days he came

across the complainant his ex-wife since 1984. Complainant and her daughter invited him for a drink. To him, it was a shame because in 1984 when he used to have sexual intercourse with the complainant he was too young. He was not comfortable and that prompted him to move to another bar. Whilst there complainant's niece came to him saying complainant wants him to go to Indongo's bar. He went as invited and it was at that place complainant invited him to her place. She explained where the room was and had agreed not to lock the room. He followed them and was under the influence of liquor. However, he was still not feeling well because in his heart he could not sleep with a disabled woman. When he arrived that night complainant opened and he entered the room. He had sexual intercourse with her once that night and she consented to sex. The witness further testified that after having sex with her he was not feeling well as he could not believe it happened. He decided afterwards not to go to the complainant again instead he became a friend to the girls who push her wheelchair. He proposed one of them, who agreed and they had sex together. That angered the complainant to the extent of accusing him falsely. These piece of evidence was not put to any of the State witnesses in cross examination.

[27] With regard to the assault charges accused admitted to having slapped the complainant once on the face in July 2010. That was the day he was coming from the cuca shop and found complainant in the mahangu field insulting and was mentioning his name saying he likes fucking. He went to her while she was busy insulting and told her to stop insulting otherwise he will beat her. According to the accused she responded by saying 'beat me'. There were other people also coming from the cuca shop who were laughing. The accused was ashamed, got angry and then beat the complainant by slapping her and kicking the wheelchair. He was later taken by Tomas, his nephew and they went home.

[28] Accused further testified that he only returned to the complainant's residence to find out how she was doing the next morning. On arrival at the house complainant started crying saying she got hurt on the forehead from the reeds when she fell from the wheelchair accused kicked the previous night. That was the reason he told her to go to



his parents' house in order to tell them the reason why he hit the complainant. She agreed and went to tell them that she insulted him. Accused confirmed to have taken her to the hospital as he didn't want them to squander the money they got from his mother. He did not insist on taking complainant to Onekwaya but they went there on their own. She was referred to Engela hospital where he was arrested and detained. He denied threatening the complainant in any way nor did he threaten complainant to tell nurses that she was assaulted by robbers.

[29] Hailinge Haufiku was called as a defence witness. His evidence adds no value to the charges accused is facing. He did not witness the assault nor the rape. He only heard about the assault as complainant was taken to the hospital by his wife Ndeufewa. He also knows the accused and complainant from the same village.

[30] Nakale Junius Tuhafeni is the second defence witness. He testified that he did not know why he was called to be at court. He knew nothing about the charges accused is facing but he is from Oshandumbala village. He knew that accused and complainant were boyfriend and girlfriend. He however could remember the day he passed by complainant's house and found a lot of people surrounding the accused. The accused complained that he got sick at complainant's house. The witness rushed to buy fresh milk with accused's money and brought it to him. That concludes the defence case.

[31] Basenero Appolos is a medical doctor for 17 years and holds a bachelor's degree in medicine and surgery from Mercury University in Uganda. He was called as a witness in terms of section 186 of the CPA. He had been in Namibia for 11 years and currently works at the Ministry of Health at the Quality Assurance Unit. He testified that on 10 July 2010 he was working at Engela State hospital and a disabled woman was brought in a wheelchair. She was conscious and gave a history of being assaulted and raped. He examined her and his findings were fresh bruises all over the face and the inside of the right eye was red. He also examined her private parts and there were bruises on the lower part of the vagina. On the anus there was no laceration noted. His diagnosis was that she was assaulted with trauma on the face and on the lower part of the posterior

part of the vagina. He suspected that the bruising could have been because of the rape. He prescribed medication and documented his observations in the health passport which was marked Exhibit J. He confirmed that the injuries on the J88 Exhibit K was the same injuries recorded on the medical passport. He explained that he could not complete the J88 at the time of the examination as he had an emergency to attend to. That resulted in the J88 being completed by Dr Kashaya, the principle medical doctor at Engela who is now deceased. In cross examination the doctor testified that it is not normal to note a person's previous convictions in the medical reports but findings on medical grounds. He explained that the rape kit was not used because the complainant was already taking the ARV tablets.

[32] That concludes the evidence presented by the State and the defence. The court is now called upon to determine whether the State had proven its case beyond reasonable doubt on all eight charges preferred against the accused. It is not in dispute that accused was at the complainant's room in July 2010 and had sexual intercourse with her. The only issues this Court has to decide is whether complainant consented to as alleged by the accused and whether there was subsequent sexual intercourse with the complainant without her consent. It is also not disputed that accused assaulted the complainant during the same month. The issue is whether complainant gave permission to be assaulted and whether she was assaulted more than once and whether the offence of defeating or obstructing the course of justice was proven beyond reasonable doubt.

[33] The basis of our law is that the guilt of the accused must be proven by the state beyond reasonable doubt and the onus to prove that is on the state. The mere fact that the evidence of an accused may be false does not necessarily lead to a conviction if there is a reasonable doubt as to the reliability of the State's evidence as per *S v Lebeus* (CC 9/2013) [2015] NAHCNLD 18 (22 April 2015).

[34] Counsel for the State submitted that complainant's evidence is clear and credible in all material respects. He further submitted that the accused raped the complainant

twice the first night. At a certain stage accused forced the hooked door open and again raped her. The accused made himself guilty of housebreaking with intent to rape and rape read with the Combating of Rape Act. With regard to assaults, counsel for the State submitted that accused pleaded not guilty to the charge of assault with intent to do grievous bodily harm. He however admitted to having slapped and kicked the complainant. In his view the accused's defence is baffling, because he could not testify what the insults were all about nor could he tell the court what wrongs complainant had done, his defence is rejected.

[35] On count five and six of the indictments complainant testified that accused came to her room and that was on the night of 8 July 2010 and he raped the complainant. He had a knife. The accused denied these rape but Bettie Simon saw him at the room of the complainant. Complainant could not run away as she feared the knife. That night the accused laid behind the complainant and raped her by inserting his penis into her anus which must have caused excruciating pain. The accused disliking the complainant's resistance, he cut the earring out of her ear with a knife as she told him to go to the children of which he did but could not wake them up. Accused put the complainant down stepped, kicked and stabbed her with a knife on the forehead. He also put the mattress and curtains on her and set them alight and she screamed.

[36] With regard to count eight counsel submitted that credible witnesses refuted accused's version. Complainant testified that accused threatened her on the way to the clinic not to tell the nurses that accused assaulted her and her evidence was supported by Ndeufewa. Their evidence was not disputed in cross examination. Accused was present when the police asked complainant what had happened to her at Engela hospital. He could have told them that she got injured from the reeds after she fell from a wheelchair. The complainant told the lie of the robbery to the nurses and the police to protect herself against the violence of the accused. That explain the reason why she only revealed the truth about the rapes and assault after the accused was removed from her vicinity.

[37] It was Counsel's further submission that the accused was a feared person at that village. Betty and Ndeufewa jumped the fence and ran away because of fear after complainant screamed. Ms Tuuliki came by but did nothing when she found complainant was crying as she feared the accused. Thomas could not do anything when he saw the accused assaulting the complaint save to take the accused home to prevent further assault. Ndeufewa cried when she heard the accused threatening to hit her child against the tree. According to counsel, complainant was afraid of the accused. The accused barely denied the evidence of the witnesses on these facts but he did not show any motive why they were lying apart from alleging jealousy because he proposed to complainant's niece Ndeufewa which she refuted. The question remains could all the state witnesses really be untruthful and the answer is simply 'no'.

[38] Accused in his submission, submitted that if complainant was really raped, she could have reported the matter to her brother who is a police officer. Section 7 of the Combating of Rape Act states that 'in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature, the court shall not draw any inference only from the length of the delay between the commission of the sexual offence or indecent act and the laying of a complaint<sup>1</sup>'. Complainant in this matter is a physically disabled person and a vulnerable witness. She explained to the court that she did not report the rape because accused threatened her and she was scared of him. The fact that the complainant delayed reporting the matter cannot be used as a weapon to draw adverse inferences against the complainant.

[39] There was undisputed evidence that on the day of the break in, the accused returned to her room demanding entry. After the entry was refused he kicked the hooked door open and raped the complainant in her anus. In *Small v Smith*<sup>2</sup> it was said that 'It is in my opinion elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross examination and afterwards argue that he must be disbelieved'. Accused denied that he forced open the door and

---

<sup>1</sup> See *S v Mitshibe* (CC15/2008) [2012] NAHC 323 (29 November 2012) p 30 para 85

<sup>2</sup> 1954(3) SA 434 (SWA) at 438 F

raped the complainant however he failed to dispute the state witnesses' evidence. All what the accused said was all witnesses were lying without clearly indicating the motive why the witnesses must lie. Therefore in this instant case where the accused kicked the door that resulted in it being unhooked in order to gain access to the house also qualifies as a breaking in with intent to rape the complainant and rape.

[40] The court is mindful of the contradictions and the discrepancies in the evidence of the state witnesses as alleged by the accused in his submission. However the fact that there were contradictions and discrepancies in her evidence, does not mean a court must reject the evidence about the rape as untruthful especially where the evidence was corroborated in material respects. In *S v Hanekom*<sup>3</sup>, the Supreme Court, stated the following: 'Before evaluation of the evidence of the various witnesses mention must also be made of the fact that not every contradiction or discrepancy in the evidence of a witness reflects negatively on such witness. Whether such discrepancy or contradiction is serious depends mostly on the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence'. Assessing the evidence in its totality it is my respective view that, some imperfections in state witnesses evidence, were not material resulting the rejection of the State case.

[41] The credibility of complainant's ability to accurately identify the accused as the person who had sexually assaulted her is borne out by the fact that they grew up together in the same village. The identity of the accused is not an issue in dispute. Accused placed himself at the scene of crime in confirming the state witnesses' evidence. If accused's version of consensual sex was to be believed, why was it necessary for him to carry a knife in his hand each time he went to the complainant's room at that time of the night? There is medical evidence of injuries sustained during the rapes and on account of the assaults. Doctor Appolo orated that the injuries sustained were not indication of consensual sexual intercourse. I find that the evidence of other witnesses has furnished material from which an inference corroborating the evidence of the complainant can be drawn.

---

<sup>3</sup> *S v Hanekom* (SA 4/00) [2001] NASC 2 (11 May 2001) at 16

[42] Accused was not consistent with his defence throughout the trial. When asked to reveal the basis of his defence, accused indicated that he did not rape or fuck anyone. However, in his evidence in chief accused testified that he had consensual sex with the complainant once that night. Whilst in his submission accused submitted that complainant was his girlfriend or his ex-wife since 1984 and they use to make love. This is despite the overwhelming evidence that on several occasions he threatened to kill the victim and was constantly in possession of a knife. It is trite practice that when a party wishes to rely on specific circumstances or omission it should be put to that witness to enable him or her to deal with the alleged fact or omission. I cannot see on what basis an accused can claim that he would be prejudiced in the presentation of his defence if he was to disclose it in his plea explanation or during the cross examination of the State's witnesses. This is because if he withholds it until he testifies there might be prejudice to the State since the State will not have an opportunity of leading evidence to the contrary. This was not done and his defences has to be rejected as an afterthought.

[43] With regard to the defeating and obstructing the course of justice, a person could be found guilty only if it was proved that the justice had in fact been defeated. In the instant case despite accused's deliberate attempt to influence or threaten the witnesses' into giving false information, justice has nevertheless prevailed and accused was arrested. It is my respective view that accused cannot be found guilty of defeating or obstructing the course of justice but with an attempt to defeat or obstruct the course of justice.

[44] The complainant is a single witness in as far as the rapes are concerned. However after evaluating the whole body of evidence before court more particular that of the complainant and medical reports and bearing in mind the following reasons in *S v Katamba*<sup>4</sup> where the court held that 'the cautionary rule in sexual offences as it had been traditionally applied should be abolished'. The court however added the proviso that the evidence of any witness especially a single witness should be regarded with caution. However, this caution was not related to the fact that the witness is a woman. I have

---

<sup>4</sup> 1999 NR 348 (SC) 348D

come to the conclusion that the accused's defence of consensual sex and that the complainant gave him permission to assault her has been credibly displayed by the evidence of the State and the defences are rejected as false beyond reasonable doubt. The rapes and assaults were committed under coercive circumstances because the application of physical force and threats of violence existed.

[45] In the result the accused is convicted on all eight counts as follows:

1. Count one: Rape – guilty;
2. Count two: Rape – guilty;
3. Count three: House breaking with intent to rape and rape read with the provisions of Act 8 of 2000 – guilty;
4. Count four: Assault with intent to do grievous bodily harm – guilty;
5. Count five: Rape – guilty;
6. Count six: Rape – guilty;
7. Count seven: Assault with intent to do grievous bodily harm – guilty;
8. Count eight: Attempt to defeat or obstruct the course of justice – guilty.

---

J T SALIONGA  
JUDGE

## APPEARANCES

For the State:                   Mr J Pienaar  
Office of the Prosecutor General, Oshakati

For the Accused:               Mr S Nambuli, in person  
Oshikango Police Holding Cells, Oshikango