

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REASONS

Case no: HC-NLD-CRI-APP-SNA-2020/00013

In the matter between:

THE STATE

APPELLANT

v

HANGO SINDANO

RESPONDENT

Neutral citation: *S v Sindano* (HC-NLD-CRI-APP-SNA-2020/00013) [2021]
NAHCNLD 16 (26 February 2021)

Coram: JANUARY J and SMALL AJ

Heard: 8 October 2020

Delivered: 18 February 2021

Released: 26 February 2021

Flynote:

Criminal Procedure - State Appeal- Acquittal- Respondent acquitted by the Regional Court on a charge of contravening section 2(1)(a) of the Combatting of Rape Act 8 of 2000, read with Section 21 of the Domestic Violence Act, Act 4 of 2003.

Criminal Procedure - State Appeal- Interference -In the absence of an apparent and material misdirection by the trial court, its findings are presumed correct. The appeal court can only disregard them if the recorded evidence shows them as wrong. This approach does not relieve an appeal court from its obligation to carefully consider the evidence because it has other advantages that the trial court does not have. A Court of Appeal is in a better position to evaluate the secondary facts from the evidence as the case is laid out thoroughly before them.

Criminal Procedure - State Appeal- Misdirection-Applying revoked cautionary Rule- The Court a quo misdirected itself by applying the revoked cautionary rule regarding the evidence of complainants in cases of a sexual nature when evaluating the evidence of the complainant.

Criminal Procedure - State Appeal- Appeal Court entitled to interfere due to the serious misdirection, and at large to disregard the Court a quo's findings of fact, even those based on credibility, to come to its conclusion based on all the evidence.

Criminal Procedure - State Appeal -In considering the evidence afresh on appeal the State carries the onus of proving that the State proved the accused's guilt beyond a reasonable doubt. There is no onus on an accused to prove his innocence. An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.

Criminal Procedure - State Appeal-Consent and the Combating of Rape Act 8 of 2000.-Consent is no longer a defence for the crimes committed under the Combating of Rape Act 8 of 2000. The crime is committed by the commission of a sexual act with another person under coercive circumstances.

Criminal Procedure - State Appeal- Section 227A of the Criminal Procedure Act, 1977- If the defence brought no application to lead the evidence of the previous sexual conduct or experience of the complainant in terms of section 227A of the Criminal Procedure Act, 1977 they did not show that such evidence had significant

probative value and substantially outweighed the potential prejudice to the complainant's dignity and right to privacy. No decision that such evidence was relevant and admissible before it was led.

Criminal Procedure - State Appeal- Section 227A of the Criminal Procedure Act, 1977-In the absence of such an application and finding, such evidence is irrelevant and inadmissible in terms of section 227A of the Criminal Procedure Act, 1977. An Appeal Court cannot substitute an order that was not applied for in the Court a quo. The provisions of the section provides that no such evidence shall be lead or a question asked to elicit this. Any such evidence elicited and led in this regard should thus be ignored. This would include any cross-examining done in this regard and any evidence led to provide evidence of the previous sexual conduct or experience of the complainant.

Criminal- Procedure State Appeal-Section 151 of the Criminal Procedure Act, 51 of 1977-Evidence by an Accused- If the accused wishes to give evidence in his own defence must give evidence first. The purpose of section 151(2)(b)(i) is to lessen the possibility of an accused tailoring his evidence to accord with the evidence of the other defence witnesses as he is in Court while such witnesses give evidence and not only hears their evidence but also any answers they might give in cross-examination. If this is not followed or an application is not brought for defence witnesses to give evidence before an accused, the court may draw such inference from this conduct as may be reasonable in the circumstances.

Criminal Procedure - State Appeal-Cross-examination-The practice of directing a torrent of words at the witness containing assertions of fact, expressions of opinions, vituperative remarks, adverse comment on the witness and his evidence and a series of questions on different aspects of the case before pausing for an answer is impermissible. It is not cross-examination. A prosecutor or a legal practitioner must reserve adverse comment on the evidence of the accused, his demeanour, unreliability, lack of credibility or dishonesty for his address to court, and not to use it as a weapon for attacking the witness during cross-examination.

Criminal- Procedure State Appeal-Evidence-Discrediting a Witness- A court should be slow to discredit a witness on the strength of discrepancies between a police statement and what the witness has testified in court. Only if the differences are inadequately explained and are material to the charge's essential allegations, would it impact the witness's credibility.

Criminal- Procedure State Appeal-Single Witness- A Court approaches such evidence with caution- the exercise of caution should not be allowed to displace common sense. The evidence of the single witness need not be satisfactory in every respect. A Court may still accept and rely on such evidence, although it was not perfect in all aspects, if it concludes that the evidence is materially true.

Criminal Procedure - State Appeal-Single Witness-Corroboration- A witness being the sole witness to an incident is no longer a single witness when the evidence of other witnesses furnish material corroborating such witness's evidence.

Criminal Procedure - State Appeal-Mutually Destructive Versions- A court that considers two mutually destructive versions must have a good reason for accepting one version over an opposing version. The court must follow the approach to evaluate the state case and determine whether the defence case does not establish a reasonable hypothesis. The court must not be blinded by where the various components originate. Instead, it should attempt to arrange the facts, properly evaluated, in a mosaic to determine whether the alleged proof indeed goes beyond a reasonable doubt or whether it falls short and thus falls within the area of a reasonable alternative hypothesis and therefore within the description of reasonable doubt.

Criminal Procedure - State Appeal- Evidence-Admissibility of Text Messages- The question of admissibility is whether the evidence is relevant to a fact in issue in the case. All relevant evidence is potentially admissible, subject to common law and statutory rules on exclusion. Relevant evidence is evidence of facts in the issue and evidence of sufficient relevance to prove or disprove a fact in dispute. What is a fact in issue will depend upon what the elements of the offence charged are. This is determined by what the prosecution has to prove and what defence was raised by

the accused. Section 210 of the Criminal Procedure Act, 1977 frames this principle in a someone different manner

Summary: Appeal by the State against an acquittal. The Respondent was acquitted the Regional Court on a charge of contravening section 2(1)(a) of the Combatting of Rape Act 8 of 2000, read with Section 21 of the Domestic Violence Act, Act 4 of 2003.

This is an appeal by the State against the acquittal of the Respondent on 13 February 2019 by the Regional Court Oshakati on a charge of contravening section 2(1)(a) of the Combatting of Rape Act 8 of 2000, read with Section 21 of the Domestic Violence Act, Act 4 of 2003.

On appeal the Court found that the Regional Court Magistrate misdirected himself by applying the revoked cautionary rule regarding the evidence of complainants in cases of a sexual nature when it evaluated the evidence of the complainant.

On appeal the Court also found that although the Court a quo recognized that the facts of this matter contained 'mutually destructive versions' he did not follow the settled and well-known approach of applying one's mind to the merits and the demerits of the state and the defence witnesses and the case's probabilities.

This Court, as a result of the two serious misdirections, decided it was entitled to interfere, and at large to disregard the Court a quo's findings of fact, even those based on credibility, to come to its conclusion based on all the evidence.

The Court after considering and evaluating the evidence lead in the lower court decided to allow the appeal and convicted the Respondent a charge of contravening section 2(1)(a) of the Combatting of Rape Act 8 of 2000, read with Section 21 of the Domestic Violence Act, Act 4 of 2003.

The appeal against acquittal is accordingly upheld.

ORDER

1. The appeal is allowed and the acquittal by the Regional Court Oshakati is set aside.
2. The acquittal of Respondent by Mr. Hangalo on 13 February 2019 in OSH-CRM-2341/2015 is substituted with the following: The Accused is convicted of contravening section 2(1)(a) read with sections 1, 2(2), 2(3), 3, 5 and 6 of the Combating of Rape Act, Act 8 of 2000, read with section 21 of the Domestic Violence Act, 4 of 2003.
3. The matter is referred back to the court a quo for continuation and finalisation before Mr. Hangalo
4. The Respondent is instructed to report himself to Chief Inspector Shimii of the Gender Based Violence Unit at 08:00 on 19 February 2021 to be taken for an appearance before the Regional Court Oshakati.

JUDGMENT

SMALL AJ:

Introduction

[1] This is an appeal by the State against the acquittal of the respondent on 13 February 2019 by the Regional Court Oshakati on a charge of contravening section 2(1)(a) of the Combatting of Rape Act 8 of 2000, read with section 21 of the Domestic Violence Act, Act 4 of 2003.

[2] The appellant was granted leave to appeal by Salionga J on 13 February 2020 as is required by section 310(1) of the Criminal Procedure Act 51 of 1977. The respondent did not petition the Supreme Court to set aside the aforesaid leave to appeal.¹

[3] The appeal was subsequently set down for hearing on 8 October 2020. The appellant is represented by Mr. Matota and the respondent by Ms. Kishi. Ms. Kishi also represented the respondent before the court a quo.

¹ Section 310(5) of the Criminal Procedure Act 51 of 1977

Approach on Appeal

[4] The general principles of the appeal court's approach are well known. The departure point thereof is that an appellant is entitled to a re-hearing as of right. This right is a matter of law and must not be made illusory. The right, however, has limitations. In the absence of an apparent and material misdirection by the trial court, its findings are presumed correct. The appeal court can only disregard those findings if the recorded evidence shows them as wrong. However, this approach does not relieve an appeal court from its obligation to carefully consider the evidence because it has other advantages that the trial court does not have. A court of appeal is in a better position to evaluate the secondary facts from the evidence as the case is laid out thoroughly before them.²

[5] If a trial court commits a serious misdirection, this Court is at large to disregard the findings of fact, even those based on credibility, and must then come to its own conclusion based on all the evidence.³

Grounds of Appeal and Misdirections by the Court a quo

[6] The appellant averred that the learned magistrate misdirected himself and erred in law and fact when he acquitted the respondent. The appellant submitted that the court a quo misdirected itself by applying the revoked cautionary rule regarding the evidence of complainants in cases of a sexual nature when it evaluated the evidence of the complainant.

[7] From the reasons provided by the learned presiding Magistrate it is abundantly clear that he applied the abolished cautionary rule⁴ and relied on

² *R v Dhlumayo and Another* 1948 (2) SA 677 (A)

³ *S v Shikongo and Others* 1999 NR 375 (SC) (2000 (1) SACR 190) at 387F – G (SACR at 201d – e)

⁴ 'The evidence of complainants in sexual offences is not governed by statute. For many years it has shown, however that such evidence must be approached with circumspection. The reasons for the evident from the follow case law.' See page 61-62 of the record where the court a quo apparently

principles and case law ⁵ that are no longer applicable. ⁶ After he referred to the outdated case law he stated: 'Having considered the evidence in totality in the instant matter, I agree with the above analysis. Therefore, the evidence had to be approached with circumspection. As a result, I have doubt in my mind that rape was committed against the complainant. Thus, I obligated to give the accused person the benefit of the doubt.'

[8] Ms. Kishi submitted that this does not mean that the Court a quo applied the aforesaid cautionary rule in acquitting the Respondent. She further submitted that the Court a quo carefully considered all the evidence and acquitted the Respondent without committing a misdirection.

[9] I disagree. Firstly, the Court a quo never thoroughly evaluated the evidence. Secondly, the court *a quo* could not have agreed with its own analysis. To agree means approving the opinion or view of someone else and subsequently have a similar opinion and view. Thirdly, such an interpretation of the judgment ignores the fact that the Court a quo deemed it necessary to refer to the outdated case law and principles. Counsel's submission does explain that immediately after agreeing with the analysis, the Court indicated that he would approach the evidence with circumspection.

[10] The Court a quo clearly misdirected itself in applying the obsolete and redundant cautionary rule in this matter. The Combating of Rape Act 8 of 2000, under which the Appellant charged the Respondent came into operation on 15 June

quotes from Professor Dawie De Villiers, Law Faculty, in his lecture 18, Comp in August 2017 for Law of Evidence and Litigation Techniques under Corroboration and Cautionary Rules page 339.

⁵ It is easy to fabricate such evidence and difficult to rebut. *Rex v M* 1947 (4) SA 489 (N); *R v J* 1966 (1) SA 88 (SR); *S v Snyman* 1968 (2) SA 582 (A); *S v M* 1980 (1) SA 586 (B) and *S v S* 1990 (1) SACR 5 (A); The cause of the allegation may be revenge *R v J* 1966 (1) SA 88 (SR) at 92B; The financial status of the persons may be the cause for the allegation *R v W* 1949 (3) SA 772 (A); Such allegations may be the result of emotional over-reaction *R v Rautenbach* 1949 (1) SA 135 (A); Circumstances may force the complainant to allege rape, as admitting voluntary sexual relations may cause her harm *R v J* 1966 (1) SA 88 (SR); Spite sexual frustration and other unpredictable emotional causes quoting Hoffman and Zeffert 579 as authority; The cautionary rule does not discriminate against women but is merely an admonition for the cautious application of common sense *S v M* 1992 (1) SACR 125 (N)

⁶ See paragraph 10

2000. Section 5 of that same Act provides: 'No court shall treat the evidence of any complainant in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature with special caution because the accused is charged with any such offence.' The Combating of Rape Act, and thus also this section, has been part of Namibian law for almost 19 years on the date of the Respondent's acquittal.

[11] The Namibian Supreme Court had furthermore in 1999⁷, before the Act came into operation, ruled that this cautionary rule is no longer part of Namibian law. The High Court has, as far back as 1991⁸, albeit in obiter dicta, said that the cautionary rule in sexual offences, discriminates against women complainants and has no rational basis for existence.

[12] The Court a quo was thus compelled to evaluate the evidence by the complainant like that of any other state witness in any criminal trial without employing this specific cautionary rule.

[13] Although the Court a quo recognized that the facts of this matter contained 'mutually destructive versions' and referred to *S v Johannes*,⁹ the learned magistrate did not follow the settled and well-known approach of applying one's mind to the merits and the demerits of the state and the defence witnesses and the case's probabilities¹⁰

[14] That a court has correctly applied its mind in this regard it must be apparent in its judgment, indicating amongst other things why the court disbelieved some witnesses and accepted the evidence of others. It is abundantly clear from a reading of the judgment that the Court a quo did not apply the principles described above when evaluating the evidence placed before it. This was thus a further misdirection by the Court a quo.

⁷ *S v Katamba* 1999 NR 348 (SC) at 357H-J; *S v Katamba* 2000 (1) SACR 162 (NmS) at 173C-D

⁸ *S v D and Another* 1992 (1) SACR 143 (Nm);

⁹ *S v Johannes* 2009 (2) NR 579 (HC) paragraph 11

¹⁰ *S v Engelbrecht* 2001 NR 224 (HC) at 226E-H; Applied in *S v Kandowa* 2013 (3) NR 729 (HC) at paragraph [27]

[15] At this stage, one does not have to consider the further possible misdirections, as this Court is, as a result of those described above two serious misdirections, ¹¹ entitled to interfere, and at large to disregard the Court a quo's findings of fact, even those based on credibility, to come to its conclusion based on all the evidence. This however does not exclude further possible misdirections that might have been committed.

The facts (plea)

[16] The charge preferred against the Respondent in the Regional Court alleged that 'on or about the 10th day of October 2014 , at or near Otuwala village in the in the regional Division of Namibia, hereinafter called the perpetrator, did wrongfully and unlawfully commit or continue to commit a sexual act with Kapofi Klaudia Hosia, hereinafter called the complainant, with whom the accused was in a domestic relationship as defined by section 1 of Act 4 of 2003 as his cousin by inserting his penis into the vagina of the complainant by or while applying physical force to the complainant'.

[17] On 8 March 2017 the Appellant pleaded not guilty. His legal representative indicated that the plea was in accordance with her instructions. The following was recorded: 'The accused admit that there was a sexual act between him and complainant however this was by consent. The Defence dispute that there were any coercive circumstances and that the sexual act took place under coercion. And the State is put to the proof of each and every allegation thereto...'.¹²

[18] The defence framed this plea explanation rather loosely. It does not explicitly address the elements and facts alleged in the charge. The Court a quo also did not clear up the plea-explanation in terms of section 115 (2)(a) ¹² of the Criminal

¹¹ *S v Shikongo and Others* 1999 NR 375 (SC) (2000 (1) SACR 190) at 387F – G (SACR at 201d – e).

¹² (2)(a) Where the accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute.

(b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection and shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and

Procedure Act 51 of 1977. The State was entitled to accept, before commencing with the State's case, that Appellant by the plea described above, admitted that on or about the 10th day of October 2014, at or near Otuwala Village in the in the Regional Division of Namibia, he did commit or continue to commit a sexual act with Kapofi Klaudia Hosia. Notwithstanding the words 'And the State is put to the proof of each and every allegation thereto...' the only dispute before the Court a quo, therefore, appears to have been whether the sexual act was committed under coercive circumstances or not. Further whether there was a domestic relationship between the accused and the complainant. If the conclusion described above is not correct, the respondent's counsel should accept responsibility for not accurately outlining the extent of the dispute between her client and the State. I will return to this later in the judgment when dealing with the specific provisions of the Combating of Rape Act 8 of 2000.

The evidence (facts)

[19] The first witness called by the State was the complainant Claudia Hosea Kapofi. She told the Court that she was at their home in Ondodwala Village on Friday 10 October 2014. It was the house of her elder cousin George Hipondokwa. She was cleaning in the sitting room. It was around 10:00. After she cleaned the kitchen, she went to the bathroom to relieve herself. She did not close the door of the bathroom. While there, she saw the accused, another cousin of her, at the door of the bathroom. Afterwards she went to the sitting room picking up glasses and cans.

[20] The accused found her there. The accused said they had a birthday party. On her question whose birthday party it was he said that it was his mother's birthday party. The accused told her [the complainant], 'Hosiana just wait you will eat well this year because of me'. He also told her that he will get married that year. The accused said he was hungry, and she heated up meat from the fridge and gave it to him. The accused took drinks and fruit from the fridge.

[21] He gave his phone to her and asked her to take photographs of him with the food, drinks, and fruit as he wanted to send these to George through Whatsapp showing the latter he is eating George's food. She returned the phone saying that he should take the phone as she must continue cleaning up.

shall be deemed to be an admission under section 220.

[22] The accused closed the door going outside and locked it. He had the keys with him and put it in his trousers' pocket. She asked him why he closed the door. He was walking to her and it looked to her as if he intended catching her. She was at the time standing on the other side of the table in the sitting room. The accused did not reply. She tried to run away but did not manage it as the accused caught her. He held her arms with one hand behind her back. She was in fear and the arms he held were hurting.

[23] The accused pushed her on a single couch while holding her arms. He pressed her chest with his one knee and prevented her kicking him with his other leg. The accused started pulling off her trousers and her underwear. She was screaming for help and told the accused to leave her, but he did not. The accused manage to pull off her trousers and underwear. She was naked except for wearing her shirt. The accused attempted to force open her legs with his other knee as she was pressing her legs together. She was fighting the accused and fell off the couch to the floor. The accused followed her.

[24] When asked what she meant by fighting she explained that she tried to get the accused off her so that she could run away and hide. She could do nothing more than move her body around. She was lying on her stomach on the floor and the accused sat on her back. The accused tried to turn her around, but she pushed him away and pinched him. She was also screaming for help.

[25] She managed to get loose and ran to George's room to lock herself inside. There was however no key. When she tried to get out the accused again caught and held her. He pushed her into George's room and pushed her unto the bed. She was still fighting the accused, but he overpowered her, forced open her legs and inserted his penis into her vagina and had sexual intercourse with her.

[26] After a while the accused finished, stood up and left the room. She also stood up and as she was leaving the room, she observed the accused removing a condom from his penis. The condom had sperm in it. She went out to her room and the accused did not follow her. She was naked and only had her t-shirt on. She locked

herself in the room. She was upset as the intercourse happened without her consent and she and the accused were family. The accused came and knocked at the window saying she should open for him. He kept knocking but she did not open the door as she was afraid of the accused.

[27] She phoned George her elder cousin in whose house she was staying and reported to him that the accused raped her. George just said: 'What will we do now?' They then just exchanged short messages as George could not hear her properly as she was crying at the time. George said he will phone the accused person and talk to him.

[28] She then phoned Ms. Magano and told her she was raped by the accused. Ms. Magano sent a message saying she was in a meeting but she advised the complainant to go to the hospital to see a doctor.

[29] The witness then informed her boyfriend that she was raped by her cousin.

[30] Afterwards she went to the hospital in a taxi and on her own. At the hospital she was told to first obtain documentation from the police. She went to the police station with a taxi and received a paper from them to receive assistance at the hospital. She was seen by a doctor and told him what transpired. He examined her and she told him her nail tips were off as she scratched the accused. She was treated and received some medication. She identified the J88 completed by the doctor. It was handed in as Exhibit A after she indicated that the J88 inter alia contained her name and the injury to her fingernails.

[31] The J88 and the affidavit by Dr. Moses Mugondyi in terms of section 212(4) of the Criminal Procedure Act, 1977 confirming its contents, provides prima facie evidence that the Doctor saw and examined the complainant at 16:08 on 10 October 2014 and observed an injury to her fingernail.

[32] Thereafter she returned to the police station and made a statement. Lavinia Shilongo was appointed as the investigating officer of her case. She phoned Martha

Shikongo a colleague of hers to assist her as no one came from home did. She was dropped off at home around 23:00 as she had nowhere else to go.

[33] While she was at the hospital George messaged her to ask where she was. She told him she was at the hospital. He then said she should not go to the police with the paper she should just go home. She realized George was not on her side and when he attempted to contact her after she went to the police, she did not pick up or reply.

[34] She slept at home. George only came back the next day which was the Saturday. George came to her crying telling her he understood what happened to her and that he spoke to the accused. George said he will call the accused and that they should talk about this matter and that she should forgive the accused as he is family. They should talk about it before other people found out. She felt no-one considered it as a serious matter and did not see her as a real victim. They were just protecting the accused and expected her to forgive him.

[35] The accused communicated with her by sending her text messages on her phone. Accused asked her to forgive him and that he regrets what he has done. He indicated that he felt bad as he is part of the family and that she should forgive him for his actions. These messages came from Friday 11 October 2014 up to Monday 13 October 2014 and later on Thursday 17 October 2014.

[36] On 11 October 2014 at 18:20 he stated: 'I know you are feeling bad but I am also regretting all my actions. Please, please if you can forgive me about this, I am sorry and I mean please. It would be bad news to me as you know I am planning to get married next year and if this case goes on it will affect the whole process. Please reply I am sorry' On 11 October 2014 at 19:20 he stated: 'I regret what happened and it was done in a moment of drunkard state. So I can make it right, please please.'

[37] On 12 October 2014 at 12:15 he stated: 'My phone was on charger, are you home I want to come to you please.'

[38] On 13 October 2014 at 11:51 stated: 'Hosiana you know we are family. I really regret my actions to you. I am very sorry please forgive me. Think about the future I am entitled to help you still after the issue. I am sorry I will not hate you after this please help me, I'm sorry. I was looking for you yesterday but I did not find you home, please I'm sorry.'

[39] On Sunday 13 October 2020 the accused sent his parents to her. It was morning time. The accused's mother is her aunt who raised her after the death of her own mother. The accused's mother said she was sent by the accused to come and apologize on his behalf. George Hipondokwa is the one who brought them.

[40] They said they came because they felt bad for what the accused person had done to her. They did not expect this happening as complainant and accused were siblings. They said they spoke to the investigating officer for her to withdraw the case. But the investigating officer said the case can only be withdrawn if she [the complainant] agrees.

[41] On the insistence of the parents she called the investigating officer, but the phone was not picked up. She sent the following text message: 'I am Claudia Kapofi Hosiana and I have opened a case against the accused person that of rape. I want the case to be withdrawn I spoke to the elders.' The parents wanted to see the text message after it was sent. After it was sent the accused's parents and George left her room.

[42] She was feeling bad and shortly after that left the home/house by jumping over the fence. She contacted Selma Amukutuwa who had a house in Ongwediva and told her about the matter and the pressure. Selma told her to come to her home.

[43] She phoned the investigating officer Lavinia Shilongo on Sunday. The investigating officer picked up and said she did not pick up before because she was in church. Complainant asked her if she received the withdrawal text message and she confirmed that she did. She then informed the officer that she was forced and that she wanted to continue with the case. The investigation officer said she should come to the office on Monday.

[44] On Monday 13 October 20i4 she went back to the investigation officer as instructed. The investigation officer mentioned to her that she should consider withdrawing the case and get paid N\$10 000. She was further told by the officer that the accused is a businessman who can afford a lawyer and that she (complainant) will loose the case. And that she will be left looking at the accused because she let go of the other money while not even having employment. The complainant however did not withdraw the matter.

[45] On 17 October 2014 she went to Commissioner Kashihakumwa.¹³ She complained because accused was not arrested and because the investigating officer is attempting to have her withdraw the case and accept money from the accused.¹⁴ On this date the new investigator was appointed.

[46] The new investigating officer suggested that the complainant attempts to set up a meeting with the accused to facilitate his arrest. All text messages had to be shared with the new investigating officer.

[47] On 17 October 2014 at 18:20 the complainant again sent a text message to the accused. This resulted in several text message's being exchanged between them. This is quoted in her evidence and is on record. I do not think it is necessary to quote them verbatim, but I will return to these in my evaluation of the evidence.

[48] The second state witness was Lahja Magano Nomulongelo Hipondokwa. This witness confirmed that she spoke to the complainant and that she advised the complainant to go to the hospital immediately after she was told that the Respondent raped the complainant. The complainant phoned her was around 11:00-12:00, before lunch on 10 October 2014.¹⁵ This witness stated she attempted to call her brother George and the accused, but none picked up their phones.¹⁶ The complaint gave her a summarized version of what happened that corresponds with the complainant's statement and evidence. The complainant also said she was wearing

¹³ Typed record p 409

¹⁴ Typed Record p 410

¹⁵ Record p 472-474

¹⁶ Record p 476

long jeans trouser.¹⁷ The complainant was hysterical, upset and angry at the time.¹⁸ She also asked the complainant if she could inform the Respondent's mother, and the complainant gave her permission.¹⁹ She informed the Respondent's mother and told her that complainant alleges the accused raped her.²⁰ The complainant also told her at a later stage that the family wants her to withdraw the case.²¹ When she spoke to the accused on 11 October 2014 about the complainant's allegation, the accused said it was a misunderstanding.²²

[49] The third State witness was George Shihemba Hipondoka. The complainant called him on 10 October 2014 at 12:57; the time registered on his phone. The complainant told him the Respondent raped her. When he asked what transpired, she started crying. The witness then stated that he did not say to the complainant what to do. He neither told her to go to the police nor the hospital. He phoned and spoke to the accused about the incident on the same date. Accused said what happened between him and the complainant was consensual intercourse.

[50] The fourth State witness was Selma Amukutwa. She stated that the complainant on 11 October 2014 sent her a text message saying: 'I was raped yesterday'. On a question by the witness complainant replied that it was Sindano. She was shocked because she knew both the accused and the complainant and knew they were related. On Sunday afternoon, 12 October 2014, she received a text message from the complainant that she was on her way to the witness's house in Ongwediva. When she found the complainant at her home, she was crying. It seemed as if she was in shock and hurt and in a depressed state. The complainant told the witness what happened. She said she came to the witness because the Respondent's parents and George cornered her on Sunday to withdraw the case because they were family. The complainant showed her the text message she sent to the investigating officer indicating that she wishes to withdraw the matter. She

¹⁷ Record p 477-478

¹⁸ Record p 476, 485-486

¹⁹ Record p 478-479

²⁰ Record p 480

²¹ Record p 487

²² Record p 480

prevented family members from coming to her house and said if they want to see the complainant, it should happen in the police's presence. The accused phoned her to ask if the complainant was with her as they wanted to settle the complainant's payment.

[51] The fifth witness was Ennette Juanita Rue an employee of MTC. She gave evidence that two cell phone numbers to wit 081 271 2531 and 081 618 6853 belong to Sindano Hango. Exhibits C1 and C2 were handed up indicating that the two numbers belong to the accused.

[52] The sixth State witness was Niklaas Shapuba, the boyfriend of the complainant. He said he received a phone call from the complainant on 10 October 2014 between 12:00 and 13:00 while at work. She was crying, and he could not make out the words she wanted to say. However, she narrated that she was raped by the accused person who was a relative of her. He then advised her to inform the head of the household Mr. George Hipondoka and to go the police station before she goes to the hospital. He said he was contacted by the accused's mother and Ms. Magano Hipondoka, indicating that the incident that happened to the complainant can cause the family or relatives to be divided and that family members from both sides are ready to sit down and seek a solution into the matter. He then told them that he is not able to make any decision and that the matter must be left in the hands of the authorities to deal with it.

[53] The seventh State witness was Inspector Elago Bertus Elago who visited the crime scene on 11 October 2014 and compiled a photo plan of the scene.

[54] The eighth State witness was Selma Anyala the second investigating officer who took over the case after the complainant complained to the Regional Commander Commissioner Ndahangwapo Kashihakumwa. She stated that on 16 October 2014, around 17h00, they were at her office with the complainant and her male relative, whom they came together with at the office and Sergeant Benedictus. She informed the complainant on 17 October 2014 that she should send a text message to the accused indicating that she intends to withdraw the case as she wishes to forgive him. The complainant should pretend to forgive him so that it will be

easy to arrest him. She also instructed the complainant to send her each text message that she sent to the accused and the accused's response to the witness's cellphone. Although she sent those messages, they failed to get hold of the accused person. It was not the complainant's intention to withdraw the matter; it was just on her instruction.

[55] This was the case for the State. As is apparent I have not included the evidence of the State witnesses under cross-examination. I have not ignored this but I will deal with it when I evaluate the evidence after I have referred to the applicable case law.

[56] The defence called the first defence witness Ms. Lavinia Shilongo, the initial investigating officer in this matter. This witness was given her statement and read the statement into the record. She confirmed that she received a text message from the complainant on 12 October 2014 indicating that the family has resolved the issue and she wants to withdraw the charge against the suspect. She later called the complainant, requesting her to come to the office the following morning. On 13 October 2014 complainant informed her that she is no longer interested in withdrawing the matter as she wants to proceed. The witness then explained that no matter what she decides, the State may proceed with the case due to its seriousness. The complainant then requested their assistance to remove her belongings from the house, but they could not assist her immediately because there was nobody in that house. So, she advised the complainant that as soon as the house owner comes, she must inform them so that they can help her.

[57] Two days later, the complainant arrived with an unknown man at their office. The witness explained that they are still looking for the suspect to arrest him and the effort she made in that regard. Later on the same day, she was informed that the complainant is not satisfied with her work and of her removal as an investigating officer of that docket.

[58] The second defence witness was Hofeni Nlutota. He stated that he knows both the complainant and the accused person. Back in 2013, he saw them together one Friday late evening when they came to his place at Ongwediva. Then the

accused told him to provide them with his main bedroom and that he should go and sleep in another room. The next morning when they woke up, the complainant had to prepare something for them. So, he took out meat from the fridge, and she cooked for them. When they ate, they were watching television together in the sitting room. The complainant left around 12: 00. The two of them stayed until 14h00 to 15h00 when the accused also left. The impression he got by the look of things is that they were in a relationship because even when they were watching soccer, they were close, talking and when she had to leave, they escorted each other. He said by the look of things; he thought they were in a sexual relationship as they both slept in his room.

[59] The third defence witness was Respondent Sindano Hango. He testified that he is 38 years, a businessman residing at Uukwangula village. The complainant in the case is his cousin as their mothers are family and related to each other.

[60] The complainant came to him since the complainant's parents passed away and he had a decent job, he helped her out with her needs when George faced some difficulties. Either to buy food or any other necessities. The complainant informed him that she was given money by her boyfriend, transport money, to go to Keetmanshoop, but she used that money. He told her that he did not have money with him that day but that he will give it to her if he goes to town.

[61] On 9 October 2014, he just went to George's room and slept there. Early in the morning, George went to work, and he left the accused lying in the room. The complainant came waking him pulling his foot. He slept only wearing short pants with no vest. Then she started asking where the things were that he brought her. He told her that the plastic having the sweets is on the floor and the money is in the trouser. He also told her that the money in the trouser is only N\$420-00 and with a shortage of N\$580-00.

[62] He told her that he would give her the other money in town the next day. When he told her that, she came on top of him on the bed. She started seducing him, and then they had sexual intercourse. They used a condom. He is the one who sent her to get the condom from his trouser.

[63] They finished sexual intercourse and went to the sitting room. In the sitting room, he took wine from George's fridge. He was still dressed in short pants. The complainant asked him if he was not hungry so that she can warm up the remaining meat to eat it.

[64] He said it is not true that the complainant noticed him when she was in the toilet because she is the one who came to wake him up in the room, he was sleeping. He denies locking the door because even when they were having sex, the door was open as she told him that she was alone in the house. The accused person denies that the complainant tried to run away and he grabbed her. He said the evidence of the complainant in court is false, and his evidence is trustworthy.

[65] He further testified that after he ate, the complainant went to her room to prepare herself to go to Keetmanshoop. They agreed that the remaining money would be given to her at Oshakati when they meet. When he came to Oshakati, he withdrew the money. He called the complainant to find out where she was, but she was not answering her phone.

[66] He then went to the office to proceed with his work. After that he received a call from George asking him what he has done to the complainant as it seems she was on her way to the police station. So, he was shocked to hear that she will open a rape case while they had sexual intercourse by agreement, and there was only a shortage of money which he was supposed to give. After the incident, on a date he cannot recall, the complainant sent him text messages to give her money and to forgive her. She did not want the family members to know that she withdrew the case.

[67] The fourth defence witness was Tangi Mike Shilongo, who is the cousin of both the accused and the complainant on their paternal sides. He heard from the complainant that the accused person has sexually harassed her. The complainant approached him via the phone to accompany her to the investigating officer because they took too long to arrest the accused person. When she called him, he went to their house in Ongwediva, and they went to Oshakati state hospital to the Gender-Based Violence Unit. The complainant asked the investigator why the suspect has

not yet been arrested. The investigator told her that they are busy looking for him. When they find him, they will arrest him.

[68] The complainant was not satisfied by that response and told him that they must approach the Regional Commander Commissioner Ndahangwapo Kashihakumwa. She then gave her version to the Regional Commander, who decided to appoint another investigating officer to take over the matter, Ms. Anyala. The new investigator informed the complainant that for them to arrest the suspect, the complainant must send a text message to the accused saying they must meet at Oshakati Pharmacy to arrest him if he turns up.

[69] On their way home, the complainant told the witness to write a text message on his phone and forward to her. She would then forward it to the suspect. She told him to write, saying that the accused should come and meet her at Oshakati pharmacy to give her N\$10 000-00 to withdraw the case. He said the cash part was her brainchild as it was not alluded to by the investigator. She said she needed that money to withdraw the case and to later for her needs as she wanted to go to Windhoek. She told him that she wanted to withdraw the matter.

[70] He further testified that while in Ms. Lavinia's office he did not hear Ms. Lavinia suggesting that the complainant must withdraw the case nor that she must take the money.

The applicable law and the evaluation of the evidence

[71] It is trite law that the State carries the onus of proving an accused's guilt beyond a reasonable doubt. There is no onus on an accused to prove his innocence.²³

[72] To fully understand the onus on the State and what is meant by reasonable doubt it is important to consider the applicable principles approved by the Namibian Supreme Court. 'The State is, however, not obliged to indulge in conjecture and find an

²³ *Woolmington v Director of Public Prosecutions* [1935] 1 AC 462 at 481 – 482 as followed in *S v Koch* 2018 (4) NR 1006 (SC) paragraph 10

answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face of it is incriminating.²⁴

[73] 'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case. '²⁵

[74] Speculation therefore cannot create reasonable doubt. Reasonable doubt must rest upon a reasonable and solid foundation, created either by positive evidence or gathered from reasonable inferences, that is not in conflict with or outweighed by the case's proved facts.

The Combating of Rape Act

²⁴ *S v Sauls and Others* 1981 (3) SA 172 (A) at 182G et seq as quoted with approval by the Supreme Court in *S v Van Wyk* 1993 NR 426 (SC) at 438-439

²⁵ *R v Mlambo* 1957 (4) SA 727 (A) at 738 and *S v Rama* 1966 (2) SA 395 (A) at 401 quoted with approval in *S v van Wyk* 1993 NR 426 (SC) at 438-439

[75] The long title²⁶ of the Combating of Rape Act 8 of 2000 summarizes the extent in which the Act intended to amend the common law insofar as it related to rape.

[76] Consent is no longer a defence for the crimes committed under the Combating of Rape Act 8 of 2000.²⁷ The crime is committed by the commission of a sexual act with another person under coercive circumstances. It needs to be understood that the Act in section 2 (2) defines 'coercive circumstances', and not, 'absence of consent'. Unfortunately, the Court a quo did not deal with the case on this basis.²⁸

²⁶ To provide for the combating of rape; to prescribe minimum sentences for rape; to provide for the abolition of the rule that a boy under the age of fourteen years is presumed incapable of sexual intercourse; to provide for the modification of certain rules of evidence applicable to offences of a sexual or indecent nature; to impose special duties on prosecutors in criminal proceedings relating to sexual offences; to impose special duties on members of the police in respect of certain bail applications; to amend the Criminal Procedure Act, 1977, so as to insert a certain definition; to make provision for the rights of a complainant of rape in bail proceedings; to further regulate the granting of bail to persons charged with rape; to further regulate the circumstances in which certain criminal proceedings shall not take place in open court; to extend the prohibition of the publication of certain information relating to certain offences; to further regulate the admissibility of evidence relating to similar offences by an accused; and to further regulate the admissibility of evidence relating to the character of a complainant of rape or an offence of an indecent nature; and to provide for matters incidental thereto.

²⁷ Consent was an element under common law Rape when two of the elements of that crime contained the elements of "sexual intercourse" and "no consent". *Hamana v S* (HC-NLD-CRI-APP-CAL-2020/00012) [2020] NAHCNLD 156 (12 November 2020) paragraph 43

²⁸ In paragraph 21 of its judgment the Court stated: 'It appears that most of the issues in this matter are common cause. The accused person pleaded not guilty to the charge, however, in his plea explanation conceded that there was a sexual act between him and the complainant by consent but denies that there was an act of cohesion. Thus, the pertinent issue to be decided by this court is whether the sexual act between them was consensual or not.'

[77] The Court's approach set out hereinbefore²⁹ obscures the difference between rape under the new Act and common law rape. Rape is a form of assault and must be treated as such under the law. Rape, in the matter under consideration, alleged an intentional application of force to accomplish a sexual act. This definition of rape under the Act gives voice to the view that rape is a crime of violence, motivated primarily by the desire to control and dominate, rather than sexual attraction.

[78] "The Act³⁰ ushered in much needed reforms to the legal framework regulating the prosecution of sexual offences, and was supplemented by the Criminal Procedure Amendment Act, 2003."³¹ ³²

[79] The Combating of Rape Act made amendments to the Criminal Procedure Act 51 of 1977 to prohibit evidence about the sexual reputation of the complainant, and to place strict limits on evidence about the complainant's sexual conduct or experience. Not only did the section 17 of the Act delete the words "or as to the character of any woman upon or with regard to whom any offence of an indecent nature has been committed," from section 227 of the Criminal Procedure Act, 51 of 1977, but section 18 inserted section 227A³³ into the said Act.

²⁹ In no small measure most probably caused by the plea explanation of the Respondent set out hereinbefore.

³⁰ Combating of Rape Act 8 of 2000

³¹ Act 24 of 2003

³² The evidence of sexual complainants and the demise of the 2004 Criminal Procedure Act; Pamela J Schwikkard, *The Namibian Law Journal*, Volume 1 Issue 1 January-June 2009, p 5

³³ **Evidence of sexual conduct or experience of complainant of rape or offence of an indecent nature**

227A. (1) No evidence as to any previous sexual conduct or experience of a complainant in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, shall be adduced, and no question regarding such sexual conduct or experience shall be put to the complainant or any other witness in such proceedings, unless the court has, on application made to it, granted leave to adduce such evidence or to put such question, which leave shall only be granted if the court is satisfied that such evidence or questioning –

(a) tends to rebut evidence that was previously adduced by the prosecution; or

(b) tends to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue; or

[80] Before the Combating of Rape Act, 2000, section 227 of the Criminal Procedure Act, 1977, in sexual offence cases, the common law's application would determine the admissibility of evidence as to 'the character of any female'. This enabled the defence to question a complainant as to her previous sexual relations with the accused. At the time, one of the strongest criticisms against the rule permitting evidence of prior sexual history is that while it traumatizes and humiliates the complainant, the evidence it elicits is irrelevant. Evidence of this nature is inadmissible in other cases, and there are no grounds for allowing it where the issue is of a sexual nature. The counter-argument that cross-examination is an essential component of the adversary system and to limit it would infringe on the accused's rights ignores the fact that evidence of general propensity is inadmissible in other cases and is essentially irrelevant to prove guilt or innocence.

[81] The provisions of these amendments and the insertion of section 227A have been part of Namibian Law since 2000. When the trial of the Respondent commenced on 8 March 2017 these provisions were in force for almost 17 years. Notwithstanding the aforesaid, the defence counsel before the Court a quo, completely ignored these amendments and provisions and cross-examined the complainant without bringing the application provided for in the section.

[82] Sadly, the prosecutor did not object against the cross-examination in this regard, and the Court a quo did not raise it *mero motu*. Thus, there was no decision

(c) is so fundamental to the accused's defence that to exclude it would violate the constitutional rights of the accused: Provided that such evidence or questioning has significant probative value that is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right of privacy.

(2) No evidence as to the sexual reputation of a complainant in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, shall be admissible in such proceedings.

(3) Before an application for leave contemplated in subsection (1) is heard, the court may direct that the complainant in respect of whom such evidence is to be adduced or to whom any such question is to be put, shall not be present at such application proceedings.

(4) The court's reasons for its decision to grant or refuse leave under subsection (1) to adduce such evidence or to put such question shall be recorded, and shall form part of the record of the proceedings.

by the Court a quo that the evidence of the previous sexual conduct or experience of the complainant had, for the reasons set out in the section, significant probative value and substantially outweighed the potential prejudice to the complainant's personal dignity and right to privacy.

[83] When considering an amendment to the Section 227 of the South African Criminal Procedure Act 51 of 1977, by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 the Kwazulu Natal Court concluded as follows: 'The reasoning behind the section is clear. There has been a recognition by our legislator that victims of sexual assault often suffer secondary sexual assault' at the hands of the courts and agencies responsible for prosecuting such offences and is linked to gender bias and rules of evidence regulating the prosecution of such offences.'³⁴

[84] The legislature has recognized that the procedural and evidential rules often exacerbate a rape victim's trauma from reporting rape and enduring a trial. This has made victims of rape reluctant to report a rape and testify in court. Gradually there has been a shift in public and judicial opinion about procedural and evidential rules employed and the need to advance the constitutional imperative of gender equality.³⁵

[85] The section was designed primarily to protect complainants from unnecessary and irrelevant questioning and to protect the privacy and dignity of complainants while simultaneously ensuring that there is still full and thorough ventilation of the issues.³⁶

[86] The South African Supreme Court in *S v Katoo*³⁷ stated that evidence of a complainant's sexual experience, which does not relate to the incident giving rise to the trial, may not be adduced without the court's leave. Such leave is only granted if the court is satisfied that it is relevant. Consistently with this provision, trial courts must vigilantly protect complainants' privacy and dignity by only allowing evidence of

³⁴ *S v Mkhize* 2012 (2) SACR 90 (KZD) paragraph 9; See also *S v Zuma* 2006 (2) SACR 191 (W) at 199B-D; *S v M* 2002 (2) SACR 411 (SCA)

³⁵ *S v Mkhize* 2012 (2) SACR 90 (KZD) paragraph 10

³⁶ *S v Mkhize* 2012 (2) SACR 90 (KZD) paragraph 11

³⁷ *S v Katoo* 2005 (1) SACR 522 (SCA) paragraph 17

past sexual experience to be led where the section's requirements are met. The leading of evidence pertaining to the complainant's previous experience must be prevented if the section's requirements were not complied with beforehand.

[87] In my view, the role of the court in criminal matters and the primary aim of criminal procedure should be to ensure that substantial justice is done.³⁸ I therefore concur with the approach of the South African Courts as set out hereinbefore and commend the principles alluded to.

[88] The defence brought no application to lead the evidence of the previous sexual conduct or experience of the complainant in terms of section 227A of the Criminal Procedure Act, 1977. They did not request for such evidence to be allowed. The defence did not show that such evidence had significant probative value and substantially outweighed the potential prejudice to the complainant's dignity and right to privacy. Thus, there was no decision that such evidence was relevant and admissible before it was lead.

[89] In the absence of such an application and finding, such evidence is irrelevant and inadmissible in terms of section 227A of the Criminal Procedure Act, 1977. This Court cannot substitute an order that was not applied for in the Court a quo. The provisions of the section provides that no such evidence shall be lead or a question asked to elicit this. Any such evidence elicited and lead in this regard should thus be ignored. This would include any cross-examining done in this regard and any evidence lead in an attempt to provide evidence of the previous sexual conduct or experience of the complainant. There is authority in Namibian case law that if a legal

³⁸ "A perception exists in some circles that the fundamental right to a fair trial focuses exclusively on the rights and privileges of accused persons. Those rights, however, must be interpreted and given fact to in the context of the rights and interests of the law-abiding persons in society and particularly the persons who are victims of crime, many of whom may be unable to protect themselves or their interests because they are dead or otherwise incapacitated in the course of crimes committed against them." As per *S v Van den Berg* 1996 (1) SACR 19 (Nm) at 29d-e; *S v Van den Berg* 1995 NR 23 (HC) at 33C-D

practitioner and his client elects to conduct a criminal trial in a specific manner, they cannot complain if such tactics backfire.³⁹

Sequence of defence witnesses

[90] Section 151⁴⁰ of the Criminal Procedure Act, 51 of 1977 provides that the accused if he wishes to give evidence in his own defence must give evidence first. The purpose of section 151(2)(b)(i) is to lessen the possibility of an accused tailoring his evidence to accord with the evidence of the other defence witnesses as he is in Court while such witnesses give evidence and not only hears their evidence but also any answers they might give in cross-examination.

[91] Once again no such application was brought. The record on page 585 speaks for itself.⁴¹ When asked by this Court as to whether she is aware of the aforesaid section in the Criminal Procedure Act she confirmed that she is quite aware of it. When asked why she did not bring the application provided for but just called the witness prior to the accused giving evidence, she could provide no reason why she

³⁹ *S v Van den Berg* 1996 (1) SACR 19 (Nm) at 30i-31c and 31e-f; *S v Van den Berg* 1995 NR 23 (HC) at 35A-C and 35F-G

⁴⁰ 151 Accused may address court and adduce evidence

(1)(a) If an accused is not under section 174 discharged at the close of the case for the prosecution, the court shall ask him whether he intends adducing any evidence on behalf of the defence, and if he answers in the affirmative, he may address the court for the purpose of indicating to the court, without comment, what evidence he intends adducing on behalf of the defence.

(b) The court shall also ask the accused whether he himself intends giving evidence on behalf of the defence, and-

(i) if the accused answers in the affirmative, he shall, except where the court on good cause shown allows otherwise, be called as a witness before any other witness for the defence; or

(ii) if the accused answers in the negative but decides, after other evidence has been given on behalf of the defence, to give evidence himself, the court may draw such inference from the accused's conduct as may be reasonable in the circumstances.

⁴¹ 'Ms Kishi: May it please your Worship. I confirm my appearance on behalf of the Accused person in this matter. The matter is coming up for the Defence case Your Worship, we are ready to proceed. We have three witnesses in the Defence case which witnesses will be called before the Accused person come and testify Your Worship'

did this. It is not for counsel to decide whether she will call witnesses before the accused or not. The Court should authorize it on good cause shown. There clearly was no such good cause to show. This court thus may draw such inference from this conduct as may be reasonable in the circumstances.

Cross-examination.

[92] In *S v Nisani en Andere*⁴² the Court quoted the following passages from *S v Gidi & Another*⁴³ with approval:

‘Questions should be in a form understandable to the witness so that he may answer them properly. Multiple questions, that is to say, interrogation which poses a series of questions for simultaneous answer should be avoided because they tend to confuse. The witness may answer the last question, but may forget what the others were, or the answer may be ambiguous because of uncertainty which of the series of questions is being answered. Long and involved questions should be avoided when short and simple questions suffice. The practice adopted in the present case of directing a torrent of words at the witness containing assertions of fact, expressions of opinions, vituperative remarks, adverse comment on the witness and his evidence and a series of questions on different aspects of the case before pausing for an answer is impermissible. ...it is not cross-examination. A prosecutor must reserve adverse comment on the evidence of the accused, his demeanour, unreliability, lack of credibility or dishonesty for his address to court, and not to use it as a weapon for attacking the witness during cross-examination.’ This approach was approved and applied by the Namibian Supreme Court in *S v Ningisa and Others*⁴⁴

[93] In *S v Nisani en Andere*⁴⁵ it was further stated: ‘It does not matter how often a presiding officer in a criminal case has to prevent a prosecutor or a legal practitioner putting unfair questions or suggestions to witnesses. It is his duty to act. The test is not the number of times on which he has so acted, but whether the question in each case was unfair and whether the limits of cross-examination was exceeded’⁴⁶

⁴² *Nisani en Andere* 1987 (2) SA 671 (O) at 676H-677I

⁴³ *S v Gidi & Another* 1984 (4) SA 537 (C) at 539F-541B

⁴⁴ *S v Ningisa and Others* 2013 (2) NR 504 (SC) in paragraph 28

⁴⁵ at 672D-E

⁴⁶ English translation of the Afrikaans on 677H-J

Differences in the evidence of witnesses and cross-examination on a previous statement

[94] But the process of identifying contradictions of and previous statements does not provide a rule of thumb for assessing a witness's credibility. It is also trite that not every error made by a witness affects his or her credibility. In each case, the trier of fact must make an evaluation, considering such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence.⁴⁷

[95] Where different persons make the statements, the contradiction proves only that one of them is erroneous: it does not prove which one. The mere fact of the contradiction does not support any conclusion as to the credibility of either person. It only acquires probative value if one believes the contradicting witness in preference to the first witness. Thus, it is not the contradiction, but the truth of contradicting assertion as opposed to the first one, that constitutes the probative end.⁴⁸

[96] Experience shows that inconsistencies and differences of a relatively minor nature between witnesses regularly indicate honest but imperfect recollection, observation, and reconstruction. In such circumstances, inconsistencies counter any alleged conspiracy theory.⁴⁹

[97] It is a well-known experience that witnesses regularly deviate from their police statements. This is not necessarily because they are lying or are falsely adding-on to their accounts in evidence, but because original police statements are frequently not taken with the desired degree of care, accuracy, and completeness.⁵⁰

⁴⁷ *S v Oosthuizen* 1982 (3) SA 571 (T) 576G – H approved and applied in *S v Teek* 2009 (1) NR 127 (SC) paragraph 19

⁴⁸ *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B – D approved and applied in *S v Teek* 2009 (1) NR 127 (SC) paragraph 19

⁴⁹ *S v Auala* (No 1) 2008 (1) NR 223 (HC) paragraph 30; *S v Oosthuizen* 1982 (3) SA 571 (T) at 576G – H; *S v Mkhole* 1990 (1) SACR 95 (A) at 98f – g; *S v Britz* 2018 (1) NR 97 (HC) paragraph 24

⁵⁰ *S v Xaba* 1983 (3) SA 717 (A) at 730B - C approved and applied in *S v Teek* (1) NR 127 (SC) paragraph 21

[98] Suffice to say that a court should be slow to discredit a witness on the strength of discrepancies between a police statement and what the witness has testified in court. Only if the differences are inadequately explained and are material to the charge's essential allegations would it impact the witness's credibility.⁵¹

[99] The prosecution must disclose witness statements to the defence. Cross-examination of state witnesses conducted from these statements is in vogue. The general perception among some legal practitioners seems to be that a witness is, from the outset, required to give a full and detailed account of his/her evidence to the police. This exercise aims to discredit the witness by showing discrepancies between the written statement and the witness's evidence in court.

[100] There is a serious possibility that statements made to the police, made in entirely different circumstances, and in certain circumstances, far from constituting this accurate representation and, through inaccuracies, may be a target for cross-examination which, instead of revealing the truth, may obscure it.⁵²

Single witnesses

[101] How the evidence of a single witness should be evaluated is also settled law in Namibia. A Court approaches it with caution because she is a single witness, but it is trite law that the exercise of caution should not be allowed to displace common sense. The evidence of the single witness need not be satisfactory in every respect. A Court may still accept and rely on such evidence, although it was not perfect in all aspects, if it concludes that the evidence is materially true.⁵³

[102] The evidence of other witnesses furnishing material from which an inference corroborating the evidence of a witness to an incident that only he or she testifies

⁵¹ *S v BM* 2013 (4) NR 967 (NLD) paragraph 100

⁵² *R v Steyn* 1954 (1) SA 324 (A) at 335G-H; *S v Unengu* 2015 (3) NR 777 (HC) paragraph 6; (See also *S v Jaar* (case No CA 43/2002, 9 December 2009); *S v Mukete and Others* (case No CA 146/2003, 19 December 2005); *S v Bruiners en 'n Ander* 1998 (2) SACR 432 (SE))

⁵³ *S v Unengu* 2015 (3) NR 777 (HC) paragraph 5 and 11; *S v BM* 2013 (4) NR 967 (NLD) paragraph 26; *S v HN* 2010 (2) NR 429 (HC) paragraph 56;

about could be drawn, such a witness can no longer be regarded as a single witness.⁵⁴

Duty to put your case to the witnesses

[103] The institution of cross-examination not only constituted a right, but also imposed certain obligations. It has been stated in *Small v Smith*⁵⁵ that it is elementary and standard practice for a party to put to each opposing witness so much of his case or defence as concerns that witness to inform him that other witnesses will contradict him. This judicious practice is necessary to give him a fair warning and an opportunity of explaining his contradiction of such version and defending his character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that the Court must disbelieve him. Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination, particularly by a legal practitioner, the party calling that witness is usually entitled to assume that the witness's testimony is accepted as correct unless the testimony is so manifestly absurd, fantastic, that no reasonable person can attach any credence to it whatsoever.

[104] Moreover, where it is suggested that the witness is not speaking the truth upon a particular point, his attention must first be directed to the fact by cross-examination so that he may have an opportunity of explanation.⁵⁶ The aforesaid principles were explained as follows by Hannah J in *Navachab Gold Mine v Izaaks*:

⁵⁷ 'The rule that an opposing party must put his case to other party's witnesses in respect of matters which are not common cause is not to be found in formal rules of court but is, as I

⁵⁴ *S v Van Wyk and Another* 2015 (4) NR 1085 (SC) approving and applying the dicta of *S v Snyman* 1968 (2) SA 582 (A) at 585D – F and 586H – 587A applied.

⁵⁵ 1954 (3) SA 434 (SWA) at 438E-G; See also: *Namdeb Diamond Corporation (Pty) Ltd v Gaseb* 2019 (4) NR 1007 (SC) paragraph 61; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059; [1999] ZACC 11) quoted with approval in *S v VL* 2018 (1) NR 67 (HC) paragraph 42

⁵⁶ *R v M* 1946 AD 1023 at 1027-8 quoting Phipson's *Evidence* (7th ed p 460 quoted with approval in *S v Noraseb and Another* 1990 NR 346 (HC) at 347E-F;

⁵⁷ *Navachab Gold Mine v Izaaks* 1996 NR 79 (HC) at at 88B – C

have already pointed out, based on considerations of fundamental fairness and a court should be slow to reject a witness' evidence on such matters where it has not been challenged and the witness has not been given opportunity to deal with the conflicting version which the opposing party's witnesses give in due course.'

[105] A cross-examiner should put his defence on each aspect that he disputes to the witness implicating his client. This must be done explicitly and unambiguously. A criminal trial is not a catch-as-catch-can game, nor should it be turned into a forensic ambush.⁵⁸

Mutually destructive versions

[106] Where a court considers two mutually destructive versions, it is a trite rule of practice that the court must have a good reason for accepting one version over the other. It should not only consider the merits and demerits of the state and defence witnesses, respectively, but also the probabilities. The evidence presented by the state and the defence should not be considered in isolation as an independent entity when assessing the witnesses' credibility and the reliability of their evidence. The court must follow the approach to evaluate the state case and determine whether the defence case does not establish a reasonable hypothesis. The court must not be blinded by where the various components originate from. Instead, it should attempt to arrange the facts, properly evaluated, in a mosaic to determine whether the alleged proof indeed goes beyond a reasonable doubt or whether it falls short and thus falls within the area of a reasonable alternative hypothesis.⁵⁹

[107] In *S v M*⁶⁰ the Court said in paragraph 189 '... The point is that the totality of the evidence must be measured, not in isolation, but by assessing properly whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides the balance weighs so heavily in favour of the State that any reasonable doubt about the accused's guilt is excluded.'

⁵⁸ *S v Boesak* 2000 (1) SACR 633 (SCA) at 647c – d quoted with approval in *S v HN* 2010 (2) NR 429 (HC) paragraph 98; *S v Auala* 2010 (1) NR 175 (SC) paragraph 14

⁵⁹ *S v Unengu* 2015 (3) NR 777 (HC) paragraph 11; *S v Engelbrecht* 2001 NR 224 (HC); *S v Petrus* 1995 NR 105 (HC); *S v Radebe* 1991 (2) SACR 166 (T) at 168D – E

⁶⁰ *S v M* 2006(1) SACR 135 (SCA)

Evaluation of Evidence

[108] Before dealing with the evidence of the complainant, I deem it necessary to address a few aspects I consider relevant and important when considering her evidence.

[109] In the Court a quo defence counsel spent a substantial part of the complainant's cross-examination regarding the statement she made to the police. A perusal of the complainant's statement as contained in Exhibit B, indicates that it, by no stretch of the imagination, can be called a full account of what transpired between the accused and the complainant on the date in question. Her statement in broad terms indicates that the accused was with her in George's house on the day of the incident. It also states that the accused locked the exit to the house and commenced his assault on her, in the sitting room. He partially undressed her there. It was against her will. The complainant in the statement also indicated that she fell from the couch, managed to free herself, and ran to George's room where she was caught again and eventually raped on the bed.

[110] Her evidence before the Court a quo, in essence, put meat on what might be called the bare bones provided in her statement to the police. For the reasons and the case-law set out hereinbefore, this does not in itself mean that the complainant's evidence before the Court a quo should now be disbelieved or labeled contradictory. I believe the complainant adequately explained this in her evidence and under cross-examination. The statement does not contain anything substantially contradicting what the complainant stated in her evidence before the Court.

[111] Much of the apparent confusion was created by the manner in which much of the questions were framed. The record speaks for itself, but a few examples will suffice. The first example⁶¹ was objected to, and counsel actually apologized for it.

⁶¹ Page 430 of the record: 'Now it is my instructions that this came up because of two reasons why you went and make a whole story of this issue, the one issue is that I think the same day of the 10th of October I just did not get proper instruction on the date I will confirm now or the day thereafter. You were supposed to travel and the Accused person was supposed to give you money and it appears

The second example ⁶² of these questions continues one page further in the record. The third example ⁶³ is just a few pages further on. The record abounds with questions like these by defence counsel. Especially when cross-examining the complainant.

[112] These questions, like many others, clearly directed a torrent of words at the witness, which contained assertions of fact, expressions of opinions, vituperative remarks, adverse comment on the witness and her evidence, and a series of questions on different aspects of the case before pausing for an answer. As the case law quoted hereinbefore, this is impermissible, and the Court a quo should have stopped it. Counsel should have reserved her adverse comment on the witness's evidence, her demeanour, unreliability, lack of credibility or dishonesty if she could have substantiated it, for his address to Court, and not used it as a weapon for attacking the witness in cross-examination.

[113] At least on one occasion, when asked one of these questions, the complainant asked: 'Where should I start Your Worship?'⁶⁴

that the Accused person had (indistinct) this money it is my instructions (intervention)

⁶² Page 431 of the record. Now is that correct or let me put it this way that all these things the money that was not given and this marriage was the cause of this rape story and I would urge you that. On the 9th of October that is the date prior to this incident is that correct that you and the Accused person will want to point it out to you that the story that you are telling this Court is a story that you have made up, you have put on a lot of flowers and a lot of decorations to make it look very attractive to the Court and I will point it out to you. Are you texting one another?

⁶³ I am asking this question because there is so much discrepancy in this you said in the Court in the statement that you narrated in Court. I saw Accused standing in the door of the bathroom when I came from the toilet I went to the sitting room. Sindano find me in the sitting room where I was picking up glasses and cans (indistinct) hear in Court she did not mention that she went to the toilet and she went to pee that is not in here. In Court she is just saying she saw him standing in the bathroom and then she came from the toilet and went to the sitting room. And Sindano find me in the sitting room that is where I want to have the clarity. He found me in the sitting room where I was picking up glasses and cans?

⁶⁴ Record p 449 Alright now that evidence continue and it says, I got an opportunity to run away and go to George's room, now I have two questions. The statement you made to the police you do not mention anything about that is that correct you can go through it again. You can start on the second page line 1, 2, 3 and 4 sorry. And let me just for the Court interest read it out loud, I fall from the sofa

[114] After indicating to the Court that she had a certified copy of the bail proceedings ⁶⁵ defence counsel said the following to the Complainant: 'Madam, in your application for bail or in the Accused Application for bail, when he testified you said that, just (indistinct) the part he pulled off your pants up to your knees and you managed to release yourself.' When the prosecutor indicates that she would appreciate a copy of the certified bail application to follow what is being put to the complainant, the court adjourned for a short while to facilitate this. ⁶⁶ When the Court resumed the following is place on record by defence counsel: 'Your Worship I will withdraw the previous question because I realized that it can [came] from her own notes on the Bail Application but it appears that it was not recorded on the Court's notes I will leave it as such.'

[115] Just before the aforesaid transpired and when the prosecutor argued that the bail application, done in the Magistrates Court is not automatically part of the proceedings before the Regional Court submitted: 'Your Worship I think my Colleague is trying to rescue something...' suggesting that the State was attempting to keep something from the Court.

[116] At one stage after the defence, patently wrong, put to the complainant that she did not say something in her evidence in chief,⁶⁷ and she was corrected by the prosecutor, she just states: 'I am indebted to my Colleague' and just continues with the next question. No apology to the Court or the witness.

you said it is from that time. I fell from the sofa and on that time he tried to open my legs from there, now on that time he opened it he tried to open my leg from there I run away from the sitting room to George's room in order to lock myself in. Unfortunately the key of George room is together with other door side of the sitting room, that is I think (indistinct) you can read the whole statement?
 --- Where should I start Your Worship?

⁶⁵ P 446 of the record

⁶⁶ Record p 446-447

⁶⁷ Record p 451: Because now you are focusing on pinching but in your evidence-in-chief the Prosecutor asked you how did you try to free yourself and you said you were twisting you never mentioned any pinching at all?

[117] At a stage when no other state witness except the complainant has given evidence and in relation to a meeting that the accused did not attend, it was put to the complainant that it is denied that the parents of the accused asked complainant to withdraw the case against accused.⁶⁸ There is no indication whatsoever on what basis the evidence of the complainant in that regard could have been disputed in this manner.

[118] At one stage counsel's opinion that the complainant is lying is put to the witness as a fact.⁶⁹

[119] At one stage during cross-examination the complainant is taken to task because she assumed or concluded it was the accused that sent the text messages to her.⁷⁰ Notwithstanding this, it was never disputed in cross-examination, or in his evidence later, that he was the author of the messages that complainant referred to in her evidence. Nor that the content was wrongly quoted or manipulated by either the complainant or anyone else.

[120] What is abundantly clear from reading the evidence is that vital aspects of the complainant's evidence were not challenged in cross-examination. These include the text message's content sent to the complainant and the text message the complainant sent to the original investigating officer. The same can also be said about the text messages between complainant and the accused on 17 October 2014. Neither was it suggested in any shape or form that the complainant did not share the text messages she forwarded to the accused and his replies to it on 17 October 2014 with the second investigating officer.

⁶⁸ Record p 457: That is denied that they asked you to withdraw the matter, they did not ask you to withdraw the case?

⁶⁹ Record p 488 I will put it to you that you are lying. Every time you continue you add a flower to your testimony now you are crying because even in your evidence-in-chief you did not mention that you were crying you were so forced that she was repeating that you must do it and that you eventually ended up crying and that is why I ask you how were you forced. Because (indistinct) it did not come out how you were forced? But she continuously repeated that she must send?

⁷⁰ Record p 460

[121] It is further glaringly apparent that the version of the accused as to exactly how the sexual intercourse between himself and complainant commenced and took place was never put to the complainant in cross-examination. This was important as this in essence is the only aspect that were in dispute in respect of the alleged offence and was not contained in his plea explanation. The fact that he was sleeping on George's bed with only short pants on. That she woke him up by pulling his foot. That she enquired about what the accused brought her. That he showed her where her goods that he brought were. That he indicated that a part of the amount she requested was in his trouser pocket. That she took that part of the money. That she subsequently initiated the sexual intercourse. That she in fact seduced the accused. That she took off her jeans herself. That she in fact went to collect the condom from his trouser pocket prior to them having sexual intercourse. Not only that the complainant consented to the sexual act and prepared the food afterwards.

[122] The Court a quo stated in its judgment⁷¹ 'Ms. Kishi for the defence pointed out some discrepancies in the evidence of the complainant and concluded that, if one realistically analyse the evidence of the complainant, it sounds unreal. She says accused put the keys in his pants and went at her. When did the accused take off his clothes? When did he put on a condom? This must all have happened in her presence and she just looking on as he was undressing.' This clearly refers to Ms. Kishi's submission in the Court a quo contained in paragraph 23 of her Heads of Argument there.⁷² In her Heads of Argument⁷³ before this Court she once again referred to his part of the judgment in her argument that the Court a quo rejected the evidence of the complainant.

[123] The aforesaid submissions should be considered against the following background. Complainant was never asked how the accused was dressed at the time she saw him on the morning of 10 October 2014. She was never asked in cross-examination when and where and if the accused took off his clothes. She was never asked when he put on the condom, where he got it from and whether it happened in her presence. This does not make complainant's evidence unreal. What

⁷¹ Typed record p 246

⁷² Record p 278

⁷³ Paragraph 11.1 thereof.

is unreal is the fact that counsel submitted this without questioning the complainant in this regard. As was stated in the authorities quoted hereinbefore it is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and not confronting the witness with not dealing with this in her evidence, and afterwards argue that the Court must disbelieve her.

[124] In paragraph 111 of her heads of argument Ms Kishi submitted that Insp Elago does not corroborate the incident described by complainant.⁷⁴ This is not correct. Complainant was never in cross-examination given the opportunity to explain her pointing out of the chair. We know from her evidence that the chair [or as it is also called couch] played a role in the version of the complainant as to how the incident started. The evidence of the police officer in the circumstances is hearsay evidence as complainant who is allegedly the person who said what is contained in the key to Elago was not asked about the pointing out at the scene or confronted with the key to the photo plan in cross-examination.

[125] From the evidence of the Complainant the following timeline can be constructed.

The incident occurred between 10:00 and 11:00 on Thursday 10 October 2014.⁷⁵ She went to the hospital at 12:00⁷⁶ She telephonically reported the rape to Mangano, George and her boyfriend before 13:00 on the same date. She went to the hospital, was referred to the police, obtained the necessary documentation from the police and returned to the hospital. An examination of complainant was requested on 10 October 2014. The doctor examined her at 16:08 on 10 October 2014.⁷⁷ The Statement of Complainant was completed at 20:10 on 10 October 2014⁷⁸ Complainant only came home at 23:00 on 10 October 2014.

⁷⁴ Record p 295

⁷⁵ Typed record p 427

⁷⁶ Typed record p 427 & p 388

⁷⁷ Exhibit B

⁷⁸ Typed Record p 393

On Friday 11 October 2014 at 18:20 she received the first text message from the accused. Later the same evening she received another text message from the accused at 19:20.

On Saturday 12 October 2014 at 12:15 the accused send her another text message. On Sunday morning 13 October 2020 around church time the parents of the accused with George came to her room. After attempting to phone the investigation officer she sent a text message indicating that she wishes to withdraw the case against accused.

On the same day at 11:51 the accused once again send her a text message. On the same day she left Georges house and went to Selma's house in Ongwediva.

On Monday 14 October 2014 she went to the investigation officer's office and indicated that she wishes to continue with the complaint. This was the occasion when the investigating officer suggested that it was not a strong case, that the accused is a well to do businessman who will instruct a lawyer to defend him if he is acquitted, she will receive nothing.

On Thursday 17 October 2014 she went to Commissioner Kashihakumwa.⁷⁹ She complained because accused was not arrested and because the investigating officer is attempting to have her withdraw the case and accept money from the accused.⁸⁰ On this date the new investigator was appointed. On 17 October 2014 at 18:20 the complainant again sent a text message to the accused. This resulted in several text message's being exchanged between them.

[126] From the aforesaid timeline it is apparent that the complainant reported the rape very soon after the incident, went to hospital and the police shortly afterwards to lay the complaint. She continued to press ahead with the matter and even reported the original investigation officer to his superior. The text messages between herself and the accused started again on Thursday 17 October 2014.

⁷⁹ Typed record p 409

⁸⁰ Typed Record p 410

[127] The second State witness Lahja Magano Numolongela Hipondoka evidence that she spoke to the accused on Friday 11 October 2014 about the allegation made by complainant, accused said it was a misunderstanding.⁸¹ This was not disputed in cross-examination. Ms Kishi argued that this witness disputed the complainant's version that the family turned their back on her as the witness said 'We never chased her away. She cut her ties with the family'. This argument does not take into account that the complainant in fact did not allege that her family chased her away, but that she left because she believed that family took the accused's side and did not provide her with the support she expected in the circumstances of the case.

[128] George Shihemba Hipondoka seemed extremely vague in his evidence. So much so that the prosecutor leading his evidence in chief was stopped from almost cross-examining him by an objection raised by the defence. He said nothing about the parents of accused coming to see the complainant on the Sunday after the incident in his evidence in chief. When asked a question in cross-examination as to the evidence of complaint that the family wanted her to withdraw the charge against the accused, the witness answered as follows: 'I was not part of the relatives that said or that instruct the Complainant to withdraw the matter.'⁸² He alleged that he did not know how they came to be there and stated they just arrived to hear what transpired. When asked if the mother of accused forced complainant to withdraw the case, the witness answered: 'I cannot recall for Complainant been requested to withdraw the matter Your Honour'.⁸³ He also alleged that he is unaware that the complainant was forced to withdraw the matter. Or that she was forced to send a text message to the investigating officer.⁸⁴ This stands in stark contrast to the complainant's evidence that the text message to facilitate the withdrawal was send to the original investigating officer and the confirmation by the said investigator that she did in fact receive the text message at that time and on that Sunday.

⁸¹ Record p 480

⁸² Record p 497

⁸³ Record p 498

⁸⁴ Record p 498-499

[129] George's evidence should also be evaluated with the Complainant's evidence and her subsequent perception that when she reported the rape against her, he provided no assistance and asked what should we do now, and stating that he will call the accused. While she was at the hospital George phoned and said after she was at the hospital she should not return to the police she should just go home.⁸⁵ In her evidence she further stated George did not come home evening of 10 October 2014.⁸⁶ On Friday 11 October 2014 George when he came home was crying telling her he understood what happened to her and that he spoke to the accused. George according to the complainant also said he will call the accused and that they should talk about this matter and that she should forgive the accused as he is family. They should talk about it before other people know. This certainly does not prove that George acted in this matter and said what she alleges but might give an indication why complainant left his house and may assist if the probabilities are considered.

[130] Although the fourth State witness Selma Amukutwa did not say this in her evidence-in-chief she was in cross-examination confronted with her police statement in which it appears as if the accused accompanied his parents on their Sunday visit to the complainant. This witness reiterated her evidence in chief and said this was a mistake as she never averred in her statement she made. It was put to the witness that the accused denied that he phoned as alluded to by the witness. She said he did. This witness was further accused in cross-examination of a personal vendetta against the Hango family who ran to the media with the case.⁸⁷ This was denied by the witness and no evidence was led to substantiate this statement.

[131] Although the fifth witness was Ennette Juanita Rue did not provide any incriminating evidence against the accused, she was mainly cross-examined as to the possibility of editing text messages. It was however never put to the complainant that she edited text messages by herself or the ones by the accused.

[132] Mr. Nicklaas Shapumba the boyfriend to the complainant was cross-examined from his statement, but his statement was not handed into court. It is not

⁸⁵ Record p 394-395

⁸⁶ See typed record p 395

⁸⁷ Record p 523-524

clear why. His cross-examination contained amongst others the following “question”:
‘Sir the one minute you say A the other minute you say something different. Can you try to tell the truth? What were you trying to tell us about Claudia’s current situation what are you saying about that? You said that some things you did not know it will be like this, what does it mean?’

[133] Inspector Elago Bertus Elago’s cross-examination centred around the chair allegedly pointed out by the complainant and why she pointed it out. What however has to be remembered is that inadmissible hearsay evidence was elicited from this witness without the complainant confirming what is being suggested as something she said and pointed out or being confronted with it in cross-examination. It seems extremely opportunistic to allege that this inadmissible hearsay in essence contradicts part of complainant’s version of events.

[134] The eighth State witness Selma Anyala the second investigating officer denied in cross-examination that she instructed or said to the complainant that she must request money from the accused as was alleged by the complainant. This is confirmed by the last defence witness Mr Shilongo as was argued by Ms Kishi. She said that complainant was only requested to convey the false message to the accused that she has forgiven him and wanted to withdraw the matter and that they should meet somewhere to facilitate his arrest. What however should be considered as well is that the text messages between the complainant and the accused started again on 17 October 2014 after the witness made her suggestions to the complainant. I will return to the text messages of 17 October 2014 again a little bit later in the judgement.

[135] Another fact that warrants mentioning is when the prosecution attempted to lead the evidence of this witness concerning the text messages forwarded to her by the complainant about the text messages she sent to and received from the accused, the defence objected to this evidence being presented. This instruction was given to the complainant on 17 October 2014 by this witness. The complainant also presented evidence that she did as instructed in this regard.

[136] After a separate argument raised by the defence on 28 May 2018 the court a

quo dismissed the application on 29 May 2018. In the application the defence requested an order declaring the electronic messages admitted in evidence as inadmissible. That the admitted electronic messages admitted in evidence be struck as part of the evidence. That the matter must start de novo and alternative relief. As is clear from the judgement ⁸⁸ defence counsel could not draw the Court a quo's attention to any provision in the Criminal Procedure Act, 1977 in terms of which the Court as entitled to entertain the aforesaid application and in essence sit as a review or appeal court on its own previous decision.

[137] Notwithstanding the Court's ruling hereinbefore the defence in objecting against the witness being requested to deal with the text messages, previously admitted, forwarded to her, submitted that the text messages are electronically created and thus is inadmissible because no provision allows its admission. It however needs be said at this stage that there is also nothing in Namibian law that prohibits such evidence in appropriate cases or states that it is inadmissible. I will return to this aspect later in the judgement as Ms. Kishi reiterated her argument in this regard before this Court.

[138] The first investigating officer was the first witness for the defence. As indicated earlier, she gave evidence before the accused without an application in terms of section 151 of the Criminal Procedure Act, 1977 being brought to allow this. She was in essence, asked to read her statement into the record. This statement was also not handed into Court. She did, however, confirm that she received the withdrawal text message from the complainant on Sunday, 13 October 2014.

[139] However, she denied that she attempted to influence the complainant to accept money and withdraw the matter. However, this denial by her cannot just be taken as the truth because it differs from the evidence of the complainant. What should also be considered is that the complainant on Monday 14 October 2014 did not withdraw the matter, and when the accused was not yet arrested on Thursday 17 October 2014, reported the witness to her superior. The complainant in this report explicitly mentioned that the accused was not yet arrested, and that the officer attempted to convince her to withdraw the matter and seek payment. On the

⁸⁸ Record p 540-542

probabilities it seems highly unlikely and perhaps even improbable that the accused's non-arrest a week after the incident alone would have warranted her removal as investigating officer of the case. However, allegations of an attempt to influence a complainant to withdraw a criminal charge are an entirely different kettle of fish.

[140] A further important factor that must be considered in evaluating this witness's evidence is that she did not provide an answer when she was asked in cross-examination whether she is saying that she does not know why she was removed from the case.

[141] Before this Court Ms Kishi stated that the complainant was contradicted by other witnesses and specifically by this witness. I have already dealt with the witness's evidence concerning this aspect or her evidence but will consider it again when considering the mutually destructive versions by the complainant and the accused.

[142] The second defence witness was Hofni Mutota. As indicated earlier, he also gave evidence before the accused without an application in terms of section 151 of the Criminal Procedure Act, 1977 being brought to allow this. His evidence was also lead without applying for the admission of that evidence in terms of section 227A of the Criminal Procedure Act, 1977. In the absence of such an application and finding, such evidence is irrelevant and inadmissible in terms of section 227A of the Criminal Procedure Act, 1977. This witness's evidence should and will therefore not detain this Court.

[143] The Respondent was the third defence witness. I will return to his evidence after I have dealt with the evidence of the fourth and final defence witness.

[144] The last defence witness was Tangi Mike Shilongo. This witness accompanied the complainant to the first investigating officer on 17 October 2014 and afterwards to Regional Commander Commissioner Ndahangwapo Kashihakumwa. He does not contradict the complainant as to what was conveyed to the Commissioner. Once the new investigator was allocated to the case, he accompanied the complainant to her as well. He does contradict the complainant

insofar as he confirms that this investigating officer did not tell complainant to request money from the accused.

[145] His evidence that the complainant requested him to draft a text message linking the withdrawal and meeting to the payment of N\$10 000 and forwarding it to her was never taken up in cross-examination with the complainant. Nor was it taken up with her in cross-examination that she in fact said to this witness that she wanted N\$10 000 from the accused. Nor is there any suggestion that text message drafted and forwarded to complainant, was ever forwarded to the accused.

[146] The attempt to have the witness comment on whether the first investigator suggested to the complainant to withdraw the case or to take money for the accused also requires considering as he denied that this was done.⁸⁹ On first blush this seems to corroborate the evidence of the first investigating officer in this regard. What however needs to be considered is that complainant never stated that the original investigating officer suggested this course of action on Thursday 17 October 2014. Her evidence was that this discussion between the investigating officer and herself took place during her visit to the investigation officer on Monday 14 October 2014. This witness did not accompany the complainant to the investigation officer's office on the Monday and thus cannot comment in what happened or not at that stage. Ms. Kishi argument before this Court that Tangi Shilongo confirmed the evidence of Ms. Anyala the investigating officer disputing that she ever asked the complainant to solicit money from the is thus without merit.

[147] While considering and evaluating the evidence of the accused, it is essential to point out that the totality of the evidence shows that the accused admitted committing or continued to commit a sexual act with the complainant Kapofi Klaudia Hosia on 10 October 2014, at Otuwala Village in the Regional Division of Namibia. What is disputed by the accused is that he committed the sexual act under coercive circumstances. If there is a reasonable possibility that he did not commit the sexual act under coercive circumstances, he would be entitled to his acquittal.

[148] I have summarized the evidence of the accused, and it is not necessary to

⁸⁹ Record p 654-655

duplicate it here. Suffice to say that he in his evidence, explained what his version was in respect of the alleged incident. Initially, the accused suggested that the complainant laid the complaint because of the money he did not give to her. The money that is referred to is the amount of N\$580.00 that was outstanding of the N\$1000.00 he says he promised to her after he gave her an amount of N\$420.00. According to him, the complainant requested this N\$1000.00 for traveling to Keetmanshoop to visit her boyfriend. She needed it because she spent the money the boyfriend previously gave her for this purpose. He further stated that he left the house and in fact, withdrew the outstanding N\$580.00 to give it to the complainant when they would meet later that day as agreed for that purpose. After drawing this money, he phoned the complainant, but she did not answer her phone.

[149] He then went to the office to proceed with his work. After that he received a call from George asking him what he has done to the complainant as it seems she was on her way to the police station. So, he was shocked to hear that she will open a rape case while they had sexual intercourse by agreement.

[150] Under cross-examination the accused alleged that complainant was controlled by other people to lay the charge against him. He said these were political people and people who came between him and the complainant. When asked about the injury complainant said she suffered on her finger, he stated that people can injure themselves. At one stage in his evidence under cross-examination he suggested that the people controlling complainant could have told her to have consensual sex with him and the lay a charge of rape afterwards.

[151] When asked why complainant called her boyfriend if it was consensual sex, he stated that he thinks the boyfriend called and complainant might have said something that made him suspicious. Hence the rape allegation. When asked why complainant called all these people to report the rape, he suggests that she did it to spice up her allegations.

[152] When asked about Selma Amukutwa's evidence that he called to arrange payment he said they were the people asking to be paid. He also accused Selma of being part of the group of people who planned this. He also stated that she was

jealous of the success of his business.

[153] When asked why he sent the apology text message to complainant he said because complainant requested it.

[154] He denied sending his parents to complainant. When asked if they then went there on their own initiative, he said the complainant requested that they come.

[155] When asked why he sent the text message saying: 'I know you are feeling bad but I am also regretting all my actions. Please, please if you can forgive me about this, I am sorry and I mean please. It would be bad news to me as you know I am planning to get married next year and if this case goes on it will affect the whole process. Please reply I am sorry' he stated that complainant requested him to apologize. This message was sent on Friday 11 October 2014 at 18:20.

[156] When asked why he sent the text message saying: 'I regret what happened and it was done in a moment of drunkard state. So I can make it right, please please' he stated that he was not drunk. He however did not deny saying the words contained in the text message. This message was sent on 11 Friday October 2014 at 19:20.

[157] When asked why he sent the text message saying: 'Hosiana you know we are family. I really regret my actions to you. I am very sorry please forgive me. Think about the future I am entitled to help you still after the issue. I am sorry I will not hate you after this please help me, I'm sorry. I was looking for you yesterday but I did not find you home, please I'm sorry.' sorry' he stated that complainant requested him to apologize. This message was sent on Sunday 13 October 2014 at 11:51.

[158] When asked why he apologized for something he did not do, he said that he was threatened that the case will proceed, and he will go to prison.

[159] In re-examination he was asked to read the text message in which the complainant requested the apology and which caused him to send the apology text messages he read into record one that said: 'I do not want another person to come in between because my intention is for me and you to sit together to speak together so that I

can calm down because I want an apology which is coming from you so that I can become better.'

[160] In this case, it is not in dispute that the accused sent text messages to the complainant on 11, 12, and 13 October 2014. It is also not in dispute that the complainant and the accused exchanged text messages on 17 October 2014. The complainant read the aforesaid text messages into the record from her cellphone, from where it was stored from the dates in question, until she gave this evidence. The phone was handed in as an exhibit. Complainant confirmed her own text messages. The content of these text messages was never disputed in cross-examination. Nor was it denied in cross-examination that the text messages read into the record came from the accused. Nor was it alleged in any shape or form that these text messages from the accused's phone were changed in any way or tampered with to display something different from what the accused attempted to convey when sending it. Furthermore, he never alleged in evidence that someone else used his phone to forward these text messages to the complainant.

[161] Ms. Kishi argued before this Court that the position of Namibian Law is that cellphone messages are inadmissible. In developing her argument, she stated there is no law in Namibia to allow electronic evidence into evidence. She raised the question on which basis the cellphone messages were admitted into evidence. In paragraph 8.3 of her heads, she pointed out that information obtained from computer printouts can only be admissible only if the computer's function was purely passive in that it merely recorded or stored data. If the computer conducted active functions over and above storage, the evidence is inadmissible. She concluded that the text messages were thus inadmissible and should be excluded from the evidence. She however in the defence case made use of the text messages as was shown hereinbefore.

[162] Firstly I must point out that it was never suggested that the text messages came from a computer that conducted active functions in respect of the messages other than storing it. Authenticity cannot be a problem if both sides accepted the correctness of the said text messages.

[163] I believe the issues raised by Ms. Kishi is easier to resolve in the following manner if one takes the facts of this matter into account. Rather than attempting to type the evidence and then decide whether it is admissible one should start by considering whether the evidence would be admissible in the circumstances of this case. The question of admissibility of evidence is whether the evidence is relevant to a fact in issue in the case. Admissibility is always decided by the judge and all relevant evidence is potentially admissible, subject to common law and statutory rules on exclusion. Relevant evidence is evidence of facts in issue and evidence of sufficient relevance to prove or disprove a fact in issue. What is a fact in issue will depend upon what the elements of the offence charged are and, as a result, what the prosecution has to prove and any defence raised by the accused person. Section 210 of the Criminal Procedure Act, 1977 frames this principle in a someone different manner.⁹⁰

[164] It is clear that the text messages are relevant to facts in issue and of sufficient relevance to prove or disprove a fact in issue. The fact in issue being whether the sexual act was committed under coercive circumstances or not. There is no common law or statutory rule excluding the evidence. The text messages are thus admissible.

[165] What is abundantly clear from reading the evidence is that vital aspects of the complainant's evidence were not challenged in cross-examination. These include the text messages' content sent to the complainant and the text messages the complainant sent to the original investigating officer. The same can also be said about the text messages between complainant and the accused on 17 October 2014. Neither was it suggested in any shape or form that the complainant did not share the text messages she forwarded to the accused and his replies to it on 17 October 2014 with the second investigating officer.

[166] What is clear is that the accused knew quite shortly after complainant phoned George and Magano that the complaint reported that he has raped her. This was

⁹⁰ Irrelevant evidence inadmissible

210. No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings.

also conveyed to the mother of the accused shortly afterwards. That the family was aware as well is clear and not disputed.

[167] The text messages forwarded to the complainant on 11 and 13 October 2014 appear to favour the complainant's version more than the accused's version that nothing untoward happened between the two of them. He, however, explains it, saying that he apologized because the complainant requested it. When asked under re-examination to identify the text message that compelled him to apologize, he referred to a specific text message already on record and again read it into the record. He relied on this text message to explain why he apologized and sent the apology text messages if he had nothing to apologize for. The respondent did not realize when doing so that the text message he relied on was only sent by the complainant on 17 October 2014 when she attempted to entice him into meeting with her to be arrested. This text message was a reaction after he offered to send someone else with money to her or deposit the money into her bank account. He could not have reacted to such a text message when he sent his text messages of 11 and 13 October 2014 because the complainant did not yet send it.

[168] He made a similar mistake when he was asked why Selma Amukutwa said that when he called, he wanted to arrange payment. His answer to that was that they were the people asking to be paid. He clearly forgot that Selma said he phoned on Sunday 13 October 2014. The discussions about payment between him and complainant only started on 17 October 2014.

[169] When the accused's evidence is considered, it is apparent that he is not afraid of blaming others for what happened on the date of the incident. Some of these explanations sound hollow and even farfetched in the circumstances of the case. His explanation as to why he sent the three text messages apologizing is patently false and must be rejected.

[170] The text messages sent by the accused to the complainant on 11 and 13 October 2014 after he was aware that she is alleging that he raped her and laid a complaint against him corroborates the complainant's evidence that she was raped and that the sexual act perpetrated on her happened under coercive circumstances.

This corroboration means that she is no longer considered to be a single witness. Even if I am mistaken in this regard, I am satisfied that the complainant's evidence is trustworthy and that the truth has been told. Though her evidence is not perfect in every respect, it is satisfactory and cogent on material aspects and reliable.

[171] When considering the merits and demerits of the state and defence witnesses, together as well as the probabilities I find that the defence case does not establish a reasonable hypothesis as the inherent strengths, weaknesses, probabilities and improbabilities on both sides weighs so heavily in favour of the State that any reasonable doubt about the accused's guilt is excluded. The version by the accused is false beyond a reasonable doubt and the State has proven the charge against the accused beyond a reasonable doubt. The accused should thus be convicted.

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

1. The appeal is allowed and the acquittal by the Regional Court Oshakati is set aside.
2. The acquittal by Mr. Hangalo of Respondent on 13 February 2019 in OSH-CRM-2341/2015 is substituted with the following: The Accused is convicted of Contravening Section 2(1)(a) read with sections 1, 2(2), 2(3), 3, 5 and 6 of the Combating of Rape Act, Act 8 of 2000, read with Section 21 of the Domestic Violence Act, Act 4 of 2003.
3. The matter is referred back to the court a quo for continuation and finalisation before Mr. Hangalo
4. The Respondent is instructed to report himself to Chief Inspector Shimii of the Gender Based Violence Unit at 08:00 on 19 February 2021 to be taken for an appearance before the Regional Court Oshakati.

D. F. SMALL
ACTING JUDGE

I agree,

H C JANUARY
JUDGE

APPEARANCES

APPELLANT:

Mr. L. Matota

Prosecutor General Office, Oshakati

RESPONDENT:

Ms. F. Kishi

Dr. Weder, Kauta & Hoveka, Oshakati