



**CASE NO.: CC 56/2007**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

**TOBIAS NAHENDA**

**First Accused**

**MATEUS NUUGONYA**

**Second Accused**

**SIMON PETRUS**

**Third Accused**

**FILLIPUS NAMASHONGO**

**Fourth Accused**

**FESTUS SHIPANGA**

**Fifth Accused**

***CORAM:* SILUNGWE, AJ**

Heard on: 23/09/2008; 24/09/2008; 25/09/2008; 26/09/2008;  
30/09/2008; 01/10/2008; 02/10/2008; 03/10/2008; 06/10/2008;  
08/10/2008; 09/10/2008; 10/10/2008

Delivered on: 12/12/2008

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**JUDGMENT:**

**SILUNGWE, AJ:** [1] All five accused are arranged on a total of fourteen counts, thirteen of which are for rape, in contravention of section 2(1)(a) read with sections 1, 2, 2(3),

3, 4, 5 and 7 of the Combating of Rape Act, Act 8 of 2000, but the fourteenth count is for kidnapping. Each accused faces counts as set out hereunder:

Accused 1: Counts 1, 6, 10 (rape) & 14 (kidnapping);

Accused 2: Counts 2, 7, 10, 11, 13 (rape) & 14 (kidnapping);

Accused 3: Counts 3, 11 (rape) & 14 (kidnapping);

Accused 4: Counts 4, 8, 12 (rape) & 14 (kidnapping) and

Accused 5: Counts 5, 9, 13 (rape & 14 (kidnapping)).

Accused 2 (Mateus) is alleged to have caused the following co-accused to commit rape on JM (J) the complainant:

Accused 1 (Tobias): Count 6;

Accused 3 (Simon): Count 11;

Accused 4 (Fillipus): Count 12 and

Accused 5 (Festus): Count 13

[2] The crimes, to which all accused persons pleaded not guilty, are alleged to have been perpetrated upon JM – a female student – on October 27, 2006, at or near Onayena in the district of Ondangwa. In his plea explanation, Mateus states that he was in a love-sexual relationship with JM, the complainant, both of whom were schoolmates at Onehale Secondary School. In the evening of October 27, 2006, Mateus met with the complainant in a classroom of their school after she had been brought there by a female student called AH. Both he and his girlfriend voluntarily remained in the classroom until the Girls' and Boys' Hostels closed. Then, both of them slipped through a hole in the school fence and voluntarily went to sleep in a

flat a few metres away from, and outside, the school premises. There, they consensually had sexual intercourse while his four co-accused, who had also been locked outside the Boys' Hostel, were at Lubango nearby. He and the complainant usually had sexual intercourse in that flat.

[3] The State is represented by Mrs Barry, the Deputy Prosecutor General, while the accused are all represented by Mr Namandje who is briefed by the Directorate of Legal Aid.

[4] It is common cause that during the period October 25 – 31, 2006, the accused, then aged 22, 19, 21, 19 and 18 years, respectively, as well as the complainant, then aged 16 years, were all schoolmates at Onehale Senior Secondary School within the district of Ondangwa. This is a boarding school for both female and male students. The accused were not only schoolmates but also roommates in their final year (that is, in Grade 12) at the school. The complainant was in Grade 11, having joined the school at the beginning of the 2006 academic year. Thereafter, Mateus and the complainant entered into a relationship as boyfriend and girlfriend. By October 27, 2006, they had been in that relationship for six months. The complainant had a girlfriend – Miss LL – who lived in a flat at Benguella Flats, outside but next to Onehale School fence. Mateus and the complainant were familiar with that flat as they had had sexual intercourse therein prior to October 27, 2006.

[5] The case for the State is that, on October 25, 2006, at about 20h00, Kandjambanga Panduleni (Panduleni), a school and roommate of the accused persons and now a State witness, heard Festus Shipanga (Accused 5) talk in the presence of other room-mates about fucking LP (L) (also a schoolmate) in a chain form. Subsequently, Simon Petrus, who in evidence turned out to be Simson (Petrus) (Accused 3) went out in search of L.

[6] In the evening of October 27, Petrus went to look for L again but to no avail whereupon Mateus told his now co-accused that he had a substitute – JM – now the complainant whom they were going to “fuck” in a chain form. This was said in Panduleni’s presence. After that, Panduleni retired to his (as well as the accused’s) dormitory and slept therein alone.

[7] The gist of the complainant’s testimony is that, during the evening of October 27, 2006, she was informed by AH that Mateus was calling her to go to Grade 12 B classroom, and so, she proceeded to the said classroom, in the company of Alfeus. Upon arrival there, Mateus also showed up and, at that point, Alfeus returned to her dormitory. Mateus then told the complainant that they should go into a storeroom within the classroom and she obliged. While in the storeroom, Mateus told her to have sexual intercourse with him but she refused because she did not want to do so. He threatened to beat her up and lock her in the storeroom where she would sleep alone. They were in the storeroom for quite sometime. Upon a realization that the Hostel’s were about to close for the night, Mateus said to her that they should go and sleep in the (usual) Benguella flat (flat). When they left the storeroom, they discovered that the classroom steel door was locked. Someone unlocked the door from outside, allegedly after Mateus had made a missed call. While Mateus was locking the classroom door, the complainant started to head back to the Girls’ Hostel but someone pulled her back and she was then joined by Mateus who held her by the hand, pulled and told her to move fast. This was still within the school premises. As they approached the school fence and went through the drainage hole in the fence, the complainant was no longer being held by Mateus.

[8] When they approached the flat, they were by themselves. On entry into the flat, Mateus told her to have sexual intercourse with him. She then took off her clothes and lay down on

bed. Mateus used a condom and they had sexual intercourse. When they finished, Mateus got up and went outside.

[9] The complainant remained in bed. Someone she thought was Mateus came into the flat and had sexual intercourse with her. Towards the end of the sexual intercourse, she realized the man was not Mateus because his behaviour was different, at the same time, she saw two persons at a window and one at the door. That stranger, whom she was unable to identify because of darkness in the flat, got up and left the flat. The complainant too got up and put on her knickers.

[10] There then came a second stranger into the flat and demanded to have sex with her. She refused but Mateus came into the flat and said to her:

Why are you behaving stupidly? Let him have sex with you.

He (Mateus) then held the complainant's legs while the second stranger got on top of her and had sexual intercourse with her. The complainant could not see the second stranger too as it was dark. That stranger and Mateus left the flat.

[11] After that, a third stranger came into the flat and demanded to have sex. By then, the complainant was exhausted, confused and unable to resist the intruder. Thereafter, she was allegedly raped repeatedly by the perpetrators. At the end, Mateus told her that he was going to leave one of them behind while he escorted the others, adding that, upon his return, he should find that the man had finished. He then left with the others but did not return to the flat. The

complainant refused to have sexual intercourse with the remaining person and, after a while, he too left. She spent the night there alone as it was late and there was nowhere she could go.

[12] Apart from Mateus, the complainant could not identify any of the other perpetrators on a count of darkness in the flat during her ordeal. She had not given consent to any of the perpetrators to have sex with her.

[13] In the morning of October 28, when it was light but before sunrise, she returned to the Girls' Hostel, got her dormitory key from Karen, the Head girl, went to her dormitory and slept. After breakfast, she reported to Maria Anyolo, her room-mate, about what had been done to her and later reported to the headgirl as well as to Elifas Iimene, the School Principal. Both Maria and Elifas are State witnesses but Karen is not. Mrs Barry justifies the non-calling of Karen as a State witness on the ground that the complainant told her what she had told Maria and that there was thus no need for repetition. Maria's testimony is, *inter alia*, that the complainant looked disturbed when she narrated her story to him. Elifas too confirms that the complainant looked confused and scared as she narrated her story. Both Maria and Elifas attest that the complainant told them she refused to have sexual intercourse with Mateus when the latter proposed this to her in the storeroom and that she was then threatened by him. Further, Elifas confirms the complainant's evidence that Mateus made a missed call in the classroom. Contrary to the complainant's evidence, however, Maria and Elifas testify that the complainant told them (as she later told the police) that Mateus had assisted the second person to have sexual intercourse with her, whereas her testimony is that it was the third person that Mateus assisted. When cross-examined about this discrepancy, her response is that she was confused, adding that it is human to make a mistake in such circumstances as she had found herself.

Despite rigorous cross-examination, she maintains her testimony that it was not the second person but the third one that Mateus assisted.

[14] Having listened to (and read) the complainant's evidence, it is undeniable that she went through a harrowing experience during the evening or the night of October 27, 2006. I find that the complainant is sincere in her evidence and accept that she was in a state of confusion when she referred to the second, rather than to the third perpetrator, when she narrated her ordeal to Maria, Elifas and the police. It is thus hardly surprising that she broke down at some stage in the course of testifying about her traumatic experience during the trial and the Court had to go into a short recess to enable her to regain her composure. Although she has been subjected to long and thorough cross-examination, she has remained steadfast in her testimony.

[15] To pick up Panduleni's version from where it was left, at about midnight of October 27, Tobias, Mateus, Phillipus and Festus (Accused 1, 2, 4 and 5, respectively, returned to their dormitory and Mateus then aroused Panduleni and told him that they had "fucked" JM. Panduleni knew who JM was and also understood Mateus' reference to them as meaning Mateus and the other room-mates because he had previously intimated to them that they were going to "fuck" that person. Mateus told Panduleni about what they had done to J without being prompted to do so. Some 12 to 15 minutes later, Petrus (Accused 3) also arrived in the dormitory. This piece of evidence tends to corroborate in no small measure the complainant's version that one of the perpetrators stayed behind when Mateus and others exited the Benguella flat, the scene of the crime of rape. After Mateus had told Panduleni about their sexual exploits, the five accused then started chatting among themselves saying such things as:

"You don't know how to fuck."

“I fucked her so many times.”

Panduleni can't remember who said what. He testifies that his relationship with his roommates – all the accused – prior to and since that date, has been and remains good: there are no problems between him and any of them.

[16] On October 29, the police came and arrested Panduleni's roommates. Panduleni was himself not treated as a suspect and this is confirmed by Constables Simon Uusiku, Settykesria Kapembe and Sergeant Epafras Tonata, all of Okatope Police Station. Like the complainant and other State witnesses, Panduleni has been rigorously cross-examined. Although a few shortcomings have surfaced during cross-examination, such as whether Panduleni saw Petrus (Accused 3) talking with Paulus L, et cetera, I do not regard those shortcomings as materially or adversely affecting Panduleni's version of events that he witnessed in the matter, contrary to Mr Namandje's ardent submissions. For instance, I do not accept Mr Namandje's submission that Panduleni wants to see the accused convicted at all costs. Conversely, I see nothing in his evidence that even remotely suggests that he wants convictions at all costs. In essence, I find him to be a credible and trustworthy witness.

[17] I now turn to the evidence of police witnesses. I will start with Const. Uusiku and Sgt. Tonata. Const. Uusiku received a report from the complainant on October 29, 2006, whereupon he and Sgt. Tonata visited the complainant's school and approached Mateus who had specifically been implicated by the complainant. On being asked who had been with him in the evening of October 27, Mateus identified all the four co-accused. All of them were then taken to a classroom where Const. Uusiku allegedly explained their rights to them, questioned them individually and, after they had given their statements, he arrested them all for rape. Sgt.

Tonata's evidence is, however, at variance with that of Const. Uusiku in that he says that the accused, having been interviewed by Const. Uusiku, were all arrested and only then were their rights explained to them. On account of that material flaw in the State's case, the resultant responses by the accused persons were ruled inadmissible.

[18] In a somewhat similar vein, when Const. Kapembe formally charged the accused persons on October 31, she explained their rights to them but omitted to say anything about their right to approach the Legal Aid Directorate for legal representation! On that score, the ensuing statements by the accused were similarly ruled inadmissible.

[19] With regard to the police evidence of pointings out, this was admissible as the requisite explanation of the accused's rights had been done before the pointings out could be made. Const. Uusiku testifies that, following Mateus' indication that they had used condoms, he (Mateus) led them all to the Benguella flat in question where each accused showed the police the whereabouts of their respective used condoms. According to Const. Uusiku's testimony, every accused went and picked up two such condoms, with the exception of one of them who picked up one condom only. Const. Uusiku is unable to recall who picked up two condoms or who picked up one condom only. But Sgt. Tonata can't remember how many condoms were retrieved from the bush.

[20] Thereafter, both police officers, as well as all the accused, proceeded to Okatope Police Station. On arrival there, the condoms which were in Const. Uusiku's possession, were handed over to, and left with, an officer who was on duty in the charge office. The accused were then detained.

[21] When cross-examined about condoms, Sgt. Tonata's response is that he is not aware that Tobias (Accused 1) was asked on October 31, 2006, to search for condoms or that Tobias picked up six condoms from a waste paper container in Okatope Police Station's charge office. I find this piece of evidence inexplicable since the position of Tobias and of the other co-accused, save Mateus, is that none of them picked up any condoms at the Benguella flat.

[22] As it is common cause that the condoms have not been produced in evidence as exhibits, Mrs Barry is at plans to explain their non-production. The import of her explanation is that the State's leading of the evidence on condoms is for the purpose of showing that the accused know something about the Commission of the crime of rape. With due respect, this explanation cuts no ice with me. It is mind-boggling that the police, not to mention the State, failed to appreciate the significance of sending the said condoms for forensic examination the results of which could well have provided decisive evidence for the State. Hence, those condoms were absolutely crucial to the State's case.

[23] The case for the defence is one of denial of the crimes allegedly committed in the matter. The position of Mateus is essentially epitomized by his plea explanation previously referred to. A summary of his evidence is that he did not conspire with any of the co-accused to commit the crime of rape. In the evening of October 27, 2006, after dinner, he asked AH to call his girlfriend – the complainant – to meet him at a classroom. This was done. When they met, they charted together for sometime about love in a storeroom within the classroom. Thereafter, he proposed to have sexual intercourse with her and she agreed. This was when the Boys' and Girls' Hostels were about to close. Both of them left the storeroom and the classroom. With no one else present, they headed for the Benguella flat where they had previously had intercourse on four separate occasions. To get to the flat, they avoided using a school gate which was

manned by a security guard by passing through a drainage hole in the school fence. On arrival at the flat, at 10 pm, he unlocked the door with his key which he used to use at weekends. When they entered the flat, he took off his clothes, put on a condom, the complainant too undressed herself and they had consensual sexual intercourse. After finishing, they remained in bed for a little while.

[24] After that, Mateus got out of bed, dressed up and told the complainant that he was going to Lubango Bar, which is about 80 – 100 metres from the flat. Thereafter, he handed her the key to the flat and left for Lubango Bar at about 11 pm.

[25] At Lubango Bar, Mateus joined his four co-accused. There were other students there as well as non-students. He bought soft drinks which he shared with the co-accused and they played pool. Later on, at about 11:40 pm, Tobias proposed that they should leave as it was getting late. They all returned to the Boys' Hostel and managed to gain access thereto as the lock was defective. This is contrary to P's evidence to the effect that Petrus (Accused 3) returned to their dormitory about 12 – 15 minutes after the other co-accused had arrived. Mateus avers that the complainant could not get back to the Girls' Hostel as it had been locked (at 9 pm).

[26] Mateus denies having threatened the complainant in the classroom, having forced her to go with him to the flat or having raped her. He further denies the presence of anyone else, besides the two of them, outside the classroom,. According to Mateus, upon their return to the dormitory, they did not discuss anything as it was late; neither did they discuss about having fucked the complainant or that some did not know how to fuck. Also denied is the

complainant's evidence that he raped her, that he helped a perpetrator to have sexual intercourse with her or that he kidnapped her.

[27] With regard to the condom he had used during the evening of October 27, 2006, Mateus went to a certain shrub where he had thrown the used condom, picked it up and put it into a plastic bag provided by Const. Uusiku. He denies that any of his co-accused picked up any condoms outside the flat.

[28] Tobias (Accused 1) confirms in his evidence that he and his co-accused, as well as P, shared the same dormitory at Onehale Senior Secondary School. He, however, denies that he was present when the alleged plan to fuck LP took place because he was studying. He did not even get to hear about such plan.

[29] According to Tobias' evidence, on October 27, 2006, after studies which ended at 8:30 pm, he, Petrus (Accused 3), Phillipus (Accused 4) and Festus (Accused 5) went to Okalunga Bar, about 100 metres from the school. Some other students too were there. They went there at about 9:30 pm to drink. Phillipus told him and the other two co-accused of a telephone call he had received from Mateus indicating that he should find them at Lubango Bar, some 80 metres away from Okalunga Bar. The four of them then proceeded to Lubango Bar.

[30] When Mateus joined the four co-accused at Lubango Bar, he bought them some cold drinks which they finished drinking at 11:30 pm. Thereafter, Tobias told the other co-accused that they should all returned to the dormitory. They did so and, on arrival, found Panduleni asleep. According to Tobias, nobody awakened Panduleni up. They then went to sleep in their respective beds.

[31] On October 29, 2006, Tobias saw Mateus come in the company of the police. He and the other co-accused were subsequently arrested on that day. He denies having had sexual intercourse with the complainant at the flat. He did not go to, or enter any flat at the Benguella flats during the evening of October 27, 2006. He did not hear anyone talk about fucking LP or plan to fuck the complainant. Further, he never heard Mateus say that he had found JM (complainant) to be fucked neither did he hear anyone tell someone that such and such person did not know how to fuck. He did not know the complainant until he saw her at Okatope Police Station.

[32] When the police took Tobias and the other co-accused to Benguella flat, four of them remained in the police motor vehicle while Mateus went out of the vehicle with the police and then proceeded to a certain shrub where he picked up one condom and handed it over to the police. Neither he nor any other co-accused (apart from Mateus) picked up any condoms as alleged by the police.

[33] Petrus, Phillipus and Festus (accused 3, 4 and 5, respectively) all corroborate the evidence of Tobias as well as that of Mateus in all material respects, in so far that such evidence relates to them. It is, therefore, unnecessary to restate their evidence in any detail.

[34] Petrus knows LP who was his schoolmate at Onehale Senior Secondary School. They had been schoolmates from Grade 1 to Grade 12 and had together been in a relationship as girlfriend and boyfriend for four years. On October 27, 2006, both were still in that relationship.

[35] Petrus denies having heard any of the co-accused ever planning to fuck L or the complainant in a chain form. He further denies having raped the complainant at the flat on October 27, 2006, as alleged or picked up any used condom at that flat.

[36] Although Phillipus (Accused 4) knew the complainant as a schoolmate at Onehale Senior Secondary School, he never heard any of his co-accused plan to have sexual intercourse with her or with LP in a chain form. He further denies having raped the complainant at the Benguella flat on October 27, 2006, neither did he visit that flat on that day, as alleged. Like Tobias and Petrus, he denies having picked up any condom or condoms at that flat on October 29, 2006, as alleged. He admits, however, that he was a roommate of all the co-accused as well as of Panduleni and that, in the evening of October 27, he was in the company of Tobias, Petrus and Festus at Okalunga Bar and that they were later joined by Mateus at Lubango Bar. When they returned to their dormitory, he did not hear anyone talking about someone not knowing how to fuck or that someone had fucked the complainant so many times.

[37] As regards Festus (Accused 5), he too echoes the testimonies of his co-accused in so far as they relate to him. He was his co-accused's room-mate as well as that of Panduleni. He knew the complainant and LP prior to October 27, 2006, as schoolmates at Onehale Senior Secondary School.

[38] Festus denies having planned to have sexual intercourse with LP or with the complainant, neither did he hear any of the co-accused planning to fuck L or the complainant. In addition, he denies having raped the complainant on October 27, 2006, at the flat. He did not visit that flat on that day, neither did he pick up used condoms outside the flat on October 29, 2006. He avers that, in the evening of October 27, he, Tobias, Petrus and Phillipus (accused 1, 3

and 4 respectively) were at Okalunga Bar before they relocated to Lubango Bar where they were joined by Mateus. Upon their return to their dormitory, they found Panduleni, their roommate, asleep and they did not discuss anything about who does not know how to fuck or how many times any of them had fucked the complainant.

[39] From the foregoing resumé of the evidence, it is apparent that Mateus' defence is that he had consensual sexual intercourse with the complainant, his then girlfriend, and thus lacks any criminal involvement against the complainant. The other co-accused distance themselves from any criminal planning or practical activity against the complainant. In other words, the defence perspective is that the State witnesses, in particular, the complainant and Panduleni are not credible witnesses, with the result that the State has failed to discharge its burden of proof beyond a reasonable doubt.

[40] On the contrary, the State urges the Court to find that, although there are some shortcomings in the evidence of its witnesses, such shortcomings are not material and that, as such, the evidence adduced is credible and should thus result in convictions of all accused persons as follows: two counts on rape against Accused 1, i.e Counts 1 and 6; two counts of rape against Accused 2, i.e Counts 2 and 7; and one count of kidnapping, i.e Count 14; one count of rape against Accused 3, i.e. Count 3; two counts of rape against Accused 4 and 5, i.e, Counts 4 and 8 and Counts 5 and 9, respectively. The State concedes that the kidnapping count has been proved only against Accused 2 but not against Accused 1, 3, 4 and 5.

[41] Having given due consideration to the evidence before me, I am satisfied that, notwithstanding some shortcomings here and there in the evidence adduced by the State, the truth has been told, especially by the principal State witnesses, namely, JM, the complainant,

and Kandjambanga Panduleni, on whose evidence the case for the State rests. I accept their evidence as substantially true.

[42] To put in motion the execution of the plan against the complainant, Mateus used Helena Alfeus, another schoolmate of his, to invite the complainant to meet him at the Grade 12B classroom. Both Alfeus and the complainant responded positively but, shortly afterwards, Alfeus left Mateus and the complainant alone. Thereafter, Mateus engaged the complainant up to a point that he asked her to have sexual intercourse. The complainant declined to do so. It seems Mateus persisted with his request but to no avail. Mateus then resorted to threats of violence and kidnapping. When he apparently realized that the Girls' and Boys' Hostels were about to close, he indicated to the complainant that they should relocate to the familiar Benguella flat. I believe the complainant's evidence that when they left the storeroom, they found the steel door of the classroom locked and that Mateus signaled someone, by means of a cellphone, who came and unlocked the door. It is likely that this was done by Mateus' roommate. I accept the complainant's testimony that Mateus pulled her by the hand and told her to move fast as they headed towards the drainage hole in the school fence, en route to the flat.

[43] I further accept that when they got into the flat, Mateus told the complainant that they should have sexual intercourse; she undressed, lay on bed, Mateus put on his condom and they had sexual intercourse. When they finished, Mateus left the flat and went outside while the complainant remained in bed. Someone, whom the complainant believed to be Mateus, entered the flat and began to have sexual intercourse with her. When he was about to finish, the complainant realized this was a stranger and, at the same time, noticed two people at the window and one at the door. Had she not thought that the stranger was Mateus, she would not have had sexual intercourse with him.

[44] The question that arises is: whether Mateus and the complainant had consensual sexual intercourse, as he (Mateus) alleges and is backed by Mr Namandje's submission, or it was rape, as the complainant claims and is supported by Mrs Barry's submission.

[45] The complainant maintains that she believed that she was still under Mateus' threat. She, in any event, could not have gone back to the Girls' Hostel as it had been locked, a reality that at least Tobias, Mateus and Petrus have testified to.

[46] Mr Namandje argues that the sexual intercourse could only have been consensual since the last threat had been issued inside the classroom. Mr Namandje's submission overlooks the complainant's testimony that, apart from the threats, Mateus pulled her by the hand as he told her to hurry up. Further, it is to be recalled that the threats and the pulling featured in the complainant's reports to Maria, Elifas (the school principal), Johannes Angula (the supervising teacher), as well as in her statement to the police. The threats and the pulling were indeed authentic. I believe the complainant's testimony that the said threats were still operating on her mind when Mateus had sexual intercourse with her. Consequently, he made himself guilty of rape and kidnapping.

[47] Tobias, Petrus, Phillipus and Festus (Accused 1, 3, 4 and 5) have all pleaded alibi, claiming that they were at Okalunga Bar during the time they are alleged to have raped the complainant. They all deny having visited the Benguella flat during the evening of October 27, 2006.

[48] In my judgment, I am satisfied, on the evidence of Panduleni that, on October 25, 2006, Festus conceived a plan for all the accused to have sexual intercourse in a chain form with L, who turned out to be Accused 3's girlfriend. Thereafter, efforts by Accused 3 to make L available for such sexual intercourse were unfruitful whereupon Mateus stepped in to make the complainant available. Mateus subsequently prevailed upon the complainant by means of threats and, after having had sexual intercourse with her, other co-accused did likewise by taking turns, one of whom was assisted by Mateus. Then, Mateus, Tobias, Phillipus and Festus returned to their dormitory leaving Petrus behind. On their return, Mateus aroused Panduleni and told him they had fucked the complainant. Shortly afterwards, Petrus also returned and comments were then made about the sexual experience they had just had.

[49] In the circumstances, I find that the evidence of Tobias, Petrus, Phillipus and Festus, supported by Mateus, to the effect that there was no scheme to have sexual intercourse in a chain form with L or the complainant and that they neither had sexual intercourse with the complainant nor visited the Benguella flat cannot reasonably possibly be true: it is false and is dismissed as such. I am satisfied that the only inference that reasonably flows from the circumstances of this case is that all the accused were sexual perpetrators against the complainant.

[50] Although the complainant's evidence shows that after the initial acts of rape, she was again repeatedly raped, there is no evidence to suggest that all the accused or which of them did that. In the premises, it would not be safe to convict any of them of a second crime of rape, besides Mateus who assisted the third perpetrator.

[51] As Mrs Barry has properly submitted in relation to count 14 (Kidnapping), Mateus alone is guilty on the said count.

[52] In conclusion, I make the following order:

**Accused 1** is convicted of rape on Count 1; but he is acquitted on Counts 6 and 14: (rape and kidnapping, respectively).

**Accused 2** is convicted of rape on Counts 2 and 3; and of kidnapping on Count 14; but he is acquitted on Counts 7, 10, 11, 12 and 13 (rape).

**Accused 3** is convicted of rape on Count 3; but he is acquitted on Count 14: (kidnapping).

**Accused 4** is convicted of rape on Count 4; but he is acquitted on Counts 8 and 14: (rape and kidnapping, respectively).

**Accused 5** is convicted of rape on Count 5; but he is acquitted on Counts 9 and 14: (rape and kidnapping, respectively).

**COUNSEL ON BEHALF OF THE STATE:**

Adv. Barry

**Instructed by:**

Office of the Prosecutor General

**COUNSEL ON BEHALF OF THE ACCUSED:**

Mr Namandje

**Instructed by:**

Sisa Namandje & Co.