

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC 13/2012

In the matter between:

THE STATE

and

REAGAN MBAIMBAI SITWALI

ACCUSED

Neutral citation: *The State v Sitwali* (CC 13/2012) [2012] NAHCNLD 08
(15 November 2012)

Coram: LIEBENBERG J

Heard: 30 – 31 October; 01 – 02; 05 – 07 November 2012

Delivered: 15 November 2012

Flynote: **Criminal Procedure** – Evidence – Evaluation of evidence of single witness – Cautionary rule applicable – Complainant's evidence self-contradicting with marked discrepancies on crucial aspects between her evidence and other State witnesses – Accused charged with abduction, alternatively kidnapping and three charges of rape, read with the provisions of

the Combating of Rape Act 8 of 2000, alternatively, committing or attempting to commit sexual acts with a person under the age of sixteen years – Accused’s explanation reasonably possibly true.

Summary: The accused pleaded not guilty on charges of abduction, alternatively kidnapping (count 1); and three charges of rape (c/s 2 (1)(a) of the Combating of Rape Act 8 of 2000), alternatively, committing a sexual act with a child under the age of 16 years (c/s 14 (a) of the Combating of Immoral Practices Act 21 of 1980 (counts 2-4). Complainant gave single evidence in respect of all the charges and whereas her evidence was supported on certain aspects not considered to be material, her evidence was also self-contradicting, while material discrepancies exist between her evidence and that of other State witnesses. The version of the complainant is irreconcilable with that of the other witnesses on crucial aspects of her evidence. Such evidence, sufficient to cast doubt on the veracity of the complainant who gave single evidence. The accused’s explanation, when considered together with the rest of the evidence, seems probable and is accordingly found to be reasonable and possibly true. The accused acquitted on all charges.

ORDER

Count 1: Main and Alternative counts – Accused found not guilty and discharged.

Counts 2–4: Main and Alternative counts – Accused found not guilty and discharged.

JUDGMENT

LIEBENBERG J:

[1] The accused is 26 years of age and stands charged with the crimes of abduction, alternatively kidnapping, and three counts of rape, read with the provisions of the Combating of Rape Act 8 of 2000. In the alternative to the rape charges, he is charged with contravening s 14 (a) of Act 21 of 1980¹ (as amended) for committing or attempting to commit a sexual act with a child under the age of 16 years. He pleaded not guilty on all charges and his defence during the trial that followed was conducted by Mr *Bondai*. Mr *Matota* appeared for the State.

[2] The crimes for which the accused is on trial were allegedly committed on 31 October 2006 at Katima Mulilo, and involves only one complainant, then 14 years of age. The accused at the time was 20 years old. In order to protect the complainant's identity (being a minor at the time) I shall refer to her in my published judgment as KB. Abbreviations will equally be used when dealing with the testimony of other minor witnesses or where reference is made to them in the published judgment. However, as for now I shall refer to them by name.

[3] It is common cause that at the relevant time the complainant, KB, had been living with her mother in their house situated in a residential area of Katima Mulilo, known as Lyambai location. Also that her mother IS had gone to the village a few days prior to the alleged incidents when KB was allegedly raped. A person by the name of Nico rented a room from Irene's house, but in my view, the presence or absence of this person during the relevant period plays no significant role in the outcome of the trial; neither was he called as a witness. Complainant was thus alone at home for the period 28 October to 01 November 2006 and had to care for herself in the absence of her mother who were only to return on the 31st, but was unable to do so due to illness. It is further not in dispute that complainant was friends with NM, then aged 15 years, and whose house was close to that of KB. She visited that house often

¹ Combating of Immoral Practices Act 21 of 1980.

and was also friends with NM's siblings called NS and MM. Accused was a neighbour to the complainant and was living with his aunt.

[4] Whereas the State case is entirely based on the single evidence of the complainant, it seems necessary to deal with her testimony in some detail. Complainant testified about three individual incidents during which she was raped; two of which taking place on the night of the 31st of October, while the third was on the morning of the 1st of November. The first incident of rape took place in some nearby bushes whilst the last two were at the complainant's room at home.

[5] Complainant said it all started at around noon on the 31st when she was about to leave home for the afternoon studies when the accused arrived and started accusing her of being the reason why his girlfriend, NM, broke up with him. He slapped her once on both cheeks and then left. I pause here to observe that the accused was not charged for this alleged assault on the complainant.

[6] It is common cause that complainant visited NM at home that evening and told her about the incident during which she got slapped by the accused. After complainant returned home she again later went to watch TV at NM's place. At some point she, NS, then aged 13 years, and MM (the younger brother), went to sit outside while NM and her mother retired for the night. Accused shortly thereafter turned up at the house enquiring 'with whom the next fight would be'. At this stage NS stood up and went inside the house whereafter the accused left. Complainant said that NM then came outside enquiring as to who was looking for her, but as the accused by then had already left, she returned inside the house, leaving complainant outside only with MM. When accused shortly thereafter returned, she and MM stood up to also go inside the house and it was then that accused grabbed her on the arm and started pulling her away. She shouted that he must let go of her but no one from the house came to her rescue. She was pulled on her arm down the road into nearby bushes where the accused told her to undress. When she refused he threatened to beat her. She did not resist him when he started

undressing her. He thereafter ordered her to lie down and had sexual intercourse with her. She said this was her first sexual encounter and she experienced it as painful. When he had finished he decided that they should next go to her mother's house which was nearby (approximately 30 m away) and when she refused, he insisted and pulled her on her arm from there up to the house.

[7] Up to this point it has been the complainant's testimony that she was unwilling to accompany the accused and had put up resistance when dragged away from NM's house until they reached the spot in the bushes where she was raped for the first time. When he told her to undress, he was no longer holding her. In view of the earlier assault on her when accused slapped her, she was afraid that he might carry out his threat to beat or even kill her. She then allowed him to undress her.

[8] On the way to the house they did not meet with anyone. When she refused to open the door of her room the accused again threatened to assault and kill her. Once inside, the accused locked the door but left the key in the lock. After she undressed herself on his instructions, he pushed her down onto the bed and had sexual intercourse with her for a second time. When he had finished he said that he would spend the night in her room and they remained together on the bed until the morning. Complainant said she was unable to sleep and could not tell whether or not the accused had fallen asleep during the night and therefore she was too afraid to try and sneak out. She however had to wake the accused in the morning when she informed him that she wanted to attend school.

[9] Complainant said that the accused then insisted on another bout of sexual intercourse and it was only after he had finished that he got dressed and left. Before leaving he said that if he ever were to hear about her telling anyone what had happened between them, he would hurt or kill her. It is against this background that accused, according to the complainant, had sexual intercourse with her against her will.

[10] NS arrived at complainant's room soon thereafter and found the complainant crying; however, complainant said that because of her being in pain and the accused's earlier threats, she did not want to explain to NS the reason why she had been crying. They decided to go together to NM's house as the latter's mother was also at home. There the complainant merely informed them that she had been raped by the accused. NM thereafter accompanied her to her grandmother, Cecilia Silimwe's, house to whom the rape incident was reported. She in turn proposed that the accused's grandmother should be informed, but as nothing came from that, it was decided that complainant should make a report to the police.

[11] At the Woman and Child Protection Unit (WCPU) complainant for the first time narrated to Detective Warrant Officer (D/W/O) Tuli the complete version of the events that took place the previous night. After making the report she was taken for a medical examination conducted by Dr Sanjobo at Katima Mulilo State hospital and who completed a medical report that was handed into evidence by agreement. Whilst at the hospital, her mother arrived and although she made a report to her about the rapes, she did not do so in any detail.

[12] The gist of the medical examination report handed in as evidence is that the left labia minora of the complainant's genitalia was bruised; the hymen was absent; and complainant experienced the examination as painful. Pertaining to the broken hymen, it is not reported that it was a fresh injury or that any sign of bleeding was present. In the absence of medical evidence explaining whether or not the broken hymen and the absence of blood are features consistent with complainant's evidence about her having had no previous sexual intercourse, I do not intend speculating as to the meaning and interpretation of what is noted in the report. It seems to me that the probative value of the medical report was correctly placed in context when Mr *Matota* submitted that the injuries mentioned in the report are not inconsistent with a consensual sexual act and does not *per se* prove an act of rape. Thus, the injury to the complainant's genitalia is neutral, and is neither here nor there.

[13] It is common cause that complainant was fetched by the police the following day for the pointing out of the respective crime scenes. According to the complainant there were marks on the ground at the scene in the bush denotative of a struggle that took place there. She was unable to recall whether footprints were equally visible.

[14] The complainant in cross-examination contradicted herself by first stating that she did not give NM and her mother the details of the rape as she was too traumatised, but later changed this to having told them that she had been raped in the bushes. However, she thereafter changed her version back to not having informed them where the rape took place. Though noteworthy, I do not consider the discrepancy to be material. However, when complainant's evidence is considered with that of some of the other witnesses where their evidence overlap, there are indeed material contradictions which deserve further scrutiny. I intend dealing next with the supporting and contradicting evidence given by the respective witnesses all in one, and thereafter consider the probabilities of the case.

[15] The complainant's evidence describing the circumstances immediately prior to her being forcibly pulled away from NM's house differs markedly from what NS and NM testified. It furthermore differs from what she narrated to the investigating officer about what happened on this point. NS and NM confirm the complainant's visit at their house that evening and that complainant, NS and MM after watching TV, went to sit outside the house while NM went to bed. NS also confirms the accused's arrival thereafter and that he made remarks about a fight which prompted her to go inside the house as she became scared of him. She also disputed allegations that the accused was called there by anyone. She said that although she tried to wake NM, this was not the reason why she had entered the house. Opposed thereto stands the complainant's evidence that NS, before entering the house, specifically said that she was going to call NM. This discrepancy in their evidence does not appear to me to be material. However, both NS and NM deny that NM, after she had gone to sleep, had left the house that night; further, there is no reasonable explanation for complainant's version that NM came outside to

check on the accused. Of equal importance is what followed thereafter, as this describes the circumstances under which the complainant left with the accused, forming the basis of the alleged subsequent incidents of rape.

[16] Complainant said the accused came to that house twice that evening, whilst it is clear from NS's evidence that it could only have been once; for when she returned outside after 2 – 3 minutes, the accused and complainant were no longer present. Unlike complainant who said that she was grabbed by the accused the moment she and MM were *entering the house*, NS upon her return, still found MM *sitting outside* where she had left him and the complainant.

[17] I pause here to remark that MM was not called as a witness as it would appear from a psychiatric evaluation report prepared by a certain Dr Simbi from the Katima Mulilo State hospital on the 5th of November 2012, and handed into evidence by agreement, that he is at this stage not fit to testify in court. However, NS confirmed that MM was (already) mentally challenged back then, but was of the view that he communicated very well with his relatives and those persons near to him. NS was one such person and in the circumstances prevailing that night one might have expected from MM to have made a report to NS about the strange circumstances under which the complainant had been forced to leave with the accused. Nothing was mentioned of that sort and even from NS's evidence one does not get the impression that something sinister happened in her absence.

[18] A third version as to the events taking place at NM's house came from D/W/O Tuli who testified that complainant on this point said to her that the accused came into the yard from the street, walked directly to her and grabbed her on her arm and started pulling her away from there. This all happened *in the presence of Ntuli and MM*. Closely related thereto is the complainant's evidence that when she was grabbed by the accused, she screamed for help. NS did not hear anything and there seems to be no reason why she should not have heard, because by then the TV (according to NM) had been switched off. D/W/O Tuli, on the contrary, said that she specifically

asked the complainant whether she had screamed for help when the accused pulled her away and she replied that she *did not scream but only cried*, quite the opposite from what she testified in court.

[19] There is also no evidence pertaining to possible marks made on the ground inside the yard when complainant was forcibly pulled away. According to NM the reason for this is because there was a rain shower during the night. One has to accept her evidence on this score because she had been cleaning (sweeping/raking) the yard in the morning and was in an excellent position to have made observations as regards drag marks made in the sand. Her evidence about the rain that could have destroyed imprints made in the sand is consistent with that of some witnesses who had come to the same conclusion pertaining to imprints found at the first scene of rape, which was just nearby. I will return to the alleged prints observed at the scene in the bushes later.

[20] Regarding the events taking place at the house of NM and which include the circumstances under which the complainant had left the scene together with the accused, it must from the aforementioned be clear that there are irreconcilable differences in the State's case which remains unexplained. Not only does the complainant's evidence on this aspect differ markedly from other witnesses, it is also self-contradicting when regard is had to what she told the investigating officer, one day after the alleged incidents, opposed to her testimony in court. Mr *Matota* submitted that the complainant's young age and time lapse of six years between the occurrence of the incidents of rape and the complainant giving evidence, might have a bearing on the quality of her evidence. I agree that it may indeed be reasonably possible and the argument should equally apply to the other witnesses; however, one would not expect that it would bring about such divergent versions as has been shown in this case. It appears to me inescapable to conclude that the complainant, at least as far as it concerns the circumstances leading up to her leaving NM's house in the company of the accused, did not speak the truth.

[21] Another factor that might equally have impacted on the veracity of the witnesses is the fact that complainant had afterwards narrated to NM and NS what had happened to her. It appears to me to be reasonably possible that these minor witnesses, over the years that followed, have become familiar with each other's versions and have adopted facts making it part of their own evidence which they did not witness or experience themselves. It is well known that young children are susceptible to influence and often find it difficult to distinguish between fact and fiction.

[22] Turning now to the first rape incident that took place in the nearby bushes, there appears to be even more contradictions pertaining to the existence or otherwise, of marks found at the scene during a pointing out made to the police by the complainant two days later. According to the complainant the accused let go of her once they had reached the spot in the bushes and when she refused to undress herself, he took off her clothes. She co-operated because she was afraid of the accused and when he told her to lie down, she obliged. Against this background I find the evidence of the complainant and those witnesses who observed 'struggle marks' on the scene questionable. When complainant was asked what exactly she had pointed out at the scene she replied that she only showed the police where the incident took place and *no specific marks*.

[23] Complainant's mother described the scene as one where 'struggle marks' and the footprints of two persons – one male and the other female – were clearly visible between a mixture of sand and grass. How the witness was able to distinguish between the prints, as she did, remains a mystery. It rather appears to me that she reached this conclusion purely on what she had learned from the complainant and not from her own observations.

[24] As for D/W/O Tuli, she testified about 'physical drag marks' and the marks made by someone who had been lying on his back. She confirmed that despite it having rained in the mean time, the drag marks were clearly visible. When confronted in cross-examination with the complainant's evidence that there was *no struggle* between her and the accused at the scene, she said

that complainant told her that '*after she (complainant) refused to undress, the accused grabbed her and put her down on the ground*' and that they '*struggled*'. This report made by the complainant to the investigating officer stands in sharp contrast with her *viva voce* evidence namely, that she lay down when told to do so and that the accused thereafter positioned him on top of her. These two versions, once again, are irreconcilable, for there should not have been any so-called 'drag marks' on the scene if there was no struggle or force used between the accused and the complainant.

[25] It certainly begs the question what marks were then observed by D/W/O Tuli two days after the alleged incident, in circumstances where it had been raining. Due to the rain shower on the night of the 31st of October NM was unable to observe any drag marks inside their yard. What then would the chances have been of making observations about drag marks at a different scene in close proximity of the first, after *two* days, and why is it that one witness observes footprints on the scene and the rest making *no* mention thereof in their evidence? As for the witness Tuli, the events of the 2nd of November during the pointing out do not form part of her witness statement, as she had already prepared her statement on the 1st and did not file a supplementary statement pertaining to subsequent events. She had merely refreshed her memory from the police docket and thus had access to the witness statements of all the other witnesses. That alone, in my view, should be sufficient reason to approach her evidence, where uncorroborated, with the necessary caution. I do not consider complainant's or Cecilia's evidence on this point to be corroboration, but rather contradictory.

[26] According to D/W/O Tuli the scene was such that Detective Sergeant Coetzee from the Scene of Crime Unit, who accompanied her, could photograph it. However, these photographs, after *six years*, were never printed and thereafter incorporated into a photo plan. According to Tuli, these photos '*are still out somewhere in the system*' (whatever that may mean). The production of photos taken at the scene would undoubtedly have clarified any uncertainty that might have existed about the presence of any marks or footprints on the scene; however, this is not to be and no satisfactory

explanation was proffered as to why it was not made available as evidence. I find the excuse that Sergeant Coetzee was transferred in the interim implausible.

[27] Thus, when deciding the veracity of the respective witnesses who testified on the marks or prints found at the first rape scene, it must be said that there is not one that can be considered trustworthy and whose evidence inspires trust and confidence in the court's mind. Hence, the totality of the evidence of the State witnesses on that aspect of the evidence does not necessarily support the complainant's version, but rather raises more questions than providing answers as to what really happened between the accused and complainant on that night.

[28] The complainant's evidence, pertaining to the second and third incidents of rape that took place inside her room during the course of the night and the following morning, is uncorroborated in all respects. She said that although the key remained in the lock of the door, she was too afraid to even attempt to flee or find help as she was not certain whether or not the accused was awake. This notwithstanding, she had to *wake* the accused the following morning when she told him that she wanted to go to school.

[29] The complainant's behaviour towards the accused after they had reached her room, must not be viewed in isolation, but must be considered together with the rest of the evidence. It would thus mean that, if the complainant was forcibly taken into the bushes where she was raped and from there to her room where she was again raped and kept hostage, then one could have expected from her that she subjected herself to the whims of the accused. On the contrary, had she accompanied him willingly and agreed to have sexual intercourse, as the accused claims she did, then, obviously, she would have reacted differently.

[30] Mr *Bondai* strongly submitted that one peripheral issue, namely, the confrontation of the complainant by the accused in the afternoon during which he allegedly slapped her, forms the basis of the complainant's alleged

demeanour during the subsequent incidents of rape that night and the next morning. This, so it was argued, is unconvincing and is not borne out by the facts.

[31] Although the accused admits that he went to see the complainant during the afternoon when he blamed her of being the cause of his breakup with NM, he disputes having assaulted her. Complainant said that since that incident earlier in the day, she was fearful and mindful during the period thereafter when forced to be with him, that he had already assaulted her and might execute his threats to beat her again or even kill her. Despite having reported the incident of assault to the police, it is common cause that the accused was never charged with this offence. I enquired from Mr *Matota* why the accused was never charged for assault, and whether the decision not to prosecute was taken by the State because the complainant, on this aspect of her evidence, was disbelieved. He submitted that it was merely an oversight on the side of his office when the charges against the accused were formulated. The omission is unfortunate and to a certain extent compromises the credibility of the complainant; particularly where the complainant said that she 'knew her rights'.

[32] Mr *Bondai* submitted that complainant sought to exaggerate the incident between her and the accused earlier in the day (and by fabricating evidence about an assault perpetrated on her), as it does not appear from her actions thereafter that she was terrified to the point that she wanted to stay indoors in order to avoid contact with the accused. On her own evidence, she went to NM's house *twice* in the evening without fearing to again meet with him; whilst she was the last person to remain seated outside when he turned up at NM's house; this despite a second warning he had given a few minutes earlier about an impending fight. Visibility outside was sufficient for her to have noticed the accused already when entering the yard the second time around, and this would have given her sufficient time to go inside the house. She however remained seated and explained this behaviour by saying that she was now with others. If NS appreciated the seriousness of the threat made

the first time, why not the complainant; more so, if she had already been assaulted by the very same person earlier in the day?

[33] I tend to agree with counsel that the complainant's behaviour in the circumstances appears to be inconsistent with that of a person who claims to have been fearful of the accused. On the contrary, it would rather be consistent with the accused's version that the complainant accompanied him willingly when they left NM's house together. It would also be consistent with the accused's evidence that he and complainant spent the night together in her room by mutual agreement and that she was not detained against her will. A worrying aspect of the complainant's evidence is that she had been lying awake the whole evening, without attempted to escape. Firstly, in the circumstances portrayed by the complainant one would not expect the accused to have left the key on the door lock if he intended holding her hostage; secondly, least when he decided to sleep over. That he indeed slept through the night was confirmed by the complainant who had to *wake* the accused the following morning. Whereas she had been lying awake with him on the same bed through the night, there must have been some indication from his side that he had fallen asleep. Although still at a very young age, the evidence shows that complainant was not completely helpless and dependent on others. She, on her mother's evidence, was used to be at home alone over weekends and had to look after herself. From this it seems reasonable to infer that she had learned during these (regular) periods of her mother's absence to fend for herself. I thus find her excuse for not even attempting to run away doubtful.

[34] It was further argued that, on the complainant's version, she had been screaming when forcibly pulled away from NM's house; yet, this went unnoticed in circumstances where not only the people of that house must have heard her screams, but most probably also persons living in a boarding house just across the street; as well as other persons in neighbouring houses where they had passed. It is common cause that there are street lights which light up the area along the way the complainant was allegedly pulled. It was shortly after 21h00 in the evening and the chances of people moving around

on the streets do not appear to be remote. In these circumstances I find it peculiar that the complainant's protestations and screams went unnoticed. Neither do the probabilities of the case on this point favour the complainant's evidence.

[35] When one looks at the circumstances leading up to the accused and the complainant going to her room, it appears from the complainant's evidence that the accused decided to do so on his own volition. It is against this background that Mr *Bondai* argued that the accused could not have known that the complainant's mother would not be at home, unless she had told him so herself. It was not the complainant's testimony that she was ever asked by the accused as to her mother's whereabouts. On the contrary, according to what the complainant had told her grandmother Cecilia, the reason why they had moved from the bushes to her room was *because they were bitten by mosquitoes*. This is something the complainant had not mentioned to anyone else and neither did she advance that as a reason why the accused decided that they should go to her room. It certainly begs the question why the accused in the first place would have decided to take the complainant into the bushes if he well knew that the complainant was alone at home?

[36] Be that as it may, it is the accused's evidence that after he and the complainant left NM's place together on their way home, he offered to buy her a soft drink at the shops and it was whilst on their way back that she invited him over to her place where they then once had consensual sexual intercourse that night. He disputes the complainant's evidence about her being forced into submission before being raped in the bushes or on the morning of the 1st of November. It was submitted by Mr *Matota* that the accused's claim to the benefit of doubt 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' (*S v Van Wyk*).² I respectfully agree.

² *S v Van Wyk*, 1993 NR 426 (HC) at 438J-439A.

[37] The only contradiction between the accused's evidence and that of another State witness (besides the complainant) is where NS confirmed the complainant's evidence about the accused upon his arrival at NM's house asked who is the next to fight. Also, in respect of her finding the complainant in tears the next morning. What followed thereafter is the complainant's narrative to the other witnesses about the events taking place the previous day. Their confirmation of complainant's narrative during their testimony is not considered corroboration, as it emanates from the same source ie the complainant. It is an established principle that corroboration should emanate from an independent source, and that the mere repetition of a story does not constitute corroboration, though it may prove consistency. In the latter instance the previous consistent statement of the witness is usually admitted in order to rebut an allegation of recent fabrication. See Schwikkard and Van der Merwe *Principles of Evidence* 2 ed at 497 and the cases cited. In *De Beer v Rex*³ at 34 it was said:

‘The evidence of the complainant made to the mother is not corroboration; it merely tends to show consistency of conduct on her part and so affects credibility . . .’

[38] Mr *Matota* urged the court to reject the accused's version as false in that his evidence about the accused and complainant first proceeding to the shops where he bought her a soft drink, was not put to the witness under cross-examination. However, this proposition is incorrect as the accused's defence on this point was indeed put to the complainant, which she disputed. What was not put to her is that she apparently made reference about the accused having money and that he could buy her a soft drink. I do not consider this to be material in any way and of significance when deciding the veracity of the accused. Although the purpose of accused going to NM's house that night may seem questionable, it does not in my view mean that he is therefore guilty of the crimes he stands accused of. It is not the accused's duty to prove his innocence and even if the court does not believe his story in all its detail,

³ *De Beer v Rex*, 1933 (NPD) 30.

the test is whether his version, considered together with the rest of the evidence, is reasonably possibly true. Once the court finds that there is a reasonable possibility of the explanation being true, then the accused is entitled to his or her acquittal.⁴

[39] The proper approach in a case as the present where the court is faced with two conflicting versions, is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses respectively, but also to consider the probabilities of the case.

[40] With reference to the contradicting evidence given by the complainant and other State witnesses, Mr *Matota* relied as authority on *S v Teek*⁵ where Brand AJA at para 20 said:

‘It follows that a list of contradictions between witnesses in itself leads nowhere as far as dishonesty is concerned. It is only when it has been established on other grounds that the one witness is reliable and the other one not that the evidence of the latter can be rejected.’

After due consideration of all the evidence adduced, whilst mindful of the provisions of s 208 of the Criminal Procedure Act 51 of 1977, and having followed a cautious approach in the assessment of the complainant’s single evidence, I am not persuaded that the complainant’s evidence is trustworthy in material respects, and that the truth has been told. Not only was she self-contradicting, her evidence is also contradicted by other witnesses who in turn corroborate one another, albeit on peripheral issues which indirectly impacts on the credibility of the witnesses. Consequently, it has not been shown beyond reasonable doubt that the complainant was taken away from NM’s house against her will; neither that she had been raped by the accused on three occasions thereafter. In view thereof, the accused’s explanation is probable and thus found to be reasonably possibly true.

⁴ *S v Haileka*, 2007 (1) NR 55 (HC).

⁵ *S v Teek*, 2009 (1) NR 127 (SC).

[41] Regarding the main charge on count 1, namely abduction, Mr *Matota* conceded that this offence was not proved against the accused. However, he strongly contends that the accused should be convicted on the alternative charge of kidnapping. The elements of the crime of kidnapping are (a) the deprivation of (b) a person's freedom of movement (or the parental control in the case of a child) which takes place (c) unlawfully and (d) intentionally. See C.R. Snyman *Criminal Law* 5 ed at 479.

[42] In view of the court's finding that the complainant was not deprived of her freedom and movement by the accused during the period in question, it is clear that the offence of kidnapping, equally, was not proved.

[43] As regards the alternative charges to the three counts of rape, Mr *Matota* conceded that these were not proved against the accused and that the State only sought convictions on the three charges of rape, set out in the main counts. In order to secure a conviction on s 14 (a) of the Combating of Immoral Practices Act 21 of 1980, the prosecution has to prove beyond reasonable doubt that the accused committed a sexual act with a child under the age of 16 years, whilst the accused is more than three years older than such child. In addition *mens rea* is required in that the accused must have appreciated the wrongfulness of his act, accompanied by the required intent.

[44] On the present facts the accused admitted having had consensual sexual intercourse with the complainant and whereas she was 14 years and he 20 years of age at the time, it satisfies the requirements of the unlawfulness of his actions, as required by s 14 of the Act. What has not been admitted by the accused, or proved by means of evidence, is that the accused knew the complainant was under the age of 16 years and therefore appreciated the wrongfulness of his act when committing a sexual act with her. The State did not attempt to prove these elements of the offence by leading evidence on point or through cross-examination of the accused. There is also nothing turning on the evidence itself that the accused must have realised from the complainant's general appearances and conduct that she

was under the age of 16 years.⁶ Neither is the fact that she was still attending school indicative of her young (and exact) age. This court finds itself in the same position in that it would be impossible, six years later, to draw certain inferences from the complainant's general appearances now, when attempting to determine whether or not she appeared to be under the age of 16 years when the offence was committed. Accordingly, the concession made by the prosecution that the accused should be acquitted on the alternative charges is properly made.

[45] Consequently, the court finds as follows:

Count 1: Main and Alternative counts – Accused found not guilty and discharged.

Counts 2–4: Main and Alternative counts – Accused found not guilty and discharged.

JC LIEBENBERG
JUDGE

⁶ *S v F and Others*, 1967 (4) SA 639 (WLD)

APPEARANCES**STATE**

L Matota

Of the Office of the Prosecutor-General, Oshakati.

ACCUSED

G F Bondai

Instructed by the Directorate: Legal Aid,
Ondangwa.