REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 110/2002

In the matter between:

BEN TJIVEZE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation*:* *Tjiveze v The State* (CA 110/2002) [2012] NAHCMD 84 (28 November 2012)

Coram: HOFF J and MTAMBANENGWE AJ

Heard on: **04 July 2003**

Delivered: **28 November 2012**

Flynote: Criminal law – common law presumption that a male person under the age of 14 years is irrebuttably presumed to be incapable to commit the crime of rape – Accomplice furthering the commission of a crime by another – liability accessory in nature – lacks actus reus of the perpetrator – if perpetrator cannot legally be convicted of crime nobody can be convicted as accomplice – may be convicted of attempt to commit crime.

Summary: Criminal law – prior to promulgation of Act 8 of 2000 the common law presumption that a male person under the age of 14 years is irrebuttably presumed to be incapable of committing the crime of rape was applicable - An accomplice is

someone who furthers the commission of a crime committed by another person – the liability of an accomplice accessory in nature – it lacks the actus reus of the perpetrator – boys under the age of 14 years had sexual intercourse with girls aged 12 years on instruction of the appellant – boys cannot be regarded as perpetrators of the crime of rape where complainants did not consent to sexual intercourse due to the operation of the common law presumption – The appellant could thus not be convicted of rape in his capacity as an accomplice – may however be convicted of crime of attempted rape.

ORDER

(a) The conviction in respect of count 1 (indecent assault) is confirmed.

(b) The convictions of rape (counts 2 and 3) are set aside and substituted with convictions of attempted rape.

(c) The sentence of ten years imprisonment is confirmed.

JUDGMENT

HOFF J (MTAMBANENGWE AJ concurring):

[1] The appellant had been charged with four counts of rape in the Regional Court but was convicted on one count of indecent assault and two counts of rape. The appellant was acquitted in respect of the fourth count of rape. The counts were taken together for purpose of sentence and a direct term of ten years imprisonment was imposed.

[2] The appellant appealed against the convictions and the sentence.

[3] The charge sheets read the same, namely that the accused person did unlawfully and intentionally had sexual intercourse with the complainant without the complainant's consent or while she was under the age at which she could legally give consent.

[4] I must mention at this stage that after the appeal was heard on 4 July 2003 the appeal record disappeared and could nowhere be found despite several attempts to locate it. A copy of the appeal was recently found in the filing room at the Registrar's Office/General Office which is fairly complete. It is on the basis of the copy of this record that this appeal judgment is being written. The original appeal record is still missing.

[5] The respondent in its first heads of argument filed argued that the convictions and sentence be confirmed by this court. In amended heads of argument filed subsequently the respondent abandons its previous stance and now argues that the conviction respect of indecent assault should be confirmed, but that that convictions in respect of rape should be set aside and substituted with convictions of attempted rape alternatively indecent assault .

[6] Before the matter was argued Mr M D Harmse of the law firm Metcalfe Legal Practitioners, informed this court that no heads of argument had been filed on behalf of the appellant since he was of the view, as expressed in a letter addressed to the Registrar, that he concurred with the decision of the presiding magistrate in respect of the convictions as well as the sentence imposed and that it would not be in the best interest of the appellant to argue the matter.

[7] The facts established during the trial as found by the presiding regional court magistrate were in a nutshell as follows:
All four of the complainants whose ages ranged between 12 years and 13 years were accommodated at a hostel at the Opuwo Primary School during November 1996. It was against hostel rules for boys to visit the girls' hostel and vice

versa. All the pupils at the hostels were not allowed to leave the premises without prior authorisation from their respective parents or guardians or from the school principal. The accused was aware of this rule. The appellant was given permission to stay in one of the hostels (presumably the boys' hostel), by the principal in order 'to guide' and 'to guard' the young students. The accused was 21 years old at that stage. The accused used to entice boys and girls (amongst whom were the complainants) to his uncle's house in the 'location' where the accused himself from time to time stayed. The uncle of the accused was absent during the relevant times since he was working elsewhere at that stage.

[8] It is common cause that the children sold sweets on behalf of the appellant at the school. The evidence was that the appellant was sort of a matchmaker by telling girls, including the complainants, to be the girlfriends of certain boys in the presence of those boys. The court a quo found that the appellant told these boys and girls how to kiss, that he lectured them in the art of love-making and that it appears that some force was applied to ensure that every person complied with what the appellant was instructing. All the children were under the spell of the appellant and would comply with whatever instructions he was giving them.

[10] During an occasion in November 1996 the complainants and some boys (mentioned in the charge sheets) slept over at the house the appellant shared with his uncle. The evidence was that he bought food for them, had arranged the house where they would sleep and provided blankets. The complainants in counts 2, 3 and 4 slept with their boyfriends on the floor and the appellant with complainant in count 1 to whom I shall refer as P slept on the bed. P who was 13 years old testified that the appellant had touched her breasts, forcibly removed her panty and put his penis into her vagina but that his penis could not fit into the vagina. The magistrate found based on the testimonies of the three complainants in counts 2, 3 and 4 and the three boyfriends, that the appellant had instructed them to have sexual intercourse. When it appeared that the boyfriend in count 4 was reluctant to comply with this instruction, the appellant used a sandal and threw it at him which hit him on the shoulder. The evidence presented was that the complainant in count 4 and her

boyfriend did not engage in sexual intercourse, hence the acquittal of the appellant on this count.

[11] The complainant in count 2, to whom I shall refer to as N, and her boyfriend who I shall refer to as K, complied with the instruction by the appellant and they had sexual intercourse. N was 12 years old and K was 13 years old at that stage.

[12] The complainant in count 3 whom I shall refer to as H and her boyfriend to whom I shall refer to as T also complied with the instruction of the appellant and had sexual intercourse. The evidence presented by her guardian was that H was 12 years old and the evidence of his guardian was that T was 12 years old at that stage. H testified that she had sexual intercourse twice. It is not clear when the second incident occurred and with whom she had sexual intercourse on this occasion, and under what circumstances.

[13] The two complainants (in counts 2 and 3) and the boy mentioned in count 2 testified that they did not know how to have sexual intercourse but that the appellant had taught them how to do it. Complainant in count 2 testified that she reported the incident to her mother.

[14] The reason why the appellant was found guilty of indecent assault in respect of the first count was because the magistrate was not satisfied that the appellant had penetrated the complainant and the cautionary rule was applied in respect of her evidence since P initially did not testify that the appellant attempted to insert his penis into her vagina but only testified about it after an adjournment during her testimony in chief.

[15] Mr Podewiltz counsel appearing on behalf of the respondent submitted that the appellant in respect of counts 2 and 3 did not physically have sexual intercourse with the complainants, but that the conviction on the rape counts followed acts committed by others.

[16] The court a quo did not specifically mention in what capacity the appellant was convicted but made the ruling that the appellant induced, aided or abetted the actual perpetrators in the commission of the crimes.

[17] In *S v Williams* 1980 (1) SA 60 (A) at 63 Joubert JA distinguishes an accomplice from a perpetrator as follows:

> 'An accomplice liability is accessory in nature so that there can be no question of an accomplice without a perpetrator or co-perpetrator who commits the crime. A perpetrator complies with all the requirements of the definition of the relevant crime.
> . . . . On the other hand, an accomplice is not a perpetrator or co-perpetrator, since he lacks the actus reus of the perpetrator. An accomplice associates himself willingly with the commission of the crime by the perpetrator or co-perpetrator in that he knowingly affords the perpetrator or co-perpetrator the opportunity, the means or the information which further the commission of the crime. . . according to general principles there must be a causal connection between the accomplice's assistance and the commission of the crime by the perpetrator or co-perpetrator.'

[18] Furthering or assisting the commission of a crime by another can take different forms. Furthering includes any conduct whereby a person facilitates, assists or encourages the commission of an offence, gives advice concerning its commission, orders its commission or makes it possible for another to commit it. (*Snyman: Criminal Law* 3rd Ed p 257).

[19] The perpetrator need not be tried and convicted. It is sufficient that somebody else committed the offence as perpetrator even though the police cannot find him or where the perpetrator has turned State witness. (See *Snyman* at 257/8).

[20] It was submitted by Mr Podewiltz that if the perpetrator cannot legally be convicted of the crime in question nobody can be convicted *as an accomplice* to the commission of a crime.

[21] The boys named in counts 2 and 3 as the perpetrators were both under the age of 14 years at the relevant time. The presumption in common law that a male person under the age of 14 years is irrebuttably presumed to be incapable of committing the crime or rape is applicable since the incidents took place prior to the promulgation of the Combating of Rape Act 8 of 2000 which abolished this presumption.

[22] In *S v A* 1962 (4) SA 679 (ECD) at 680 A this presumption was expressed as follows:

> 'It has long been accepted in South African Courts that a boy under the age of 14 years cannot be convicted as a principal offender of rape, because he must be conclusively presumed to be incapable of having carnal knowledge of a woman.'

[23] Since the boys mentioned in the charge sheets could not have been convicted of rape the appellant could not have been convicted as an *accomplice* to the crime of rape. It was submitted by Mr Podewiltz that the appellant should have been convicted of attempted rape.

[24] In order to illustrate this principle this court was referred to *R v Davies* 1956 (2) SA 52 (AD) in which the appellant endeavoured to procure an abortion where the foetus was already dead. Schreiner JA at 64 A declared authoritatively:

> 'To sum up, then, it seems that on principle the fact that an accused's criminal purpose cannot be achieved, whether because the means are, in the existing or in all conceivable circumstances, inadequate, or because the object is, in the existing or in all conceivable circumstances, unattainable does not prevent his endeavour from amounting to an attempt.'

(See also *S v W* 1976 (1) SA (1) (AD); *S v Campbell* 1991 (1) SACR 435 (Nm) at 452; *S v Dube* 1994 (2) SACR 130 N at 138).

[25] The appellant was charged as having had sexual intercourse with a woman without her consent or being unable to legally consent to intercourse. In terms of our

common law a female under the age of 12 years is irrebuttably presumed to be incapable of consenting to intercourse. (*R v Z* 1960 (1) SA 739 AD). It appears from the evidence that the complainants in counts 2 and 3 were each 12 years old at the time of the incidents. The common law presumption is therefore not applicable. The State must therefore inter alia prove that the complainants did not consent to sexual intercourse. It is trite law that the consent of a woman may be vitiated by threats of violence, fear or fraud and that a mere submission to intercourse does not necessarily involve voluntary consent.

[26] In *R v Swiggelaar* 1950 (1) PH H 61 at 110 – 111 it was held that 'if a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realises is useless.'

[27] The facts establish in my view, that there was an absence of voluntary consent to intercourse by the complainants in respect of counts 2 and 3. Had the boys referred to in counts 2 and 3 been 14 years or older, they would have been the perpetrators of the crime of rape and the appellant would have been guilty of the crime of rape but in the capacity as an accomplice.

[28] However since the 'perpetrators' were incapable of committing the crime of rape on account of the irrebuttable presumption referred to hereinbefore, the appellant cannot be convicted as an accomplice, but may on the authority of *R v Davies* (supra) be convicted of attempted rape.

[29] Regarding the sentence imposed the appellant admitted two previous convictions one for theft and one for the possession of suspected stolen property. These previous convictions are not strictly relevant in respect of the counts the appellant had been convicted of.

[30] I am of the view that the magistrate committed no irregularity by taking the three counts together for purpose of sentence, since the charges were closely connected in point of time, place and circumstances.

[31] I am further of the view that a sentence of ten years imprisonment would still be an appropriate sentence even where this court substitutes the convictions of rape with that of attempted rape.

[32] In the result the following orders are made:

(a) The conviction in respect of count 1 (indecent assault) is confirmed.

(b) The convictions of rape (counts 2 and 3) are set aside and substituted with convictions of attempted rape.

(c) The sentence of ten years imprisonment is confirmed.

E P B Hoff

Judge

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Mtambanengwe AJ

Judge

APPEARANCES

APPELLANT:	Mr Harmse Of Metcalfe Legal Practitioners, Windhoek.
RESPONDENT:	Mr Podewiltz Of Office of the Prosecutor-General, Windhoek