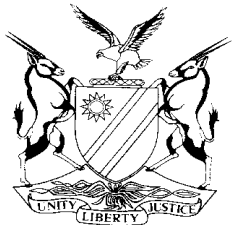
REPUBLIC OF  **NAMIBIA**

CASE NO. CA 2/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

RICHARD ARMSTRONG
Appellant

and

THE STATE
Respondent

CORAM: **HOFF, J *et* VAN NIEKERK, J**

Heard: 8 September 2010
Delivered: 30 May 2011

APPEAL

VAN NIEKERK, J: [1] The appellant was tried in the regional court on a charge of contravening section 2(1)(a), read with sections 1, 2(2), 2(3), 3, 4, 5, 6, 7 and 13 of the Combating of Rape Act, 2000 (Act 8 of 2000). The particulars of the charge read as follows:

> "In that upon or about the 13th day of March 2003 and at or near Rehoboth in the Regional Division Namibia, the accused, hereinafter called the perpetrator, did wrongfully and intentionally and under coercive circumstances commit or continue to commit a sexual act

> with …… [CMG], hereafter called the complainant by inserting his penis into her vagina while the complainant is affected by a permanent or temporary physical disability or helplessness, mental incapacity or other inability.
>
> The complainant is 17 years and the accused is 47 years being more than three years older than the complainant."

[2] The appellant pleaded not guilty. He was represented by Mr *Wessels*, who also appears on his behalf in this appeal. On 23 October 2008 the appellant was convicted of attempted rape and sentenced to five years imprisonment. The appeal lies against both the conviction and the sentence.

[3] The facts of the case may be summarized as follows. It is common cause that the complainant (hereinafter also referred to as "C") was 16 years old at the time of the events and big of build; that she suffered brain damage from the age of 3 years as a result of rheumatic fever and that she has the psycho-chronological age of a 2 or 3 year old child. She never went to school and only started to speak at the age of 5. She speaks in short sentences consisting of 2 or 3 words and sometimes spoke incoherently. She cannot make informed decisions. She was using medication constantly and was on a strict diet not to eat or drink sugary food stuffs. She lived with her grandmother VG, who has known the appellant and his parents for a

long time, but had lost contact. The appellant had heard of the complainant before, but not met her.

[4] On the day in question he met VG by chance outside her house when he came to visit the neighbours. He was invited into VG's house where he met the complainant and chatted about old times. Appellant made jokes, which made them laugh. When he was about to leave, the complainant asked whether she could go for a drive with him. VG explained that it was customary when family came to visit that they take the complainant for a drive, apparently as she enjoyed this. The appellant agreed. Initially the idea was that VG would go along, but she changed her mind and indicated to the appellant that he should go to the end of the street or around the block. They left between 14h30 and 15h00, but did not return within a short while as VG expected them to do. She became concerned and later went to look for them all over Rehoboth, even at the appellant's house, but to no avail. She later reported the matter to the police.

[5] Ms Linda Barns who owns a shop in Rehoboth saw the appellant when he came to buy drinks on the day in question. He was in complainant's company. Ms Barns, who did not know her, could clearly see that she was mentally not well, but she was at ease. The appellant told her that VG had left the complainant in his care for the day and

that he should be returning the complainant to her home as VG would be worried.

[6] Eventually after about 5 hours of absence from home the appellant returned the complainant after dark. Many people were waiting at VG's house. When confronted by VG, who smelt liquor on his breath, he explained that they had been at his aunt's house and that VG never told him what time they should return. When VG said to him that she did not know what he had done with the complainant, he said that he had done nothing. The complainant could not walk properly and Mrs Christiaans, a neighbour who assisted in the search, saw that C was uneasy and crying. She asked C if the man had touched her on her breast, to which C responded "yes". She also asked her if the appellant had touched her private parts, but the evidence does not indicate what the answer was. Inside the house C went to the toilet and they saw sand on the toilet paper when she wiped herself. VG decided to take C to the doctor to be examined. The examination could only be done the next day. VG stated that it was difficult to conduct because C resisted.

[7] The State did not call the doctor who examined the complainant. It is not clear why. The completed J88 form was handed in as an exhibit with the consent of the defence. According to the notes made

by the doctor the hymen was broken, but there is unfortunately no indication whether this occurred long before the examination or whether the injury was recent. The *labia majora* and *minora* were reddish and there was a white discharge, but no blood. No injuries were noted. There is no indication that any examination was done on the anus. The doctor made no remarks about the allegation that the complainant had been raped. In the circumstances it must be taken that the broken hymen had no relation to the alleged rape.

[8] After the examination VG bathed the complainant and observed sand on her private parts and a scratch at the back of her leg. She also saw "grey-whitish things", which, it is common cause, was appellant's semen, which had dried. The complainant slept and when she woke up made certain reports to VG about what had happened when she was with the appellant. The reports amounted thereto that he had sexual intercourse with her and also sodomized her.

[9] VG was adamant that the complainant had never had sexual intercourse before and emphasized that, because of her mental condition she is always in the company of a caretaker. She testified that the complainant sometimes may appear to be normal, but when she speaks, it is obvious that she is a retarded person, because she does not speak properly.

[10] It was put to VG that the appellant would testify that the complainant looked normal to him and when she spoke, he had the impression that she had a speech impediment, but he never identified her as a mentally ill person. However, when the appellant testified, he denied the version that he thought that she had a speech impediment. VG repeated that she had informed the appellant about the complainant's mental state. She acknowledged that the complainant was at times unpredictable and would have a change of mood, perhaps throwing things around when she gets cross. VG attributed this behaviour to the effects of especially tartrazine in gassy, sweet drinks. When asked if she told the appellant not to buy such drinks for her, she responded that the appellant was not supposed to take the complainant out, only to take her for a drive. When the complainant was younger she was very aggressive, but at the time she was under medication, which keeps her calm. She did not take medicine to suppress any sexual desire, nor did any doctor advise that this should be done.

[11] The State called Ms M G Calitz who has a Masters degree in Educational Psychology. She is a psychologist and an educational consultant. She works with children who have learning and/or emotional problems. The complainant was brought to her for

evaluation. C had a problem with communication. Her vocabulary was very restricted as she was mentally handicapped. She was functioning at the psycho-chronological age of a 2 or 3 year old child and used 2 or 3 word sentences to express herself. She realized that the case involved a possible rape. Eventually she dealt with C during 4 sessions varying in length between one and one-and-a half hours each. Before C came to her VG already made a report to her about what C had allegedly told her about the incident between C and the appellant. She used Gestalt therapy and drawing techniques to help C cope with her problems and her stress about the incident. Afterwards she made sure that C knew the terminology for certain body parts depicted in sketches C had made, e.g. the correct words for the breasts, penis and vagina. As I understand it, C made drawings of these body parts and called them by her own names. She was then taught the correct biological terms for these body parts. C also made drawings at home and brought them to the therapy sessions and talked about them. As the therapy progressed, C made certain reports to her regarding what had allegedly happened between her and the appellant. C on several occasions reported that the appellant, who she called by his first name, Richard, said that his penis is not dangerous but it hurts a lot.

[12] When asked if C could have made up the story about appellant raping her Ms C responded that a child of 2 or 3 years old does not

make up stories about the penis, the vagina and penetration. She was never able to pick up that C told imaginative stories, rather she was naïve. She did not seem to have knowledge about sexual intercourse which she picked up elsewhere, e.g. by watching television. She was adamant that C could not make up a story of sexual intercourse unless it really happened to her.

[13] Under cross examination the witness conceded that it is possible that a child like C could tell a version of events which has been suggested to her repeatedly by others, but she also stated it as a possibility that a child of that mental age, generally being very honest, would then report that, say, her mother told her that version, e.g. her mother told her that the appellant put his penis inside her vagina. She conceded that by the time C came to her the first time she already knew how to spell the appellant's first name. She agreed that the complainant must have been taught how to do this and that this would amount to coaching of the complainant. However, she testified that the complainant showed a negative emotional response to whatever it was that had occurred between her and the appellant.

[14] The magistrate did not deal with the evidence about the therapy and the reports and drawings. It appears that the magistrate did not rely on this evidence, in my view correctly so. It is clear from the

evidence that already when the appellant returned the complainant that evening, leading questions were posed to her about whether the appellant touched her on her breasts and on her private parts. She was taught how to write his name on the drawings and even made drawing of the inside of her womb and a possible pregnancy. This evidence suggests strongly that the complainant was perhaps influenced, maybe unwittingly, to portray matters in a manner suggested by others. Apart from this, the J88 suggests that the complainant's hymen was broken some time before, which gives rise to a reasonable possibility that she might have experienced sexual intercourse before and could therefore account for her knowledge about sexual matters.

[15] The last witness for the State was the complainant. Her evidence may be ignored, as she clearly not able to testify. She did not respond to the questions in a manner that could assist the court. Some of the answers were random and not a logical response to the questions posed.

[16] The appellant testified in his defence. The thrust of his evidence was as follows: On the day in question VG asked him to come and assist her at her home with a woman who was giving problems. She was hysterical and out of control. He agreed and went to the house.

He sat down and saw the complainant coming from the bathroom half naked. VG said to her that the appellant was the man who would be taking her for a drive. While he was standing complainant touched him on his buttocks, called him her beautiful man and VG told her to wait. Complainant then went to get dressed. VG intended to accompany them on the drive, but the complainant wanted to go alone with the appellant.

VG then agreed that he should take complainant for a drive to calm her down and gave them a music tape to listen to in the car, as the music would calm the complainant. They did not discuss the route to be taken or the time that complainant should be returned. VG only said that he should buy complainant a coke and something to eat. He drove to the nearest shop and bought 2 liter Coke and ice cream. He did not realize that complainant was mentally retarded, although she "looked to me a bit not normal". She was talking to him freely and said that she was taken out of school because she had been bullying the other children "because she was well built". Although she was talking a lot he did not realize that she had any problem. She referred to him as a handsome man and got excited and started touching him on his thighs and penis. She said they should go to some trees near a riverbed because her father was buried there. When they stopped she got out and ran into the sand in the river bed and removed her clothes. She returned to the appellant and opened his trousers, which fell off

and she started masturbating him. The appellant reached an orgasm and ejaculated on her thigh. He then told her that they should go back because it was getting late. However, his car became stuck in the riverbed. Some people came to help him out. He then drove to the shop of Ms Barnes where he bought refreshments and at about 19h45 he took the complainant home. VG asked him why he took so long, to which he replied that he got stuck. Complainant was not crying. At one stage she returned to the car to collect her cool drink and also said to him “my handsome man, do not leave now”. VG told him to leave because he was smelling of alcohol. He left.

[17] On Sunday he heard that the police were looking for him and on the Monday he reported himself to the police. He denied ever penetrating the complainant with any object. In fact, he was not attracted to her because she was fat, but when she touched his penis he became excited and allowed her to masturbate him to calm her down. He said that the whole process already started at her home when she touched him on the buttocks and when VG said that she should wait till later. He had the impression that perhaps VG gave her the indication that she must touch him. While driving in the car he asked he questions about her family. Complainant always answered appropriately. She also told him that Drieka’s boyfriend had sexual intercourse with her once before.

[18] In the notice of appeal the main grounds of appeal against the conviction are that the trial court erred by:

1. finding on circumstantial evidence only that “the only possible conclusion” the trial court could arrive at was that the appellant in fact wanted to or attempted to rape the complainant, whereas there was no indication whatsoever that the appellant attempted or was of the intention to rape the complainant;

2. finding in the circumstances of the case that the appellant was of the intention to rape the complainant because –
   a) the appellant took the complainant for a ride in his car;
   b) he took her away from her home for a considerable period of time;
   c) he took her to an isolated area where people could not see her;
   d) they were both stripped naked from their clothing or part thereof,

   whereas the conclusion arrived at by the magistrate was not “the only possible conclusion” in the circumstances;

3. jumping to the conclusion that the appellant wanted to rape the complainant because of the fact that he undressed himself and allowed the complainant to masturbate him, whereas this conclusion is not “the only possible conclusion” to be arrived at in the light of all the surrounding circumstances;

4. coming to the conclusion that the appellant’s version is so unlikely that no reasonable court would accept his version of the event, whereas the version of the appellant, however suspicious it might be, “might possibly” be correct and the appellant should therefore have been given the benefit of the doubt;

5. failing to keep in mind the test applicable to circumstantial evidence, which is that the appellant could only be convicted on the conclusion reached by the magistrate if that conclusion was “the only possible” conclusion to be arrived at and excludes “any other possibility”, whereas in this case there were “various other possibilities”; and

6. failing to find that the appellant’s acts fell short of an attempt to rape.

[18] I think it is necessary to comment shortly on the use of the above quoted words in the grounds of appeal, as these words were

echoed in the appellant's heads of argument and further in counsel's oral submissions. Counsel relied on applicable authority relating to the manner in which circumstantial evidence should be assessed when he, *inter alia*, referred us to the two cardinal rules of logic as set out in the *locus classicus* in *R v Blom* 1939 AD 188 at 202-3:

> "In reasoning by inference there are two cardinal rules of logic which cannot be ignored:
>
> (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
>
> (2) The proved facts should be such that they exclude **every reasonable** inference from them save the one sought to be drawn. If they do not exclude **other reasonable** inferences, then there must be a doubt whether the inference sought to be drawn is correct." [my emphasis]

[19] It is important to note that it is not, contrary to counsel's submission, every "possible" other inference or conclusion that should be excluded, but every other "reasonable" inference or conclusion. By approaching the matter as counsel is doing, too restrictive a gloss is placed on the second cardinal rule of logic, which gloss would in fact lead to a requirement that the State should prove its case beyond a shadow of doubt, instead of beyond a reasonable doubt. Furthermore, the test is not whether the appellant's version "might possibly" be true, but whether it is <u>reasonably</u> possibly true.

[20] Before us Mr *Wessels* pointed to several aspects of the magistrate's judgment which are unclear. While the magistrate notes that the complainant could not testify exactly about what had happened between her and the appellant, she mentions the report of sexual intercourse made by complainant to her grandmother. Unfortunately the magistrate does not deal with the admissibility of the report, nor does she expressly state whether she relies on it or not. Mr *Wessels* argued that she did rely on the report, amongst other evidence, to conclude that the appellant attempted to rape the complainant. This submission, strictly speaking, goes beyond the confines of the grounds of appeal. However, even if it does not, I think it must be clear, despite the deficiencies in the judgment, that the magistrate by implication (and correctly in my view) did not rely on the report otherwise she would have convicted the appellant of rape based on sexual intercourse and anal penetration. In fact, the magistrate eventually convicted the appellant, partly at least, on his version that there was no penetration, but that he was genitally stimulated by the complainant.

[21] At this stage I wish to pause and say that I reluctantly accept that the version by the appellant that the complainant throughout played the leading part in initiating and continuing the sexual conduct

that took place, is the version of events on which the appeal must be decided. I find this version improbable, but in the light thereof that the complainant was not able to testify and there is no other admissible evidence to the contrary, the appellant's version is reasonably possibly true.

[22] This brings me to a second aspect which, Mr *Wessels* submitted, is unclear in the judgment. This is the sentence close to the end of the judgment in which the magistrate states: "The explanation of the Accused person regarding the events on the other hand is so unlikely and so improbable that no reasonable Court can accept it to be reasonably, possibly true." I agree with counsel that it is not clear to what explanation this sentence refers, because the magistrate, by clear implication, accepted the appellant's version that what happened between him and the complainant consisted of her "becoming intimate towards him by the time he offered her a ride" and of the appellant being masturbated by the complainant until ejaculation. I can only surmise that the sentence relates to other aspects of his evidence, which the magistrate did not identify. There are, indeed, such aspects. These include the appellant's version that he did not know or realize that the complainant was mentally retarded or incapacitated; that he thought the complainant was an adult; that VG invited him into her home to calm the complainant down; that VG intended that he should

calm the complainant down by engaging in sexual conduct with her; that he was not happy with the fact that C touched his penis, but that he went along with it because he wanted to make her happy; that VG gave no indication of the extent of the drive he was requested to undertake with the complainant; and that it was quite in order for him to return after dark with the complainant after an absence of about 5 hours.

[23] Mrs *Esterhuizen* for the respondent initially supported the conviction, but in response to some questions raised by the Court with both counsel, she conceded that the conviction cannot be upheld. In my view the concession is correctly made. The learned trial magistrate found that the appellant had the intention to have sexual intercourse with the complainant, although she was clearly not prepared to rely on any statements by the complainant that the appellant had actually done so. What the magistrate relied on was, expressed in her own words:

> "…[E]ven though the Complainant is mentally ill and as such could not explain in court as to what exactly had happened on the day of the incident, the Accused person's own testimony of having been masturbated by the Complainant after he had undressed himself and ejaculated clearly show that he had an intention to have sexual intercourse with the Complainant who at the time was mentally ill and could not have consented to such sexual act…..firstly the Accused had

> been directed by the Complainant's grandmother to only drive up to a certain point but went on further. And secondly he stayed away with the Complainant for a considerable period of time, thus he had the opportunity to have sexual intercourse with the Complainant. Thirdly, he left for an isolated area or destination in order to avoid being seen with the Complainant who did not understand the nature of the act due to her mental condition as well as her youthfulness. The explanation of the Accused person regarding the events on the other hand is so unlikely and so improbable that no reasonable Court can accept it to be reasonably, possibly true. And for that reason the Accused is found guilty on a charge of attempted rape."

[24] I agree with Mr *Wessels* that the reasons advanced by the learned trial magistrate do not in themselves permit as the only reasonable inference the conclusion that there was an intention to commit sexual intercourse as such. By ignoring the grandmother's instructions and staying away for a long time while taking the complainant to a secluded place the appellant could just as well merely have had the intention to commit an indecent act with the complainant without going so far as sexual intercourse. The fact that he was undressed (the magistrate misdirected herself on the facts when she found that he undressed himself) and reached an orgasm when the complainant stimulated him is also not of itself necessarily indicative of an intention to have sexual intercourse.

[25] Even if it could, for argument's sake, be said that there was an intention to have sexual intercourse, I also agree with defence counsel

that an attempt to have sexual intercourse was not proved beyond reasonable doubt. The facts on which the magistrate relied do not go far enough to constitute such an attempt. In this respect it is useful to have regard to the discussion of what constitutes an attempt to commit the offence of rape in *S v September* 1999 NR 334 (HC). This much was also conceded by the State during oral argument.

[26] In my view the magistrate misdirected herself by not considering the obvious question namely, whether the appellant was not guilty of rape under Act 8 of 2000 by committing a sexual act as defined in section 1(1) with the complainant under coercive circumstances. This is one of the questions which the Court posed to both counsel on appeal. In response Mrs *Esterhuizen* referred to the definition, the relevant part of which states that a "sexual act" means, *inter alia*, "cunnilingus or any other form of genital stimulation" and submitted that the act which took place between the complainant and the appellant fits this definition. She further submitted that the appellant is in fact guilty of rape by contravening section 2(1)(a) of Act 8 of 2000, the provision with which he was charged, but on a different factual basis than that alleged by the State.

[27] Mr *Wessels* disagreed. He referred to the provisions of section 2(1) which read as follows:

"**Rape**

2. (1) Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances-

(a) commits or continues to commit a sexual act with another person; or

(b) causes another person to commit a sexual act with the perpetrator or with a third person,

shall be guilty of the offence of rape."

He submitted that the appellant did not commit a sexual act with the complainant as provided for in section 2(1)(a) because he was the passive party – at the time the sexual act was being done to him and was initiated by the complainant without any influence by the appellant.

[28] A careful reading of the evidence shows, however, that the appellant was not merely at the receiving end of the complainant's sexual favours without any positive conduct on his side. He testified that while he was driving around with the complainant she began touching him on his thighs and his penis and repeatedly called him "my handsome man". He became sexually aroused. While she was directing him to drive to the place where her grandfather was buried, he decided of his own accord to stop in the riverbed, because he was aroused and he, in his own words, "wanted her to get it over …. So that she can finish with me". In my view this can only mean that he wanted

some sexual release from what had been started and what excited him. When he stopped the car, “she was all over him”. He participated in the intimacy by kissing her and touching her breasts. She kissed him back. According to him her reaction showed him “that she needed love”. They got off the vehicle and he went around to her side of the vehicle to meet her. This indicates his willingness to continue in further physically intimate conduct. The complainant ran onto the river sand where she removed her clothes. The appellant followed her and she then opened his trousers, which fell off. She bent down and started to stimulate his penis with her hand. She later went onto her knees and then sat down in the sand. He remained standing in front of her holding her head. This indicates further positive conduct from his side. He did not want to ejaculate in her face, but rather on the ground. From this testimony I understand that he placed himself in such a position as to avoid her face, but nevertheless messed on her thigh. To my mind his own testimony indicates that he willingly participated in the physical intimacy between them before and during the sexual act by performing positive conduct and that he therefore committed the sexual act within the meaning of section 2(1)(a) of the Act.

[29] Although the appellant during the trial in the court *a quo* throughout professed not to have realized that the complainant was

mentally retarded or incapacitated, he did not, to my mind advisedly, appeal against the magistrate's implied finding that he realized her condition and took advantage of it. The complainant, having the mental age of a child of 2 or 3 years old, was clearly incapable of understanding in an informed manner the nature of the sexual act. This means that coercive circumstances within the meaning of section 2(2)(f)((i) of the Act existed at the time. Even if the appellant did not know the precise details of her mental incapacity, he clearly realized that she was incapable of understanding the nature of the sexual act, alternatively foresaw the possibility that she was so incapable and reconciled himself thereto. This means that that the appellant should have been convicted of rape under section 2(1)(a) of the Act.

[30] There is another, to some extent alternative, basis on which the appellant is guilty of contravening section 2(1)(a) of the Act. The complainant's grandmother placed her in the appellant's care for a limited duration and purpose with the request to take the complainant for a drive as a treat. He knew of her mental incapacity. He accepted the responsibility. Having done so, he assumed a protective relationship with the complainant which placed a duty on him to act positively in circumstances where the complainant acted in a manner detrimental to her interests without realizing the nature of her actions. When she initiated inappropriate physical intimacy with him leading to

his arousal and everything that followed after, there was a duty on him to act positively to stop this from happening or to disengage himself from the situation. There was no reason why he could not do so. He omitted to take such positive action in circumstances which render his failure to act unlawful. Mr *Wessels* submitted that an omission to act is not covered by the provisions of section 2(1)(a), but rather by the provisions of section 2(1)(b) of the Act, with which the appellant is not charged. I do not agree. The appellant was not "causing" the complainant to act in the way she did. He committed the sexual act under section 2(1)(a) by omitting to take action to prevent or to stop the sexual act from taking place in circumstances where the legal convictions of the community demand that there be a duty to act positively (See in this regard *Minister van Polisie v Ewels* 1975 (3) SA 590 at 597A-B; *S v Mahlangu* 1995 (2) SACR 425 (T) at 435*j*-436*a; S v Williams* 1998 (2) SACR 191 (SCA) at 194*a*-*b*).

[31] The next issue to be decided is that of sentence. I note in passing that the appeal against sentence was not based on the ground that the sentence of 5 years imprisonment is inappropriate for attempted rape, but aimed at securing a lesser sentence in the event that the conviction is substituted with another lesser offence, e.g. indecent assault. Both parties were requested to make written submissions on the question of whether the sentence should not be

increased if the appellant's conviction of attempted rape is substituted with a conviction of rape in contravention of section 2(1)(a) of Act 8 of 2000, based on his version of what transpired between him and the complainant.

[32] Mr *Wessels* on behalf of appellant submitted that the sentence should not be increased. He submitted that the trial magistrate in any event sentenced the appellant on his own version after having considered all the surrounding circumstances of the incident and properly applying her mind.

[33] Mrs *Esterhuizen* submitted that there is a compelling need to increase the sentence, not only because the completed offence of rape is by its very nature more serious than an attempt to rape, but because of the aggravating circumstances of the case.

[34] Neither of the counsel addressed the issue of the minimum sentences prescribed by the Act. The trial magistrate also did not give any indication that she was passing sentence in terms of section 3 of the Act, which is a misdirection. It is however clear that, as the complainant was under the age of 18 years and as the appellant was in a position of trust over the complainant, she being in his care at the time he committed the sexual act with her, that the applicable

minimum sentence is one of 15 years imprisonment in terms of section 3(1)(a)(iii)(cc).

[35] I agree with State counsel's submission that there are several aggravating circumstances in this case. She correctly pointed out that the complainant was only a child of 16 years, that her mental capacity was equal to that of a 2 or 3 year old, that the appellant was aware of her condition, that VG trusted the appellant, being a family acquaintance, by allowing her vulnerable granddaughter to drive with him. Counsel emphasized the anguish which VG experienced when the appellant did not return the complainant for hours until after dark. As counsel pointed out, the complainant was even younger than some of appellant's own children. In my view the conduct of the appellant was despicable.

[36] On the other hand I also think that there are substantial and compelling circumstances which justify the imposition of a lesser than the prescribed sentence in terms of section 3(2) of the Act. These are that, according to the available evidence, the complainant initiated the physical intimacy between them and took the leading role. She was the one who chose to engage in the sexual act in the manner that she did. As Mr *Wessels* pointed out, she was not forced into submission, nor did she sustain injuries or trauma. In my view a shorter period of

imprisonment, partly suspended, should do justice in this case, bearing in mind that the appellant at the age of is a first offender.

[37] The result then is:

1. The appeal is upheld in that the conviction is set aside.

2. The conviction is substituted with a conviction of rape under section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000).

3. The sentence is set aside and substituted with the following sentence: 10 (ten) years imprisonment of which 4 (four) years imprisonment are suspended for 5 (five) years on condition that the appellant is not convicted of rape under section 2(1) of the Combating of Rape Act, 2000 (Act 8 of 2000), or an attempt thereto, committed within the period of suspension.

4. The sentence is antedated to 23 October 2008.

_____

VAN NIEKERK, J

I agree.

_____

HOFF, J

Appearance for the parties:

For the appellant: Mr J H Wessels

Stern & Barnard

For the respondent: Mrs K Esterhuizen

Office of the Prosecutor-General