CASE NO. CA 48/2009

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

FRANCOIS VAN ZYL
APPELLANT
vs

THE STATE
RESPONDENT

Neutral citation: *van Zyl v The State (*CA 48/2009) [2012] NAHCMD 4 (19 September 2012)

CORAM: **MILLER AJ *et* PARKER J**

Heard on: 18 June 2012
Delivered on: 19 September 2012

APPEAL JUDGMENT

MILLER, AJ: [1] The appellant, who was represented before us by Mr. Botes, was convicted by the Regional Magistrate in Windhoek on a charge of having contravened section 2(1)(a) of the Combating of Rape Act, Act 8 of 2000 (the Act). In substance the allegation is that the appellant had sexual intercourse with the complainant under

coercive circumstances as defined in this Act. The State alleges as a coercive circumstance that when the sexual intercourse took place the complainant was under the age of 14 years and the appellant was more than three years older than the complainant.

[2] The regional magistrate sentenced the appellant to ten (10) years imprisonment.

[3] During the course of argument before us Mr. Botes conceded, properly and correctly in my view, that the appellant on his own version of the events is guilty of an attempt to contravene Section 2(1)(a) of the Act.

[4] It is apparent from the facts that the appellant for periods of time lived in the same house with his brother, his sister-in-law and the latter's daughter who is the complainant. It was during these periods that a relationship, sexual in nature, developed and continued between the appellant and the complainant. This relationship spanned several years.

[5] The only real dispute between the State and the appellant is whether or not the appellant succeeded in penetrating the vagina of the complainant with his penis. The appellant admits to having attempted to do so, but mentioned throughout, from the time the matter came to light, that he did not succeed.

[6] Although the complainant repeatedly stated that the appellant had sex with her, it must be borne in mind that the word "sex" is not necessarily synonymous with vaginal intercourse. ***S v Katuta 2006 (1) NR 61 (HC).***

[7] There is but a single, terse and vague reference in the evidence of the complainant that vaginal intercourse took place. The complainant could not say when, where and on how many occasions this happened. The learned magistrate concludes that the evidence of the

complainant is corroborated by a written statement which the appellant made to a fellow employee and which was handed in at the trial as an exhibit. A reading of that document does not support the version of the complainant. To the contrary it is consistent with the version of the appellant.

[8] Apart from that finding, which was wrong, the magistrate's judgment contains nothing as to why she found the evidence of the appellant to be false beyond reasonable doubt. A reading of the record of the proceedings does not in my view support such a conclusion.

[9] It follows that the conviction must be set aside and substituted with a conviction on a charge of attempting to contravene Section 2(1)(a) of the Act.

[10] That finding necessitates that the sentence should in my view be set aside as well.

[11] Having considered that aspect I am of the view that a sentence of six (6) years imprisonment will meet the justice of the case.

[12] I consequently make the following orders:

The conviction and sentence are set aside and substituted with the following:

(1) Guilty of an attempt to contravene Section 2(1)(a) of the Combating of Rape Act, Act 8 of 2000.

(2) The appellant is sentenced to six (6) years imprisonment.

(3) The sentence is back dated to 30 March 2009, which is the date upon which the appellant was sentenced in the Regional Court.

_____

MILLER, AJ

I agree

_____

PARKER, J

ON BEHALF OF THE APPELLANT	**MR. BOTES**
INSTRUCTED BY	DR. WEDER, KAUTA & HOVEKA INC.
ON BEHALF OF THE RESPONDENT	**MS. NDLOVU**
INSTRUCTED BY	OFFICE OF THE PROSECUTOR-GENERAL