REPUBLIC OF NAMIBIA **NOT REPORTABLE**

IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

JUDGMENT

CASE NO. CA 48/2009

In the matter between:

PETRUS HANGO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Hango v The State* (CA 48/2009) [2013] NAHCNLD 44 (07 August 2013)

Coram*:* DAMASEB, JP et MILLER, AJ

Heard: **05 August 2013**

Delivered: **07 August 2013**

Summary: Criminal Law – Appeal against conviction and sentence – Convicted on a charge of rape, read with the provisions of the Combating of Rape Act, 2000 (Act 8 of 2000) – Regional Magistrate finding that there are no substantial or compelling circumstances – Conviction and sentence confirmed by appeal court.

ORDER

The appeal is dismissed.

JUDGMENT

MILLER, AJ (DAMASEB, JP concurring)

[1] The appellant who was not legally represented during his trial, was charged in the Regional Court sitting in Outapi with one count of rape, read with the provisions of the Combating of Rape Act, 2000 (Act 8 of 2000). In essence, the allegation was that on 6 November 2003 he had sexual intercourse with the complainant when coercive circumstances were present.

[2] The appellant pleaded not guilty to the charge and advanced as the basis of his defence, the fact that he and the complainant had been lovers for some time prior to 6 November 2003 and still were on the date in question. He alleged that on the date in question, he engaged in consensual sexual intercourse with the complainant.

[3] Despite his plea, the learned magistrate convicted the appellant on the charge preferred after some evidence was advanced which I shall refer to in summary in due course.

[4] The learned magistrate concluded that the prescribed minimum sentence had to be imposed, absent any substantial and compelling circumstances. He accordingly sentenced the appellant to 15 years imprisonment. The appellant now appeals against both the conviction and sentence imposed.

[5] The issues resolved by the learned magistrate and now the subject of this appeal are entirely factual and center around the fact whether the state had proved the existence of coercive circumstances beyond reasonable doubt, or to put the matter conversely there remained on the totality of the evidence, the probabilities and the circumstances surrounding the case a reasonable possibility that the version advanced by the appellant might reasonably possibly be true. When I refer to the version of the appellant, I do so guardedly given the fact that the appellant elected not to testify himself. One is therefore left only with the explanation he tendered with his plea. He did, however, call a witness, one Stephanus Shikongo.

[6] During the course of his judgment, the learned Magistrate accurately summarised the evidence of the complainant in the following way:

'The complainant testified that on that particular day the accused came to the cucashop, she then asked him for a hike home. When they drove off, the accused proposed to her. The complainant then informed the accused that she already has a boyfriend. The accused insisted to have sexual intercourse with her but she refused. When the complainant wanted to get off the vehicle the accused drove faster. The complainant then opened the door and jumped out of the vehicle. She then ran away. The accused then stopped the vehicle and got hold of the complainant. The complainant then testified that the accused pulled her back into the car. As the accused drove off, she then again jumped off, this time through the window. The complainant then ran away as she did not want to have sexual intercourse with the accused. The accused then stopped the vehicle, got hold of the complainant and forced her back into the vehicle. At both occasions the complainant was beaten by the accused. The accused then drove up to the house. The complainant also testified that the other man who was present did nothing. He was just watching when she was beaten. When they got at the house of the accused he beat the complainant again. The accused then instructed her to get into the room; he then instructed her to take off her panty and had sexual intercourse with her. According to the complainant the accused had sexual intercourse with her twice. The complainant testified that she only got out of the room at sunrise. The accused and the complainant got into the vehicle and drove up to the tarred road. The accused then pushed the complainant out of the vehicle. The complainant then went home and reported the matter to her mother. Thereafter she went to the hospital and then to the police.'

[7] Her testimony is corroborated where relevant by her mother and the police officer who attended the scene once the matter was reported to the police. The appellant, once

his rights were fully explained to him elected not to testify. He did however call Stephanus Shikongo to testify. Mr. Shikongo confirmed that he was a passager in the vehicle at the time. He also confirms the evidence of the complainant that at a point near her place of residence, the complainant tried to jump from the moving vehicle whereafter the appellant assaulted her until she returned to the vehicle. He does not mention the second occasion referred to by the complainant. Mr. Shikongo testified that the complainant and the appellant were actually living together. This fact was never put to the complainant by the appellant and, in my view, the magistrate was correct in rejecting that portion of the evidence.

[8] In my view the facts in their totality, the probabilities and the circumstances surrounding the case overwhelmingly establishes the veracity of the complainant's evidence and the learned magistrate in my view was correct in finding that the state had proved its case to the required standard of proof. The appeal against conviction must therefore fail. It is now contended that the conclusion reached by the magistrate that he had no option or choice to accept the evidence of the complainant, since the appellant did not testify is a material misdirection. Even if it was a misdirection, I am satisfied that the evidence as a whole established the guilty of the appellant beyond reasonable doubt.

[9] As far as the sentence imposed is concerned, the learned magistrate correctly cautioned the appellant that the court would have to impose the statutory prescribed minimum sentence unless the appellant could establish facts which could be considered to constitute substantial or compelling circumstances and informed the appellant that he could testify under oath or make submissions. The appellant preferred the latter option. It emerged that the appellant was 29 years old at the time and was employed on a part time basis as a casual labourer. He is the father of three children, who are cared for by his sister.

[10] The learned magistrate was correct in concluding that none of these, individually or collectively, amounted to substantial or compelling circumstances. I cannot fault the Magistrate's reasoning. I will accordingly dismiss the appeal.

P J Miller

Acting

I agree.

P T Damaseb

Judge President

APPEARANCES

APPELLANT:	G Mugaviri Of Mugaviri Attorneys, Oshakati

RESPONDENT: D Lisulo

Of Office of the Prosecutor- General, Oshakati