HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: CA 09/2007

In the matter between:

THE STATE **APPLICANT**

and

VASCO KANGULU LIBONGANI **RESPONDENT**

Neutral citation: *State v Libongani* (CA 09/2007) 54 NAHCMD

CORAM*:* **SHIVUTE J and SIBOLEKA J**

Heard on: **25 October 2012**
Delivered on: **07 November 2012**

Flynote: Criminal law – Prosecution-application for leave to appeal.

Criminal law: Applicant dissatisfied with this court confirming the Regional Court sentence of 12 years for the Rape of a 10 years old female when at the time of sentence minimum mandatory sentences were applicable. Applicant is of the view that the respondent deserved a sentence of 15 years or more seeing that he

was found to have raped the victim on diverse occasions, a verdict applicant construes to mean a conviction of more than one count of rape. That the Regional Court Magistrate misdirected himself in finding the presence of substantial and compelling circumstances when in fact non existed.

Held: Act 8 of 2000 did not list substantial and compelling circumstances, but were left for the court to decide.

Held: That factors traditionally regarded as mitigatory factors a convictee places before court with the assistance of the Magistrate if undefended or through his counsel are all considered and taken into account in the sentencing process.

Held: That the finding on the evidence by the Regional Court that the victim was raped on diverse occasions does not alter the fact that the respondent was charged – pleaded, tried, and convicted only on one count of Rape in contravention of section 2(1) of the Combating of Rape Act 8 of 2000.

Held: That the verdict of “Guilty as charged” handed down by the Magistrate refers and relates to that one count only.

Held: That the State was at liberty to apply for the amendment of the charge sheet in terms of section 86 of the Criminal Procedure Act, and would have preferred as many counts as it would have seen fit at any stage during the trial.

Held: That the victim was raped on diverse occasions although not explicitly stated, in my view is one of the factors the court took into account during sentencing.

Held: That the Regional Court correctly took judicial notice of the fact that the respondent had swollen legs, walked with difficult and had already spent 21 months in custody. The Regional Court Magistrate was legally entitled to regard these factors sufficiently empowering him to depart from the prescribed minimum sentences.

Held: That the applicant has failed to satisfy this court that there are reasonable prospects of success on appeal, application for leave to appeal dismissed.

ORDER

The application for leave to appeal against sentence is dismissed.

JUDGMENT

SIBOLEKA J (SHIVUTE J concurring):

[1] On the 25th of October 2012 this court reserved judgment on the application for leave to appeal and indicated then that judgment will follow later. Here now is the ruling.

[2] This is an application for leave to appeal to the Supreme Court of Namibia against the dismissal of the applicant's appeal against the sentence imposed by the Regional Court Magistrate, Katima Mulilo on the respondent.

[3] The respondent faced and pleaded to the following charge in the Regional Court.

> "That the accused is guilty of contravening section 2 (1)(a) read with sections 1, 2(2), 2(3), 3, 4, 5, 6 and 7 of The Combating of Rape Act, 2000 (Act 8 of 2000) read with section 94 of Act 51 of 1977.
>
> In that between July 2004 and August 2006 and at or near Lisikili Village in the regional division of Namibia the accused hereafter called the perpetrator, did wrongfully and intentionally under coercive circumstances commit or continue to commit a sexual act with Ndisudengolwa Lilian Siyonga hereafter called the complainant, by
>
> (a) inserting his penis into the vagina of the complainant: and/or
> (b) …
> (c) …
> (d) …
>
> (a) applying physical force to the complainant and/or (a person other than
> the complainant): and/or
> (b) …
> (c) …
> (d) the complainant is 10 years old (under the age of fourteen) and the perpetrator is 21 years old (being more than three years older than the complainant)."

[3.1] On the above charge of rape, the respondent was sentenced to 12 years imprisonment on 26 May 2006. The applicant submits that the sentence is

startlingly lenient and induces a sense of shock, an argument we dismissed on 24 February 2012.

[4] The applicant's grounds of appeal are as follows:

"The grounds upon which the applicant wishes to appeal the decision of this Honourable Court are the following:
The Honourable Judges erred in law and/or on the facts by:

GROUND NO. 1

Finding that the learned Regional Magistrate did not misdirect himself in sentencing the Respondent when it is clear that:

(i) The learned Regional Magistrate gave insufficient weight to the deterrent and preventive function that sentences in these circumstances should have.

(ii) The learned Regional Magistrate over emphasized the circumstances of the Respondent.

(iii) The learned Regional Magistrate gave insufficient weight to the seriousness of the offence committed by the Respondent.

(iv) The learned Regional Magistrate disregarded and/or paid Insufficient regard to the coercive circumstances in this case which called for the imposition of the mandatory minimum sentence of 15 years imprisonment.

(v) The learned Regional Magistrate found that there were substantial
and compelling circumstances when such a finding was not justified by the circumstances of the case:

[4.1] In an application for leave to appeal the test is that the applicant must convince the court that were leave to appeal be granted there are

reasonable prospects of success on appeal. (See *R v Ngubane and Others* 1945 AD 185-7). The question is whether there are reasonable

prospects that a court of appeal will arrive at a different conclusion and that the appeal may succeed.

[4.2] The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial Court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate tribunal. (See *Rex v Mapumulo and Others* 1920 AD 56 at 57, *S v Kibido* 1998 (2) SACR 213 SCA at 213 J). A court of appeal would be entitled to interfere on appeal with a sentence imposed where the trial court has materially misdirected itself on the facts or the law or committed an irregularity or where the sentence imposed is startlingly inappropriate or induces a sense of shock or is such that a striking disparity exists between the sentence imposed by the trial court and that which the court of appeal would have imposed had it sat in the first instance. (See *S v Vries* 1996 (2) (638 (Nm) at 643 J, and at 644 a.

[4.3] Looking at the circumstances of the case as the whole, this court did not detect a misdirection on the facts or the law. Neither is there an irregularity in the sentencing process warranting an intervention. The reason for imposing 12 years' instead of the prescribed minimum of 15 years' are satisfactory. This ground cannot therefore succeed.

GROUND NO. 2

The Honourable Judges erred in the law and/or on the facts by confirming the learned Regional Magistrate's finding that the Respondent's health was so poor that he would 'very soon' become a burden to the prison authorities, to justify a departure from the mandatory minimum sentence prescribed by the Combating of Rape Act, 8 of 2000, when there was no medical evidence justifying such a finding:

[5] The contention – that the learned Magistrate should not have taken the sickness of the respondent into account without a medical certificate is untenable. On the record it is correctly stated by the Magistrate that a medical certificate can only be secured on seeing a doctor, an opportunity the respondent was denied. In my view a doctors' certificate would indeed have given more details pertaining to the ailment, the cause and the remedial medication. However, it is further my view that a doctor would not

have failed to see that the legs of the respondent were in fact swollen and he walked with difficult, the same state of affairs the Magistrate saw with his eyes during trial in court..

[5.1] On the sickness of the respondent the following appears on page 248 of the record and I quote verbatim:

"You are of ill health, you are ill. Your legs are swollen to above knee, level, you walk with visible difficulty and there is evidence aduced before the Court that you have not been taken to hospital for your illness."

[5.2] It is my considered view that the Regional Court Magistrate would have committed a gross miscarriage of justice if he had ignored the visible ailments of the respondent just because there was no medical certificate.

[5.3] Substantial and compelling circumstances does not mean 'special' or 'exceptional circumstances'. (See *Frans Limbare v The State* Case No. CA 128/2005 unreported judgment Nm HC delivered on 16 June 2006).

[5.4] It was correctly indicated in this court's judgment dismissing the appeal against sentence that there are no specific recognized factors called substantial and compelling circumstances. It was stated by this court in various judgments that all factors traditionally and rightly put forward during mitigation are cumulatively taken into account by courts in

weighing and assessing whether there is justification for a departure from the prescribed minimum sentence. In the result this ground has no merits.

GROUND NO. 3

The Honourable Judges erred in law and/or on the facts by:

Finding that the sentence of 12 years imprisonment is not startlingly lenient as to induce a sense of shock when regard is had to the number of times the Respondent raped the complainant, the tender age of the complainant, the threats that were leveled against the complainant by the Respondent and the fact that the Respondent raped the complainant in the sanctuary of her own home.

GROUND NO. 4

The Honourable Judges erred in law and/or on the facts by finding that the Respondent was charged with only one count of rape and 'could not have been sentenced for a sexual act that he had not been convicted of when it is clear that the Respondent was charged for more than one count of rape and was convicted as charged.

GROUND NO. 5

The Honourable Judges erred in law and/or on the facts by failing to recognize that once the Respondent was charged for contravening section 2(1)(a) of the Combating Rape Act, 8 of 2000 read with section 94 of the Criminal Prosecure Act, 51 of 1977 it meant that he committed rape on diverse occasions consequently when the trial court convicted the Respondent as charged that conviction was not for one count of rape but for several counts.

[6] Grounds 3, 4 and 5 are interrelated and will be discussed together hereunder.

[6.1 The part of applicant's argument that the then 21 year old respondent was charged for contravening section 2 (1)(a) of the Combating of Rape Act, Act no. 8 of 2000 read with section 94 of the Criminal Procedure Act 51 of 1977 on a ten year old victim is correct. According to Mrs Nyoni when the applicant "invoked section 94 it was a vindication that the respondent was being charged with not one but several charges of rape". This is not correct.

My own underlining.

[6.2] Section 94 reads:

> "94 Charge may allege commission of offence on diverse occasions: where it is alleged that an accused on diverse occasions during any period committed an offence in respect of any particular person, the accused may be charged "in one charge" with the commission of that offence on diverse occasions, during the stated period."
>
> My own underlining.

[6.3] In my view the words 'diverse occasions' in section 94 does not mean or refer to extra counts or charges in addition to the one charge preferred to the respondent. Neither does the following words "… the accused may be charged in one charge with the commission of that offence on diverse occasions" alter or change the one count of rape into several counts not at all.

[6.4] The applicant is correct in arguing that when the Magistrate convicted the respondent 'as charged' it means that the latter was convicted for committing sexual acts with the complainant under coercive circumstances on various or several occasions. However, the words "various" or "several" occasions does not relate to "several charges" or counts.

[6.5] In *S v Muketi and Another* 1979 (4) SA 569 (c) at 569 H; Berman AJ stated the following:

> "The need to ensure that an unrepresented accused is afforded a fair trial and is not placed at a disadvantage in proceedings against him where his liberty is endangered applies with, equal force in the Magistrates' and Regional Courts …, : prosecutors must ensure that the charges they put to unrepresented accused spell out with sufficient clarity the allegations of fact upon which reliance will be placed for a conviction, and Magistrates must ensure that such an accused understands what the States' case is and why it constitutes the offence charged." My own underlining.

[6.6] Section 1 of the Criminal Procedure Act, Act 51 of 1977 as amended defines "charge" as "includes an indictment and a summons".

[6.7] Section 105 states that:

"105: Accused to plead to charge:
The charge shall be put to the accused by the Prosecutor before the trial of the accused is commenced and the accused shall … be required by the Court forth with to plead thereto …"

[6.8] Section 85 states that:

"85 Objection to charge:

An accused may, before pleading to the charge … object to the charge on the ground –

(a) That the charge does not comply with the provisions of this Act relating to the essentials of a charge.

(b) That the charge does not set out an essential element of the relevant offence.

(c) That the charge does not disclose an offence.

(d) That the charge does not contain sufficient particulars or any matter alleged in the charge.

(e) …"

[6.9] The respondent was charged on one count of rape, he pleaded to it, was tried and eventually correctly convicted only on that one count and nothing else.

[6.10] The Fifth Edition of Oxford Advanced Dictionary for Current English defines "charge" as follows "to accuse somebody of something especially formally in a Court of Law."

6.11] "Indict" is defined as: "to accuse somebody officially of something; to charge somebody."

[6.12] In *S v Zululand Observer (Pty) Ltd and Another* 1982 (2) SA 79 NPD at 80A, the following was stated:

> "The word 'charge' as employed in section 154 (2)(b) of Act 51 of 1977 as amended, and now substituted by section 15 (a) of the Combating of Rape, Act 8 of 2000, means a formal notification directed to a specific

accused person apprising him of the accusation which he will be called upon to meet in Court."

[7] It is my considered view that the statute only empowers a Court to return a verdict of guilty or not guilty on the charge the accused was facing and pleaded to, during the trial. The finding by any court like it was the case in this matter that the respondent raped the complainant on diverse occasions is only a matter which is considered and taken into account during the sentencing process. Although the Regional Court Magistrate did not explicitly state it like that, I find that the aspect is subtly subsumed and taken care of in the 12 years he imposed. Grounds 3, 4 and 5 do not therefore warrant an intervention and are also without merit.

[8] In my view the Magistrate correctly considered the personal circumstances of the respondent, the gravity of the offence, he was fair to society and exercised his discretion judiciously.

[9] Having carefully considered all the grounds upon which the court's findings were challenged, I have come to the conclusion that the appeal has no reasonable prospects of success.

[10] In the result I make the following order:

The application for leave to appeal is accordingly refused.

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A M SIBOLEKA

Judge

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N N SHIVUTE

Judge

APPEARANCES

APPLICANT: **MRS I NYONI**

Instructed by Office of the Prosecutor-General

RESPONDENT: **MR T IPUMBU**

Directorate of Legal Aid