

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

SENTENCE

Case No: CC 06/2019

In the matter between:

**THE STATE**

v

**HELENA KAUPITWA**

**ACCUSED 1**

**SEBRON SHILONGO**

**ACCUSED 2**

**PETRUS SHILONGO**

**ACCUSED 3**

**MEDULETU SHILONGO**

**ACCUSED 4**

**Neutral citation:** *S v Kaupitwa* (CC 06/2019) [2024] NAHCNLD 10 (29 January 2024)

**Coram:** SMALL AJ

**Heard:** 28-29 November 2023 and 26 January 2024

**Delivered:** 29 January 2024

**Fly note:** Criminal Procedure-Sentence- Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape-The decision of *S v Gaingob and Others* 2018 (1) NR 211 (SC), if unqualified or if not limited to sentences imposed in respect

of common law crimes or a common law crime created a ceiling of 37 and a half years –A sentencing court cannot stray beyond such period with a sentence as it would be subjecting the accused to cruel, degrading and inhuman punishment that infringes their right to human dignity enshrined in the Namibian Constitution.

Criminal Procedure-Sentence- Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape-If the Supreme Court can generally and retrospectively limit the sentence that a High Court imposed while exercising his sentencing jurisdiction and simultaneously cap the ceiling beyond which a High Court or other sentencing court could and cannot go, it does matter whether the origin of the sentence is the common law or contained in a statute.

Criminal Procedure-Sentence- Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape-None of the three charges warrant the imposition of life imprisonment -the collective effect a sentence of 45 years on the three charges is inappropriate in the circumstances of the case-no reasonable court would impose such a sentence-appropriate to order that sentences to run concurrently to prevent a cumulative inappropriate sentence.

**Summary:** The Court convicted Accused 1 of Contravening Section 56(a) of the Immigration Control Act 7 of 1993-Aiding abetting a foreigner in entering and remaining in Namibia in contravention of the Act, Contravening Section 77(1)(g) of the Education Act 16 of 2001-Harboursing a child who is subject to compulsory school attendance during school hours, Kidnapping and Common Assault. Accused 2 was convicted of three counts of Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape and on a charge of Attempting to defeat or obstruct the course of justice. Accused 3 and Accused 4 were both convicted of Assault with the intent to do grievous bodily harm.

The Court sentenced Accused 1 to fines in respect of the contravention under the Immigration Control Act, Education Act, and the conviction of Common Assault. In respect of the conviction of Kidnapping the accused was sentenced to two years imprisonment of which 1 year imprisonment was suspended. Accused 2 was sentenced to 18 years effective imprisonment on the charges he was convicted of

after the Court ordered some of the sentence to run concurrently. Both Accused 3 and 4 were sentenced to fully suspended sentences.

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## ORDER

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1. Accused 1:

- 1.1 Count 2-Contravening Section 56(a) Immigration Control Act 7 of 1993- Aiding abetting a foreigner in entering and remaining in Namibia in contravention of the Act- N\$2000/One (1) year imprisonment.
- 1.2 Count 9: Contravening Section 77(1)(g) of the Education Act 16 of 2001- Habouring a child who is subject to compulsory school attendance during school hours- N\$1000/Six (6) months imprisonment.
- 1.3 Count 6: Common Assault-N\$500/Three (3) months imprisonment
- 1.4 Count 10-Kidnapping-Two years imprisonment of which one (1) year imprisonment is suspended for five (5) years on condition the accused is not convicted of Kidnapping committed during the period of suspension.

2. Accused 2:

- 2.1 Count 15-Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape- Fifteen (15) years imprisonment.
- 2.2 Count 16-Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape-- Fifteen (15) years imprisonment.
- 2.3 Count 17-Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape- Fifteen (15) years imprisonment.
- 2.4 Count 20-Attempting to defeat or obstruct the course of justice-One (1) year imprisonment.
- 2.5 In terms of section 280(2) of the Criminal Procedure Act, 1977 it is ordered that 14 years of the sentence imposed in respect of Count 15, 13 years of the sentence imposed in respect of Count 16 and the sentence imposed in respect of Count 20 is to be served concurrently with the sentence imposed in respect of Count 17.

## 3. Accused 3:

Count 22-Assault with the intent to do grievous bodily harm-Two (2) years imprisonment fully suspended for Five (5) years on condition that the accused is not convicted of Assault with the intent to do grievous bodily harm committed during the period of suspension.

## 4. Accused 4:

Count 23- Assault with the intent to do grievous bodily harm- Eighteen (18) months imprisonment fully suspended for Five (5) years on condition that the accused is not convicted of Assault with the intent to do grievous bodily harm committed during the period of suspension.

## 5. The bail should be refunded to the accused.

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**JUDGMENT**

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SMALL AJ

Introduction

[1] On 31 October 2023, the Court convicted Accused 1 of Contravening Section 56(a) of the Immigration Control Act 7 of 1993-Aiding abetting a foreigner in entering and remaining in Namibia in contravention of the Act, Contravening Section 77(1)(g) of the Education Act 16 of 2001-Harboursing a child who is subject to compulsory school attendance during school hours, Kidnapping and Common Assault.<sup>1</sup> Accused 2 was convicted of three counts of Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape and on a charge of Attempting to defeat or obstruct the

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<sup>1</sup> *S v Kaupitwa* (CC 06/2019) [2023] NAHCNLD 117 (3 November 2023)

course of justice.<sup>2</sup> Accused 3 and Accused 4 were both convicted of Assault with the intent to do grievous bodily harm.<sup>3</sup>

Approach by the Court in sentencing

[2] Generally, when a Court must determine what an appropriate punishment for any given charge is, it must consider the triad of factors, namely the personal circumstances of the accused, the offence and the crimes committed, and the interests of society. Punishment must fit the criminal as well as the crime. Considering the circumstances, it should be fair to the community as far as possible but also blended with a measure of mercy.<sup>4</sup>

[3] A sentencing court must attempt to balance the accused's and society's interests. Though all the general principles applicable must be considered, balanced, and harmonised when applied to the facts, a Court needs not give them equal weight or value. The circumstances of a case might require emphasising one or more at the expense of others.<sup>5</sup> The primary purposes of punishment are deterrence, prevention, reformation, and retribution. Deterrence is the all-important object of a sentence with the other aspects as accessories. Retribution is of lesser importance in modern times. However, in sentencing, the difficulty arises not from the general principles applicable but from the complicated task of harmonising and balancing these principles and applying them to the facts.<sup>6</sup>

[4] In *S v Rabie*<sup>7</sup> Holmes JA quoting from Gordon Criminal Law of Scotland (1967) at 50 explained the differences between the different theories as follows:

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<sup>2</sup> Ibid

<sup>3</sup> Ibid

<sup>4</sup> *S v Zinn* 1969 (2) SA 537 (A) and *S v Tjiho* 1991 NR 361 (HC) (1992 (1) SACR 639); *S v Rabie* 1975 (4) SA 855 (A) at 862G – H; *S v Seas* 2018 (4) NR 1050 (HC) paragraph 23

<sup>5</sup> *S v Van Wyk* 1993 NR 426 (SC) (1992 (1) SACR 147); *S v Seas* 2018 (4) NR 1050 (HC) paragraph 23

<sup>6</sup> *S v Van Wyk* 1993 NR 426 (SC) at 448B-F approving and applying *S v Zinn* 1969 (2) SA 537 (A) at 540G-H and *S v Khumalo and Others* 1984 (3) SA 327 (A) at 330D-I and the authorities collected there.

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'The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation... The other theories, reformative, preventive and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment.'

[5] I agree with what Corbett CJ stated In *S v Rabie*<sup>8</sup>:

'A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case.'<sup>9</sup>

[6] In *S v Banda and Others*<sup>10</sup>, the Court pointed out that Courts fulfil a vital function in applying the law in the community. The Court's decisions impact individuals in the ordinary circumstances of daily life. The Court promotes respect for the law through its decisions and the imposition of appropriate sentences. In doing so, it must reflect the seriousness of the offence and provide just punishment for the offender while also considering the offender's circumstances.

[7] I also agree with what was stated in *R v Karg*<sup>11</sup> in respect of the importance of retribution, especially while violence against vulnerable persons continues relentlessly in the Namibian society:

'While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of

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<sup>8</sup> *S v Rabie* 1975 (4) SA 855 (A) at 862A-B  
*S v Rabie* 1975 (4) SA 855 (A) at 866B-C,

<sup>9</sup> Referred to in *S v Banda and Others (supra)* at 354A-C; See also *S v Zinn* 1969 (2) SA 537 (A) at 541D-E and In *S v Harrington* 1989 (2) SA 348 ZSC at 362E-H where the Court stated that a sentencing court should never assume a vengeful attitude and correctly in my view quoted from Francis Bacon's essay 'On Revenge' which stated: 'Revenge is a kind of wild justice which, the more man's nature runs to, the more ought law to weed it out.'

<sup>10</sup> 1991 (2) SA 352 (BG) at 356E-F

<sup>11</sup> *R v Karg* 1961 (1) SA 231 (A) at 236A-B. Also see *S v Kanguro* 2011 (2) NR 616 (HC) paragraph 9 and *S v Schiefer* 2017 (4) NR 1073 (SC) paragraph 30

prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment.<sup>12</sup>

[8] The sentencing Court, however, cannot be requested or required to avenge the crimes committed. It is important to consider what was stated in *S v Harrington*<sup>13</sup> where the Court said that a sentencing court should never assume a vengeful attitude and quoted with approval from Francis Bacon's essay 'On Revenge' which stated:

'Revenge is a kind of wild justice which, the more man's nature runs to, the more ought law to weed it out.'

[9] In *S v Gaingob and Others*<sup>14</sup>, the Namibian Supreme Court warned against lengthy sentences of imprisonment that have diminishing returns and thus eventually subjecting the accused to cruel, degrading and inhuman punishment that infringes their right to human dignity enshrined in the Namibian Constitution.<sup>15</sup>

[10] A court searches for an appropriate sentence in each case. It, however, does not mean that there is only one such appropriate sentence. No court of law is perfect. The court is the community's arm dedicated to making assessments for proper sentences. The court's sentence judgement is essentially its evaluation of what is fair in the circumstances of a given case. It is, however, not a scientific calculation. A sentence cannot be objectively measured and then snipped off in the correct lengths.<sup>16</sup> It has been said that:

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<sup>12</sup> See also *S v Bothile* 2007 NR (1) 137 (HC) paragraph 21 and *S v Matlata* 2018 (4) NR 1038 (HC) paragraph 30, *S v Kadhila* [2014] NAHCNLD 17 (CC 14/2013; 12 March 2014).

<sup>13</sup> *S v Harrington* 1989 (2) SA 348 ZSC at 362E-H

<sup>14</sup> *S v Gaingob and Others* 2018 (1) NR 211 (SC),

<sup>15</sup> See also *S v Matlata* 2018 (4) NR 1038 (HC) paragraph 35

<sup>16</sup> *S v Martin* 1996 (2) SACR 378 (W) at 381E-G

‘Sentencing, at the best of times, is an imprecise and imperfect procedure and there will always be a substantial range of appropriate sentences.’<sup>17</sup>

[11] There is a persistent demand for imposing more severe sentences on all offenders for all crimes. The foundation for this demand is a steadfast belief that no punishment can be too harsh and that the more severe it is, the better it will protect society. Public expectation is not synonymous with the public interest. Although the courts must serve the interests of society and not be insensitive to or ignorant of general feelings and expectations, they may not unquestioningly adhere to that. Remarks or submissions that public expectation equates to the public interest are inconsistent with the applicable principles of law and, therefore, of no assistance to the court.<sup>18</sup>

[12] In determining an appropriate sentence, a court should strive to achieve a reasonable counterbalance between these elements to ensure that one factor is not unduly accentuated at the expense of and to the exclusion of others. The process is not merely a formula, nor is it satisfied by simply stating or mentioning the requirements. It is necessary that the Court consider and try to balance evenly the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern. As expounded by the Courts, this concept is sound and incompatible with anything less.<sup>19</sup>

### Evidence led in Aggravation and Mitigation

[13] The State called the witness Annette Munahane Tubayunge a fully qualified social worker at the Ministry of Gender Equality, Poverty Eradication and Social Welfare stationed at the Namibia Children’s Home in Eros where he victim and state witness Ndalimbilwa Nghilikeselwa is residing while attending Grade 7 at Eros Girls School.

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<sup>17</sup> *Smith v The Queen* 1987 (34) CCC (3d) 97 at 109-110 by McIntyre J in the minority judgment as quoted in *S v Vries* 1996 (2) SACR 638 (Nm) at 643f-g; *S v Vries* 1998 NR 244 (HC) at 249G-H

<sup>18</sup> *S v Makwanyana and Another* 1995 (3) SA 391 (CC) at 431C-D, *S v Hanse-Himarwa* (CC 05/2018) [2019] NAHCMD 260 (31 July 2019) paragraph 33

<sup>19</sup> *S v Banda and Others* 1991 (2) SA 352 (BG) at 355A-C



[14] The witness reiterated much of the evidence already before Court. While the victim was doing well in school the witness in paragraph 6 of her report, admitted as Exhibit SD, stated the following:

'In March 2018, the minor victim was placed in the Namibia Children's Home. She appeared to be traumatized and she took time to relate herself to other children in the center. The alleged abuse completely disrupted Ndalimbililwa's life in a way she has never imagined. She displayed signs of anger in her during her stay in the children's home. She was quiet and short-tempered and therefore it took the social worker two to three months of counselling sessions before she opened up.

In the years 2020 and 2021 when the center received a subpoena from the Oshakati High Court, she became stressed, thinking of her alleged abuse as she has not completely healed from the trauma. In 2022, Ndalimbililwa physically fought with a boy staying in the same center, and she would also argue with the girls in the center as well.

This year, on the second week of October 2023, the said victim attempted to commit suicide by cutting her left wrist, and counseling sessions were rendered to her by the social worker. During those sessions, she was asked the reasons she wanted to commit suicide, and her response was that she wanted to go back to her parents in Angola.'

[15] Helena Kaupitwa, accused 1 gave evidence in mitigation. She is a 47-year-old Namibian female who has been married to Accused 2 for 15 years. She has two children. The boy was born in 1997 and the girl in 2012. Accused 2 is not the father of her firstborn son. Her son dropped out of school and suffers from depression. She was arrested on 2 January 2018 and only granted bail in January 2020. Her highest school qualification is Grade 9 as she did not pass grade 10. Afterwards she did a course in cooking skills and presently makes a living from selling Russians and Chips and earns on average N\$500 per month. She indicated that she will be able to pay a small fine. If more substantial fines are considered appropriate, she does not have the personal means to pay it and will have to rely on loans from her family and friends.

[16] Petrus Shilongo accused 2 also gave evidence in mitigation. He is a 55-year-old Namibian male born on 30 August 1969. Both his parents, who were simple traditional farmers are deceased. He is presently married to accused 1. He

has 5 children. Two of the children were born while he was married to his first wife Hendrina Hangula who passed away. He and Accused 1 has a small daughter who is still in school. He provided no information about the other two children.

[17] He attended school up to grade four only as his parents were extremely poor. He mentions that he had no shoes and sometimes had to attend school without a shirt. Their home was far from the school. He therefore dropped out of school and stayed at home helping with the household chores until he went to Outjo to look for work. In Outjo he worked in construction digging foundations. He stayed so employed until the employer finished the construction work. Later, from 1990 up to 2017 he did electrical work in Tsumeb. This he did until he was arrested. He can speak, but not write in Oshiwambo.

[18] He was arrested on 2 January 2018. He spent over two years in custody. He was originally released on bail but was rearrested on the charge of attempting to defeat the course of justice in 2018. He suffers from several health issues. He tested positive for HIV in 1999, is a diagnosed epileptic since 2000, and suffers from high blood pressure diagnosed in 2019. He takes medication for that. He is also extremely forgetful but has not been informed what caused that. He explained that he would sometime go into a room to do something and once inside will have forgotten what he intended doing there. He maintained that he was convicted for something he didn't do.

[19] Neither Accused 3 nor accused 4 gave evidence in mitigation,

#### Arguments by counsel

[20] I intent to first summarize the submissions by the State as written heads of argument were exchanged by the parties. Some defence counsel thus in anticipation also addressed submissions made by the State during their argument in chief.

[21] In her submissions relating to Accused 1 Ms Petrus submitted in respect of Count 2, which carries a maximum penalty of R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment that a

sentence of N\$ 8 000,00- or 2-years imprisonment would be appropriate. In respect of Count 9, which offence is liable to a fine of N\$6 000 or a period of two years imprisonment, or both such fine and such imprisonment she submits that a fine of N\$ 3 000.00- or 1-year imprisonment would be appropriate.

[22] Ms Petrus did in fairness refer the Court to *Mukwangu v S*<sup>20</sup> where the well-known principles in respect to fines as set out *S v Mynhardt*; *S v Kuinab*<sup>21</sup> were reiterated. It can be summarized as follows: Fines should be used mainly as punishment for lesser offences and the imposition of a fine has its purpose punishing an accused without incarcerating him. To impose a fine which an accused can obviously not pay is to impose direct imprisonment in the guise of an alternative term of imprisonment. Although not capable of exact calculation the alternative of imprisonment must be proportionate to the fine and the gravity of the offence. The presiding officer must obtain the necessary facts before deciding upon a fine. Of vital importance is the ability of the accused to pay a fine. Here, not only the accused's income is of importance, but also his assets and liabilities and other means of obtaining funds.

[23] For Count 6 she recommended a sentence of 1 year imprisonment for the conviction of common assault. Lastly insofar as Accused 1 is concerned and in respect of the Kidnapping conviction under Count 10, she suggested a sentence of 2 years imprisonment.

[24] In respect of Accused 2 she suggested sentences of 17 years imprisonment to be imposed in respect of each of the Rape convictions under Counts 15, 16 and 17 as she submitted that no compelling circumstances were present to warrant a lesser sentence than those prescribed. In respect of Count 20, attempting to defeat the course of justice she believed an appropriate sentence would be one of 2 years imprisonment. In total this would amount to 53 years imprisonment in respect of Accused 1.

[25] In respect of accused 3 she submitted that a sentence of 2 years

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<sup>20</sup> (HC-MD-CRI-APP-CAL-2022/00042) [2022] NAHCMD 605 (7 November 2022) paragraph 35

<sup>21</sup> 1991 NR 336 (HC)

imprisonment would be appropriate for his conviction of assault with the intent to do grievous bodily harm under Count 22. In respect of accused 4 she submitted that a sentence of 2 years imprisonment would be appropriate for his conviction of assault with the intent to do grievous bodily harm under Count 23.

[26] She further submitted that none of the accused showed any remorse in the sense of them accepting responsibility for their wrongdoing as it was explained by the Court in *S v IK and Another*<sup>22</sup> where the Court stated that remorse is shown if one accepts responsibility. This is in line with what I stated in *S v Katsamba*<sup>23</sup>

[27] In her argument, Ms Petrus referred to numerous unreported and reported cases. I do not want to do her endeavours an injustice, but I have already referred to some of those or similar cases and will refer to several others later in the judgment.

[28] Mr Shipila argued that the social worker's evidence should be qualified as she did not have a baseline of the victim's normal personality and conduct before the incidents. He submitted that the Court therefore cannot determine whether the victims conduct alluded to by the witness is normal or were caused by the incidents which resulted in the trial.

[29] He further submitted that the victim Ndalimbililwa's mother agreed that the victim could come to Namibia to attend school. Although accused 1 could not enrol her in school the victim at least ended up in school and is presently performing well.

[30] He also submitted that the fact that the accused has not shown remorse cannot be held against her as she believes she is innocent and might even consider appealing the conviction. He argued that although showing remorse might be mitigating the absence of remorse cannot be considered *per se* aggravating.

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<sup>22</sup> (CC 13/2021) [2023] NAHCMD 587 (22 September 2023) paragraph 40

<sup>23</sup> (CC 14/2018) [2021] NAHCNLD 113 (6 December 2021) paragraph 25. 'I consider, in any event, that there is a massive difference between expressing remorse and showing remorse. One of the reasons why showing remorse plays such an important role when one considers a sentence is that it indicates an appreciation and acknowledgement of the extent of one's error. Furthermore, it suggests that before the sentence commenced, such a person began with his own internal rehabilitation process. Rehabilitation is usually a given if the person starts it himself.'

[31] He also referred the Court to *Kaiyamo v S*<sup>24</sup> where the Court with approval quoted a general sentencing principle alluded to by Liebenberg J in *Hanse Himarwa v State*<sup>25</sup> he had the following to say at paras 43:

‘Though it should as far as possible be avoided to send a first offender to prison, this is not always an option as the seriousness of the crime may be such that there is no other appropriate sentence available. Neither should families be torn apart if that could be prevented. It is not in society’s interest if an offender with fixed employment and a steady income loses his or her position as a result of the sentence imposed in circumstances where another sentence would equally have been appropriate.’

[32] He finally submitted that as Accused 1 is self-employed and makes a living from selling perishables, she is likely to be able to pay fines in respect of her infractions. He however added that because of the informal nature of her business, that she may not be able to meet the maximum sentences prescribed for the statutory offences. He suggested a fine N\$ 1000.00- or 3-months imprisonment for the contravention of section 56(1)(a) of the Immigration Control Act and N\$ 800 or 3 months for the contravention of section 77(1)(g) of the Education Act. In respect of the conviction of common assault he suggested a fine of N\$500.00 or 3 months imprisonment.

[33] In respect of the Kidnapping conviction he submitted that a sentence of 12 months imprisonment will be appropriate. He submitted that a full suspension of such sentence will be appropriate in view of the principle enunciated in *S v Kaiyamo*<sup>26</sup> as cited above.

[34] Mr Nyambe fairly conceded that his client Accused 2 is subject to a sentence of 15 years imprisonment for each of his three convictions of contravening section 2(1) of the Combating of Rape Act 8 of 2000 if no compelling circumstances are found for a lesser sentence to be imposed. He submitted that the sentences suggested by the State, or the minimum sentences prescribed by the legislature for the rape alone would amount to 45 years imprisonment imposed in respect of someone 55 years of age would result in sentences that removes all hope of a

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<sup>24</sup> (CA 117/2016) [2023] NAHCMD 467 (4 August 2023) paragraph 47

<sup>25</sup> (2)(CC 5/2018) [2019] NAHCMD 260 (31 July 2019)

<sup>26</sup> In paragraph 31 and Footnote 24

prisoner ever being released from prison and is unconstitutional for being cruel, inhuman and degrading. He did not suggest any sentence he considered appropriate in the circumstances but pointed out that compelling circumstances were not defined in the Combating of Rape Act 8 of 2000 and submitted that if the Court cannot find any compelling circumstances to impose a lesser sentence, to order the prescribed sentences to be served concurrently.

[35] Mr Mukasa on behalf of Accused 3 referred to many of the general sentencing principles referred to hereinbefore and placed the personal circumstances of the accused before Court from the bar. The accused is a first offender at the age of 51. He is currently unemployed but makes a living from odd jobs for which he earns between N\$1000.00 and N\$1500.00 per month. He is married and the father of 7 children, the eldest being 23 years old and the youngest is 4 years old. All the children, except the eldest are in school. His father and mother are pensioners and he also assist 4 of his siblings. He is the sole breadwinner of his family. He is on bail of N\$700.00 and is prepared to tender this amount if the Court will consider a fine to be appropriate. He finally suggested that the Court imposes a fine of N\$2000.00 or 12 months imprisonment for the crime of assault with the intent to grievous bodily harm.

[36] Mr Tjirera on behalf of accused 4 also placed his client's personal circumstances on record from the bar. The accused is 37 years old, a Namibian citizen who reached Grade 9 at school. He is unemployed and has two children who stay with his parents who are 70 years old. He was in custody for between 6 to 7 months. He further pointed out that the evidence is silent as to the injuries caused to the victim Ndalimbililwa by accused 4's assault with the stick. He in conclusion requested the Court to impose a fine with alternative imprisonment but to fully suspend such sentence of Accused 4.

Counts 15-17: Contraventions of Section 2(1)(a) of the Combating of Rape Act 8 of 2000

[37] The standard sentence principles apply to most of the convictions in this matter. I, however, believe that the convictions of Accused 2 of three contraventions

of Section 2(1)(a) of the Combating of Rape Act 8 of 2000-Rape needs specific and separate consideration.

[38] It is common cause that the coercive circumstances alleged by the State in Counts 15, 16 and 17 were formulated as follows:

‘The perpetrator applied physical force to the complainant and/ or the complainant was affected by helplessness and/ or the complainant is under the age of fourteen years, in that she was years of age, and the perpetrator was more than three years older than the complainant, as he was about 47 years of age.’<sup>27</sup>

[39] In view of the aforesaid it is also common cause that the applicable sentence prescribed for rape under such coercive circumstances under section 3(1)(iii) of the Combating of Rape Act 8 of 2000 for Counts 15,16 and 17 is imprisonment for a period of not less than fifteen years.

[40] Section 3(2) of the Combating of Rape Act 2000 provides as follows:

‘If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the applicable sentence prescribed in subsection (1), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.’

[41] Section 3(4) of the same Act provides:

‘If a minimum sentence prescribed in subsection (1) is applicable in respect of a convicted person, the convicted person shall, notwithstanding anything to the contrary in any other law contained, not be dealt with under section 297(4) of the Criminal Procedure Act, 1977 (Act 51 of 1977): Provided that, if the sentence imposed upon the convicted person exceeds such minimum sentence, the convicted person may be so dealt with in regard to that part of the sentence that is in excess of such minimum sentence.’

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<sup>27</sup> *S v Kaupitwa* (CC 06/2019) [2023] NAHCNLD 117 (3 November 2023) paragraph 45 and footnote 19

[42] This means that in the absence of a finding that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the applicable sentence prescribed, the Court must sentence the accused 2 to 15 years imprisonment on Counts 15, 16 and 17.

[43] In *S v LK*<sup>28</sup> the full bench of the Supreme Court had the opportunity to consider the prescribed sentences under the Act. It stated that in deciding whether substantial and compelling circumstances exist for a lesser sentence each case must be considered on its own as factors which may in one instance be substantial and compelling may not be sufficient in another case to tip the scales into a finding that substantial and compelling circumstances exist. Such circumstances no longer need to be exceptional. What is required by the above cases is a consideration of all the facts and circumstances, also those which traditionally were part of the sentencing process, to balance them with the aggravating circumstances and then to consider if the prescribed sentence is justified in the interest of the victim as well as the accused and the needs of society.<sup>29</sup>

[44] The Supreme Court further pointed out that a Court must consider the proportionality of the crime committed by an accused in relation to other more serious manifestations of the crime. This is apparent because the Legislature did not distinguish between circumstances under which the crime was committed but prescribed the same minimum sentence, namely 15 years imprisonment for a wide variety of circumstances. The Court will essentially have to determine whether the prescribed sentence will be unjust in the circumstances of the case.<sup>30</sup>

[45] The Supreme Court also approved and applied the approach set out in *S v Malgas*<sup>31</sup>

'The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case

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<sup>28</sup> 2016 (1) NR 90 (SC)

<sup>29</sup> Ibid paragraph 57 and 58

<sup>30</sup> Ibid paragraph 62

<sup>31</sup> 2001 (2) SA 1222 (SCA) paragraph 22



render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.'

[46] *S v Haufiku*<sup>32</sup> the Supreme Court dealt with a State's appeal against High Court's finding (and resultant sentence) that there were substantial and compelling circumstances, as contemplated by s 3(2) of the Combating of Rape Act 8 of 2000 to justify a departure from the mandatory minimum sentence of 15 years upon a conviction of rape under coercive circumstances.

[47] The Supreme Court<sup>33</sup> subsequently found:

'Although deserving of consideration, Mr Haufiku's youthfulness at the time he committed the offences and the fact that he was incarcerated for about eight years awaiting finalisation of his trial cannot outweigh the gravity of his conduct which called for the legislature's standardised response especially given the sad reality that rape shows no sign of abating in our society.'

[48] The Supreme Court<sup>34</sup> then concluded:

'Accordingly, taking into account the perpetrator's personal circumstances and the rather long period of pre-conviction incarceration, and to blend the sentence with mercy, the eight years of pre-conviction incarceration and the entirety of the sentences on housebreaking with intent to steal and theft and housebreaking with intent to rob and robbery will be made to run concurrently with the 15-year sentence on count two'.

[49] The Supreme Court subsequently ordered that 8 (eight) years of the sentence imposed on the first count of rape and the entirety of the sentences imposed on the two counts of Housebreaking with the intent to steal and theft (two years and five years respectively) are to run concurrently with the sentence of 15 (fifteen) years imposed the second count of rape.

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<sup>32</sup> (SA 6-2021) [2023] NASC (21 July 2023)

<sup>33</sup> In paragraph 22

<sup>34</sup> Ibid in Paragraph 28

[50] In *S v Gawiseb*<sup>35</sup> January J and Usiku J, in a matter where the accused sentenced to 60 years' imprisonment in respect of four counts of rape committed in a continuous transaction stated the following:

'I find the sentence, cumulatively, harsh and it induces a sense of shock considering that the different incidences of rape were committed in a continued transaction on the same date. It seems that the magistrate did not consider the cumulative effect of the sentences and felt bound by the penalty provisions in the Act. In my view, the appellant could also have been charged with rape on diverse occasions on the same day and place. In that case, the sentence would have been different as the appellant would only have faced one count of rape. Be that as it may, I will consider the sentence afresh taking into account the material facts.'

[51] The same Court stated:

'This court was referred to *S v Gaingob and Others* 2018 (1) NR 211 (SC) where it was held that where sentences exceed the normal life expectancy of an offender by effectively removing all realistic hope of release during his/her lifetime to be unconstitutional. It was submitted by the respondent that the Gaingob matter dealt with common law crimes and not statutory crimes and thus, does not find application. The appellant submitted that the collective sentence of 60 years' imprisonment is unconstitutional, unreasonable, unfair and excessive in nature. In my view, it matters not whether it is a statutory or common law crime. The principle remains the same that sentences that exceed the lifespan of an offender and removing any hope of release, are unconstitutional.'<sup>36</sup>

[52] The Court concluded that the sentencing court should consider the cumulative effect of the sentences and has the judicial discretion to ameliorate the effect by taking charges together for purposes of sentence or to order the concurrent serving of those sentences.<sup>37</sup> The Appeal Court subsequently ordered that the sentences should be served concurrently and substituted the original sentence with 30 years' imprisonment.

[53] In *S v Matlata*<sup>38</sup> the following was said:

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<sup>35</sup> 2022 (2) NR 453 (HC),

<sup>36</sup> *Ibid* paragraph 60

<sup>37</sup> *Ibid* paragraph 61 and 63

<sup>38</sup> 2018 (4) NR 1038 (HC) paragraph 24

'As regards the two counts of rape in circumstances where the complainants have suffered grievous bodily harm, the prescribed minimum sentence is imprisonment for a period of not less than 15 years. I earlier alluded to the submissions made by Mr Appollus in this regard and that the accused is deserving of a lesser sentence on these counts. Several cases were referred to where the court, in the circumstances of that particular case, found that pre-trial incarceration was sufficient to find substantial and compelling circumstances. What is clear from a reading of all the cases dealing and grappling with the concept of what constitutes 'substantial and compelling circumstances', is that no factor should be considered in isolation, but must be considered together with all other factors relevant to sentence. Depending on the circumstances of the case, a factor such as pre-trial incarceration could be accorded more weight in one case than in another, but it might be completely outweighed by other compelling considerations like the brutality of the attack and the trauma and injuries inflicted. There need not be exceptional circumstances before the court may find substantial and compelling circumstances to exist. All that is required is for the court to consider all the factors and after having accorded them the weight they deserve in the circumstances of the case, decide whether or not they are substantial and compelling, justifying the imposition of a lesser sentence. That is more likely to be the case where it involves only one count of rape.'

[54] In *S v Boois*<sup>39</sup> the High Court stated:

'In *S v Gaingob and Others*<sup>40</sup> the Supreme Court held that the phenomenon of what academic writers have termed 'informal life sentences' where the imposition of inordinately long terms of imprisonment of offenders until they die in prison, erasing all possible hope of ever being released during their life time, is 'alien to a civilized legal system' and contrary to an offender's right to human dignity protected under art 8 of the Constitution and that the absence of a realistic hope of release for those sentenced to inordinately long terms of imprisonment would in accordance with the approach of this court in *Tcoeib* and other precedents offend against the right to human dignity and protection from cruel, inhumane and degrading punishment.'

And

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<sup>39</sup> 2018 (4) NR 1060 (HC) paragraph 21 and 22

<sup>40</sup> *supra*

‘The effect of this judgment is that the convict, although marred by a previous conviction of rape, cannot be given an inordinately long sentence which will effectively erase all possible hope of ever being released in his lifetime.’

[55] In *Bezuidenhout v S*<sup>41</sup> Damaseb DCJ stated the following:

‘Mr Bezuidenhout misunderstands the rationale of the decision in *S v Gaingob & others*. Yes, *S v Gaingob & others* cautions judicial officers from handing down long and inordinate sentences which exceed 37 and a half years. *S v Gaingob* does not apply to statutory prescribed mandatory minimum sentences.’

[56] In the next paragraph<sup>42</sup> the Damaseb DCJ stated:

‘As I said in *S v Neromba*<sup>43</sup> about *S v Gaingob* – ‘There are unanswered questions which our apex court must still address in due course, but that is the present state of the law. An obvious example is the statutory regime which requires courts to impose mandatory minimum sentences in excess of 37 and a half years for repeat offenders such the Combating of Rape Act 8 of 2000. Those sentences were not the subject of decision in *Gaingob* yet they remain on the statute book.’

[57] The decision of *S v Gaingob and Others*<sup>44</sup> if unqualified or if not limited to sentences imposed in respect of common law crimes, in my opinion, seemed to have created a ceiling of 37 and a half years beyond which a sentencing court cannot stray with a sentence as it would be subjecting the accused to cruel, degrading and inhuman punishment that infringes their right to human dignity enshrined in the Namibian Constitution.

[58] If it is accepted that the Supreme Court can generally and retrospectively limit the sentence that a High Court imposed while exercising his sentencing jurisdiction and simultaneously cap the ceiling beyond which a High Court or other sentencing court could and cannot go, it does not in my mind matter whether the origin of the sentence is the common law or contained in a statute.

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<sup>41</sup> (CC 04/2005) [2023] NAHCMD 669 (19 October 2023) paragraph 10

<sup>42</sup> *Supra*. Paragraph 11

<sup>43</sup> *S v Neromba* (CC 12/2022B) [2023] NAHCMD 483 (8 August 2023) at para 27.

<sup>44</sup> 2018 (1) NR 211 (SC),

[59] In this matter the Combating of Rape Act, 2000 provides that a sentence of 15 years imprisonment must be imposed in respect of Counts 15, 16 and 17. No part of the sentences can be suspended, This total to 45 years imprisonment. None of these three charges in my opinion warrant the imposition of life imprisonment and I consider the collective effect a sentence of 45 years on the three charges to be shockingly inappropriate in the circumstances of this case. In my opinion no reasonable court would impose such a sentence even if no substantial and compelling circumstances were found to exist.

[60] Considering all the circumstances of this case, both aggravation and mitigating, and due the cumulative effect of the sentences I think it appropriate to exercise my discretion and use section 280(2) of the Criminal Procedure Act 1977 to order that some of the sentences imposed on Accused 2 should run concurrently.<sup>45</sup>

[61] In the result, and applying the principles set out hereinbefore, sentence the accused as follows:

1. Accused 1:

- 1.1 Count 2-Contravening Section 56(a) Immigration Control Act 7 of 1993- Aidind abetting a foreigner in entering and remaining in Namibia in contravention of the Act- N\$2000/One (1) year imprisonment.
- 1.2 Count 9: Contravening Section 77(1)(g) of the Education Act 16 of 2001- Habouring a child who is subject to compulsory school attendance during school hours- N\$1000/Six (6) months imprisonment.
- 1.3 Count 6: Common Assault-N\$500/Three (3) months imprisonment
- 1.4 Count 10-Kidnapping-Two years imprisonment of which one (1) year imprisonment is suspended for five (5) years on condition the accused is not convicted of Kidnapping committed during the period of suspension.

2. Accused 2:

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<sup>45</sup> The cumulative effect of sentences must always be borne in mind and concurrently served sentences may prevent an accused from undergoing a severe and unjustified long effective term of imprisonment. (*S v Whitehead* 1970 (4) SA 424 (A) at 438F-440; *S v Young* 1977 (1) SA 602 (A); *R v Addullah* 1956 (2) SA 295 (A) at 299-300; *S v Mtsali and another* 1967 (2) SA 509 (N) at 510A; *S v Breytenbach* 1988 (4) SA 286 (T) and *S v Shapumba* 1999 NR 342 (SC) at 345H-J

- 2.1 Count 15-Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape- Fifteen (15) years imprisonment.
  - 2.2 Count 16-Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape-- Fifteen (15) years imprisonment.
  - 2.3 Count 17-Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape- Fifteen (15) years imprisonment.
  - 2.4 Count 20-Attempting to defeat or obstruct the course of justice-One (1) year imprisonment.
  - 2.5 In terms of section 280(2) of the Criminal Procedure Act, 1977 it is ordered that 14 years of the sentence imposed in respect of Count 15, 13 years of the sentence imposed in respect of Count 16 and the sentence imposed in respect of Count 20 is to be served concurrently with the sentence imposed in respect of Count 17.
3. Accused 3:
- Count 22-Assault with the intent to do grievous bodily harm-Two (2) years imprisonment fully suspended for Five (5) years on condition that the accused is not convicted of Assault with the intent to do grievous bodily harm committed during the period of suspension.
4. Accused 4:
- Count 23- Assault with the intent to do grievous bodily harm- Eighteen (18) months imprisonment fully suspended for Five (5) years on condition that the accused is not convicted of Assault with the intent to do grievous bodily harm committed during the period of suspension.
5. The bail money should be refunded to the accused.

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D. F. SMALL

Acting Judge

## APPEARANCES

- FOR THE STATE: L. Matota assisted by I. Nyoni and S. Petrus  
Office of the Prosecutor General, Oshakati
- FOR THE 1<sup>st</sup> ACCUSED: L. P. Shipila  
Directorate of Legal Aid, Oshakati
- FOR THE 2<sup>nd</sup> ACCUSED: M. Nyambe  
Mukaya Nyambe Inc., Ongwediva
- FOR THE 3<sup>rd</sup> ACCUSED: G.M. Mukasa  
Directorate of Legal Aid, Oshakati
- FOR THE 4<sup>th</sup> ACCUSED: N.B. Tjirera  
Directorate of Legal Aid, Opuwo