

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
LEAVE TO APPEAL REASONS
PRACTICE DIRECTIVE 61

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| Case Title: Gerhardus Bezuidenhoudt v The State | Applicant Respondent | Case No: CC 04/2005 Division of Court: High Court, Main Division |
| Coram: Honourable Mr Justice Damaseb JP | | Delivered: 19 October 2023 |
| Neutral citation: <i>Bezuidenhoudt v S</i> (CC 04/2005) [2023] NAHCMD 669 (19 October 2023) | | |
| ORDER: 1. The application for condonation for the late noting of the application for leave to appeal is granted. 2. The application for leave to appeal against sentence is dismissed. | | |
| REASONS FOR ORDER: | | |

DAMASEB JP:

[1] On 27 January 2006, I found Mr Gerhardus Bezuidenhoudt guilty on one count of abduction and one count of rape with coercive circumstances. On 1 March 2006, I sentenced him to two years imprisonment on the count of abduction and 45 years imprisonment on the count of rape with coercive circumstances. The two years imprisonment on the count of abduction to run concurrently with the 45 years' imprisonment on the count of rape. Mr Bezuidenhoudt now seeks leave to appeal his sentence.

Background

[2] Mr Bezuidenhoudt had several previous convictions one of which was rape for which he was convicted in 1995 and sentenced to eight years at the time of his sentence in 2006. It was due to the previous conviction of rape with coercive circumstances that I relied on s 3(1)(a)(iii) read with s 3(2) of the Combating of Rape Act 8 of 2000 and imposed the minimum sentence. Section 3(1)(a)(iii) reads as follows:

'Any person who is convicted of rape under this Act shall, subject to the provisions of subsections (2), . . . , be liable –

. . .

(b) in the case of a second or subsequent conviction (whether previously convicted of rape under the common law or under this Act) -

(iii) Where the rape in question or any other rape of which such person has previously been convicted was committed under any of the circumstances referred to in subparagraph (iii) of paragraph (a), to imprisonment for a period of not less than forty-five years.

(2) 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.’

[3] I held that the common law does not postulate that a previous conviction of ten years or older must in all circumstances be disregarded and in this particular case it acted as an aggravating factor¹ and as a result I was bound by legislation to impose the minimum sentence having found that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence of 45 years imprisonment.

Grounds of appeal

[4] Mr Bezuidenhout in what is termed as his notice of appeal dated 13 October 2022 indicates that he is 48 years old and currently serving a prison term of 48 years and 10 days for Rape, assault with the intent to cause grievous bodily harm, abduction, escape and possession of cannabis. He indicates that he has already served 18 years and six months of his sentence. Mr Bezuidenhout seeks a reduction of his sentence due to the decision in *S v Gaingob and others*² which, holds that, long sentences above 37 years and a half are unconstitutional.

[5] Mr Bezuidenhout relies on the following passage from the case of *S v Gaingob and others*³:

‘This means that where a person is sentenced to imprisonment for a period longer than 37 and half years it would mean such sentence would in effect be a sentence that is harsher than a sentence of life imprisonment. As life imprisonment is the most severe sentence that can be imposed any sentence that seeks to circumvent this approach by imposing

¹ *S v Mqwathi* 1985 (4) SA 22 (T) p 23.

² *S v Gaingob and others* 2018 (1) NR 211 (SC).

³ *Ibid* at para 81.

fixed term sentences longer than 37 and a half years is materially misdirected and can be rightly described as inordinately long and is thus liable to be set aside. Such sentence is imposed contrary to the principle enunciated in *Tcoeib* and the statutory scheme relating to parole enshrined in the Correctional Service Act.

Discussion

Late filing of the application for leave to appeal

[6] In terms of s 316(1) of the Criminal Procedure Act 51 of 1977, an accused convicted of an offence before the High Court of Namibia may within a period of 14 days of the passing of any sentence as a result of such conviction apply for leave to appeal against his or her conviction or against any sentence. Mr Bezuidenhout on record first applied for leave to appeal against both his conviction and sentence on 21 March 2004. There was no set down by the office of the Registrar. Mr Bezuidenhout sent another request for leave to appeal his conviction and sentence on 29 March 2006 and yet again the matter was not set down to be heard. On 5 November 2009, Mr Bezuidenhout sent another request to the office of the Registrar and a notice of set down for hearing of his leave to appeal was set down for 1 February 2010. The matter was then removed from the roll due to an agreement between the parties.

[7] What is overwhelmingly clear is that the applicant had the intention to lodge his application for leave to appeal since 29 March 2006. It is apparent from the record that the delay is not through any fault of his own. He waited 17 years to have his day in court. He has therefore made out a case for condonation. I will proceed to adjudicate his leave to appeal his sentence as stated in his notice of appeal dated 13 October 2022.

Disposal

[9] The Legislature has in s 3(1) (a) (iii) of the Combating of Rape Act 8 of 2000 created a mandatory minimum sentence of 45 years imprisonment for repeat offenders of

the crime of rape which involve coercive circumstances and where there are no substantial and compelling circumstances. The law was correctly re-stated by Ndauendapo J in *S v Boois*⁴:

'The previous convictions record submitted into evidence indicates that the convict has a previous conviction of Housebreaking with the intent to rape and rape for which he was convicted and sentenced on 14 April 1997 to 10 years imprisonment, that is prior to the coming into effect of the Combatting of Rape Act 8 of 2000, therefore section 3(b)(ii)⁵ would be the most relevant provision under the circumstances taking into account that it refers to a common law conviction, which was only possible prior to the coming into force and effect of the Combatting of Rape Act 8 of 2000. The circumstances under which the previous rape occurred i.e. whether there were coercive circumstances remain unknown as they were not placed before court, however the circumstances of the rape of which this court convicted him showed that there were coercive circumstances as the convict used physical force before raping the deceased, for that reason, the court is required to give the convict the benefit of the doubt and employ the provisions of section 3(b)(ii) and not section 3(b)(iii), as argued by the state and which prescribed a minimum mandatory sentence of 45 years. Section 3(b)(ii) sets the minimum sentence of not less than 20 years imprisonment unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence. No substantial and compelling circumstances were placed before me to deviate from the prescribed minimum 20 years. The prescribed 20 years is a minimum and there is nothing to prevent the court to impose a sentence exceeding the prescribed 20 years minimum.

It is also of note to highlight at this point that the provisions of the Combatting of Rape Act 8 of 2000 have not yet been amended or declared unconstitutional by a competent court of law and as such I do agree with counsel for the state that they are still valid and of force and effect. . .' (my underling)

[10] 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

⁴ *S v Boois* 2018 (4) NR 1060 (HC) at paras 17- 18.

⁵ of the Combatting of Rape Act 8 of 2000.

statutory prescribed mandatory minimum sentences.

[11] As I said in *S v Neromba*⁶ 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.’

[12] Unless and until a competent court declares as unconstitutional and sets aside the mandatory minimum sentence regime under the Combating of Rape Act, no other court can impose a different sentence to the one I imposed. Mr Bezuidenhout application for leave to appeal therefore has no prospects of success.

[13] In the result:

1. The application for condonation for the late noting of the application for leave to appeal is granted.
2. The application for leave to appeal against sentence is dismissed.

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| Judge’s signature | Note to the parties: |
| | Not applicable |
| Counsel : | |
| Applicant | Respondent |
| G Bezuidenhout In person Oluno Correctional Facility | Ms Nyoni Of the Office of the Prosecutor General Windhoek |

⁶ *S v Neromba* (CC 12/2022B) [2023] NAHCMD 483 (8 August 2023) at para 27.

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