CASE NO.: CA 19/04

IN THE HIGH COURT OF NAMIBIA

In the matter between:

A. K. **APPELLANT**

versus

THE STATE **RESPONDENT**

CORAM: VAN NIEKERK, J *et* MTAMBANENGWE, AJ

Heard on: 11 April 2005
Delivered on: 2 November 2005

APPEAL JUDGMENT

VAN NIEKERK, J: The appellant was convicted on a charge of contravening section 2(1)(a) of the Combating of Rape Act 2000 (Act 8 of 2000) read with section 94 of the Criminal Procedure Act, 1977 (Act 51 of 1977) in that he on diverse occasions raped the complainant over a period of several months. He was sentenced to 20 years imprisonment. He appeals against the conviction and sentence.

In the court *a quo* the appellant was represented by a legal practitioner. On appeal Mr Verwey appeared *amicus curiae*. We appreciate his

assistance.

The facts of the case may be summarised as follows:

The appellant and the complainant's mother were living together as husband and wife in a rural area. Complainant, who was born on 25 March 1987, initially lived with other relatives and went to school in K... where she progressed up to Grade 5. During December 2000, slightly longer than a year before the appellant's arrest, the complainant began residing with her mother and the appellant. At this time she was 13 years old. There were also three younger children living at the homestead.

One day some time before Christmas when her mother was not at home the appellant called her into the room, pulled her onto the bed, took off her panty and had sexual intercourse with her without her consent. She reported the incident to her mother, who remained quiet. The next incident occurred some time after Christmas when the appellant asked her to accompany him to look for donkeys in the veld. Complainant refused and ran away, but tripped, where after the appellant had sexual intercourse with her. The appellant repeated his conduct on three occasions in the veld.

The family then moved to another place in the communal area and there the appellant had sexual intercourse with the complainant about twice in the house. Further reports to her mother were in vain - no action was

taken. When the complainant reported that her menstruation had stopped and later that something was moving in her abdomen, her mother shrugged the matter off, saying it was nothing, the complainant was just putting on weight. Complainant became pregnant but her mother ignored even this

obvious sign. Matters came to a head when the family attended a funeral where the complainant's elder sister, A. noticed that she was obviously pregnant and confronted both the complainant and their mother. A. promised that she would send for the complainant and arrange that she be examined by a doctor. A. kept her word. The medical examination confirmed that the complainant was seven months pregnant. Complainant told A. that it was appellant who used to have sexual intercourse with her. During February 2002 the complainant, at the age of 14 years, gave birth to a stillborn baby. She did not return to her mother's house, nor did she return to school. She continued staying with A.. Shortly after the birth the appellant was arrested on charges of rape.

As part of its case the State called the complainant's mother who stated that at a certain stage she noticed that the complainant's abdomen was growing bigger. At first she thought complainant was just putting on weight, but later she suspected that the complainant might be pregnant. However, the complainant denied this. The mother suspected the appellant, of being the father as he was the only adult male living there but the appellant denied knowing anything about it. However, at a later

stage, it seems after the funeral at which A. confronted her, the mother became more insistent and the appellant then admitted that he was the one responsible and that he was the one who had had sexual intercourse with the complainant. He explained that he was afraid to tell the mother in case she mistreated the

complainant. The complainant was present when the admission was made and confirmed it in her testimony.

Complainant’s mother confirmed that her daughter made reports to her that the appellant had had sexual intercourse with her, but she did not believe these reports. She thought they were just “lies of kids”. Sadly, in spite of the obvious signs and appellant's admission, the mother did not report the matter to the police or any other authority. It seems she was in denial, as she explained "I didn't believe it because I never caught them red-handed." She also explained that she did not believe the reports because it was contrary to her people's tradition for a stepfather to have sexual intercourse with his stepdaughters. She did not believe that her boyfriend, the appellant, would do something like that. However, she also did not think that anyone else impregnated her daughter as they were living alone and no-one used to visit them. She described the complainant as an obedient child who does work around the house, who never went out at night and who had no boyfriends. The mother often went away to attend funerals, leaving complainant alone with the appellant. Appellant

always took complainant with him to the veld on these occasions they were also alone.

The appellant testified and denied that he ever had sexual intercourse with the complainant. He described the alleged admission by him as a fabrication made up by the complainant and her mother, perhaps to get him into jail. The complainant's testimony he described as lies. The reason he advanced

for the lies and fabrications was that the relatives of the complainant's mother did not approve of their relationship. He described the complainant as "a bit too arrogant", but that he loved her like his own daughter. However, the complainant did not love him like her own father and used to instigate the other children against him, saying that he was not their real father. According to him, the children loved him and followed him everywhere. He related how his in-laws were against him, to the extent that threats were made one night at 2 am that he should vacate the house or it will be burnt down. He included his ex-wife (the complainant's mother) in this group of persons who all wanted him to go to jail and stated that this was the reason why she made up the story of the admission that he impregnated the complainant.

In cross examination he went so far as to deny that the complainant was ever pregnant and said that the whole story was made up by the elder sister. He also stated that when she grew bigger, she was only putting on

weight like a normal woman. He could not explain why, if there was so much dislike from his wife and her relatives, including the children, his wife never took action or reported him to the police, in spite of repeated complaints by the complainant.

On appeal the appellant instructed Mr *Verwey* to make oral submissions on certain aspects raised in his notice of appeal. The first was essentially that there was no adequate proof that the complainant had been pregnant and

that she had given birth as no doctor was called to testify to these facts. There is no merit in this ground of appeal. The complainant and A. testified that she was pregnant and that she gave birth. The mother suspected that the complainant was pregnant because of her appearance and even examined the complainant's stomach. Her insistence at times that the complainant was only getting fat and putting on weight was clearly attempts at self delusion and denial as she, for the reasons she stated in her testimony, refused to believe her own eyes and ears. Initially the appellant's case *a quo* was never that the complainant was not pregnant, he merely denied having had sexual intercourse with the complainant. It was only during cross-examination that he suddenly denied knowledge of any pregnancy. Even then appellant testified that he noticed that the complainant was becoming bigger, although he ascribed this to weight gain. In my view the learned magistrate was correct when he stated in his judgment that the fact that the complainant was obviously pregnant must be accepted.

The second ground of appeal was that the State did not prove beyond a reasonable doubt that the appellant was the father of the child as there were no blood tests done to prove this fact. The question is whether there is sufficient other evidence on which to conclude that the appellant was indeed the father, while bearing in mind that it is not necessary for a conviction on a charge of rape to prove who the father is, although proof of this fact may provide corroboration for the complainant that she was raped by the

appellant. The available evidence is the following: the complainant said that the person who had sexual intercourse with her on several occasions was the appellant. It is clear from her evidence and that of the mother that no-one else had the opportunity to impregnate her and the probabilities all point toward the appellant as the culprit. Eventually the appellant also admitted this fact.

At this stage it also becomes important to consider the next ground of appeal which is that the testimony of the State witnesses was just fabrication and lies and should have been rejected. Counsel made reference to the appellant's evidence that the relatives of the complainant's mother did not approve of him, tried to force him out of the house, that the mother, complainant and A. wanted him to land in jail, etc. However, I must say that if this is what the family wanted to achieve, they were awfully slow about it. The poor complainant's reports fell on deaf

ears; the mother took no action and stated throughout that she did not believe the reports or her own suspicions until very late. A. testified that the complainant began crying and was reluctant to explain her condition and only later stated that it was the appellant who impregnated her. These are not the actions of persons who have grudges and make up a whole case in order to land an innocent person in jail. Apart from the mere claim that complainant's matter was part of a family vendetta seeking to land him in jail appellant did not, as one would expect if the claim were true, mention any instance in which he

was at loggerheads with the mother of complainant. In my view the learned magistrate quite correctly rejected this part of the appellant's evidence.

As far as sentence is concerned the appellant appeared to say in his notice of appeal that the sentence of 20 years imposed on him was shocking. Mr *Verwey* described the sentence as excessive and submitted that the learned magistrate misdirected himself by considering such a term of imprisonment to be an appropriate sentence in the circumstances of the case. He referred to the provisions of section 3(1)(a)(iii)(cc) of Act 8 of 2000 which provide that in the case of a complainant who is under the age of eighteen years and the perpetrator is the complainant's parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant, the minimum sentence is imprisonment for a period of

not less than 15 years. The learned magistrate in his extremely short judgment on sentence referred to the same provision and then added:

> "But, having regard to the fact that this deeds by the accused happened on more than one occasion and left the child with a stillborn baby, and as a result thereof that the whole future of this child is now destroyed, one can say. And having regard to that I have no hesitation in sending the accused, not to fifteen years imprisonment but twenty years imprisonment. That will be the sentence."

Mr Verwey submitted that the legislature, in determining in the Act which circumstances must attract a certain minimum sentence, already took into account the particular circumstance when prescribing that sentence. For instance, where, as in this case, the complainant is under the age of eighteen and the accused is in a position of trust, the legislature has, in fixing fifteen years as the prescribed minimum sentence already taken into account these circumstances. A sentencing court may not take these circumstances into account to sentence more than fifteen years, he submitted. A court would have to rely on other aggravating factors in order to exercise its discretion to sentence to a period of longer than fifteen years. Other factors which have already been taken into account by the legislature, he submitted, is the trauma that is associated with the act of rape and the seriousness of the crime. Mr Verwey then developed his argument further by submitting that, in effect, the magistrate *a quo* wrongly took into account as an additional aggravating factor the trauma

suffered by the complainant when he mentioned the fact that the complainant had a stillborn baby and that her future is destroyed. He submitted that part of the normal consequences of rape is the possibility that a pregnancy may result and that the complainant would have to deal with the issue of giving birth or having an abortion. This aspect too, he submitted was already taken into account when the minimum sentence was determined and is no cause for imposing more than fifteen years imprisonment. He also attacked the reliance on the fact that the appellant had raped the complainant on more than one occasion, but conceded in argument that this was clearly proved on the facts of this case.

I do not agree with counsel's line of reasoning. The legislation gives a limited discretion to courts sentencing in rape cases. This limitation is achieved in various ways, e.g. by prescribing effective imprisonment in all cases, except where the offender was under eighteen years of age when the crime was committed or where there are substantial and compelling reasons for imposing a lesser sentence. By this means the legislature attempts to ensure "a severe, standardized and consistent response from the courts to the commission of such crimes" (*cf. S v Malgas* 2001 (2) SA 1222 (SCA) at 1230F: *S v Lopez* 2004 (4) NCLP 95 (HC). Another way of achieving this purpose is to prescribe a certain minimum effective period of imprisonment in cases where certain specific circumstances exist. In some cases the minimum sentence is "not less than five years" (sec 3(1)(a)(i)) and in others the minimum sentence varies from "not less than ten

years" (sec 3(1)(a)(ii) and sec 3(1)(b)(i)), to "not less than fifteen years" (sec 3(1)(a)(iii)); "not less than twenty years" (sec 3(1)(b)(ii)); and not less than forty-five years" (sec 3(1)(b)(iii)). I agree with Mr *Sibeya,* who appeared for respondent, that in such cases there clearly is a discretion to impose a longer sentence. The legislature merely wanted to ensure that in certain kinds of cases which are likely to arise the sentence imposed would not be less than the benchmark provided by the Act. I might have agreed with Mr *Verwey* if the sentences were fixed at a certain number of years with no room for discretion, but this is obviously not the case. The legislature wisely did not attempt the impossible by legislating for all eventualities and circumstances. If one were to take the provisions of section

3(1)(a)(iii)(cc) as an example: in one case the complainant might be, say, fourteen whereas in another she might be days away from turning eighteen. Although in both cases the matter would fall in the category mentioned in section 3(1)(a)(iii)(cc), there would be grounds, in an appropriate case, to treat the case of the younger complainant as more serious than the other.

The legislature has allowed room for differentiating within the limits of the Act. If counsel's submission were correct it would mean that no differentiation may be made, a conclusion that is clearly not supported by the wording of the Act.

I further do not agree that when the legislature prescribed the mandatory sentences it already took into account that rape normally is traumatic and that a court may not take the particular trauma suffered in a case into consideration when passing sentence. There is no indication in the language used that such a limitation upon the courts' discretion is intended. The furthest one can perhaps take the argument is to say that the seriousness of the offence of rape is reflected in the approach taken by the legislature in prescribing minimum effective prison sentences, which in some cases are quite lengthy.

In my view the learned magistrate was correct in taking into consideration that the complainant became pregnant and gave birth to a stillborn baby.

The pregnancy must have been a constant reminder of the rapes inflicted upon her. The complainant had to endure the constant probing by her mother at a time when she was entitled to rely on her support. Her obvious condition was not acknowledged but brushed off as weight gain. The appellant, at least for some time, acquiesced in the mother's self-delusion, probably because it suited him. His denials of being responsible, together with the mother's failure to act upon the complainant's reports must have isolated the complainant in her plight. There is some admissible evidence by A. that the complainant did not always cope well and was unable to return to school as a result of being pregnant. Whilst the learned magistrate's statement that "the whole future of this child is

now destroyed" is to my mind somewhat exaggerated, I have no doubt that the complainant has suffered considerably. What effect the fact of the stillbirth had upon the complainant is not known. The appellant repeatedly forced himself upon this young girl of barely fourteen, thereby exposing her to the risk of becoming pregnant, as she then did, with all the physical, emotional, social and economic implications associated with such a condition. By doing so he displayed utter disregard for her as a child under his care. One does not expect such conduct from an adult in a father-daughter relationship. The complainant was entitled to live her young life free from such gross invasion, hopefully returning to school and growing into a young woman in her own time, protected and supported by her mother and the appellant.

Mr *Verwey* submitted that if account is taken of the fact that the appellant was in custody awaiting trial for two years and four months, a sentence of twenty years is excessively long. He submitted that this would be the kind of sentence one expects where excessive violence was used or where an accused was a repeat offender. He pointed out that the appellant is a first offender and that the complainant did not testify that violence (as opposed to some physical force) was used in committing the rapes. Counsel referred to the matter of *S v Shapumba* 1999 NR 342 (SC) in which the appellant had been sentenced to 15 years imprisonment on a charge of rape. Shortly before this sentence was imposed a regional court sentenced

him on another charge of rape to nine years imprisonment of which two years were suspended. This rape was committed while the appellant had been out on bail. This factor was considered to be aggravating and led the Supreme Court to confirm the sentence of 15 years. However, the Court considered the cumulative effect of the two sentences of 22 years to be unnecessarily onerous. The Court further held that the matter was not an extreme case which would merit a total period of imprisonment of 22 years. The two sentences were ordered to run concurrently in such a way that the appellant was required to serve 18 years imprisonment. The two main grounds on which the Court relied to reduce the effective period of imprisonment were the absence of violence or weapons during the rape and the fact that the appellant was a first offender. Although this matter was decided before the promulgation of Act 8 of 2000, I agree with counsel for appellant that the judgment is useful when considering the approach to sentence in a rape case.

The record reflects that appellant's representative in the court *a quo* pertinently mentioned in mitigation of sentence the fact and period of appellant's pre-trial custody. The learned magistrate does not refer to this fact at all in his judgment and one does not know whether he took it into consideration. Mr *Sibeya* submitted that the magistrate in all probability did bear it in mind because it was mentioned just before he passed sentence. If this so, I find it strange that he does not mention one word about the most weighty mitigating factor advanced on behalf of appellant. I accept Mr *Sibeya's* submission that no judgment is all encompassing and

perfect in all respects, but the judgment is so brief that I have the impression that the magistrate decided to ignore this fact. If the magistrate overlooked or ignored this fact, he erred. Countless authorities indicate that time spent in custody awaiting trial or sentence is an important mitigating factor giving cause for a reduction in the sentence a court would normally have imposed (See e.g. *S v Sikweza* 1974 (4) SA 732 (A) 737; *S v Mnguni* 1977 (3) SA 63 (N) 65; *S v Mgijima* 1982 (1) SA 86 (E) 893; S *v Bacela* 1988 (2) SA 665 (E) 676; *S v Banda and Others* 1991 (2) SA 352 (BG) 365); *S v Gqamana* 2001 (2) SACR 28 (C) 37; *S v Matwa* 2002 (2) SACR 350 (E) 359; *S v Njikelana* 2003 (2) SACR 166 (C) 171; 174-175).

On the other hand, if the magistrate took this fact into consideration and nevertheless imposed 20 years, he also erred as the resulting sentence is, as Mr *Verwey* submitted, excessive in the circumstances of this case. It would mean that the magistrate must have considered a sentence of about 22 years

to be appropriate. In my view a sentence of 22 years, or even of 20 years, is quite a long sentence. The Act itself requires a minimum sentence of 20 years in cases where an accused has a second or subsequent conviction and

where the rape was committed under any of the coercive circumstances referred to in section 2(2)(a), (b) or (e) of the Act (see section 3(1)(b)(ii)). In my view the aggravating circumstances in this case do not require such

a severe sentence to be imposed. I would, have if I had sat as a court of first instance, sentenced the appellant to 17 years imprisonment. Bearing in mind the time spent in custody awaiting trial, I would have reduced the sentence to 15 years. Such a sentence would give effect to the intention of the legislature in prescribing a minimum sentence of 15 years and would be a measure of the specific circumstances of this case, namely that the complainant was barely 14 years old, that the rapes were repeated over a period of time, that she became pregnant, resulting in a stillbirth and the derailment, as it were, of the young life of the complainant. On the other hand it would also take into consideration that the force used by the appellant was not considerable, that no weapons were involved and that the complainant did not suffer injuries. The fact that the appellant is a first offender in his forties indicates that he is not of criminal bent and weighs heavily as a mitigating factor. He also receives credit for the two years spent in custody awaiting trial.

There is a striking disparity between the sentence this Court would have imposed and that imposed by the trial court, which entitles interference on

appeal, bearing in mind that punishment is in the discretion of the trial court (*S v Tjiho* 1991 NR 361 (HC) 364G-I; 366B).

In the result the following order is made:

1. The appeal against the conviction fails.

2. The appeal against sentence succeeds. The sentence of 20 years imprisonment is set aside and replaced with a sentence of 15 years imprisonment.

____

VAN NIEKERK, J

I agree.

____

MTAMBANENGWE, AJ

APPEARANCES:

FOR THE APPELLANT:

Mr N Verwey

Theunissen, Louw & Partners

Amicus Curiae

FOR THE RESPONDENT:

Mr O Sibeya

Office of the Prosecutor-General