

REPORTABLE

CASE NO.: CC 04/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

GERHARDUS BEZUIDENHOUDT

Accused

CORAM: DAMASEB, JP

Heard on: 15-02-2006; 23-02-2006

Delivered on: 01-03-2006

SENTENCE

DAMASEB, JP: [1] Mr. Gerhardus Bezuidenhoudt, I found you guilty on two counts: abduction, and rape with coercive circumstances, because you used a knife in the commission of the offence of rape.¹ It is now my duty to

¹Coercive circumstances exist:

- (iii) where –
 - aa) the complainant has suffered grievous bodily or mental harm as a result of the rape;
 - bb) the complainant –
 - (A) is under the age of thirteen years; or
 - (B) is by reason of age exceptionally vulnerable;
 - cc) the complainant 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;

pass sentence on you. Section 3(1)(a)(iii)(f) of the Combating of Rape Act, 8 of 2000 (the Rape Act) provides as follows:

“Any person who is convicted of rape under this Act shall, subject to the provisions of subsection[s] (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 of [forty-five years], it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.”

[2] You have several previous convictions one of which is of rape for which you were convicted in 1995 and sentenced to 8 years. You were released in 2001, and in 2003 committed the crime for which I must now sentence you.

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- dd) *the convicted person is infected with any serious sexually transmitted disease and at the time of the commission of the rape knows that he or she is so infected;*
 ee) *the convicted person is one of a group of two or more persons participating in the commission of the rape; or*
 ff) *the convicted person uses a firearm or any other weapon for the purpose of or in connection with the commission of the rape ... (my emphasis)*

The issue that arises is whether the rape of which you were convicted in 1995 renders the present a second or subsequent conviction; for if it is the case, the law requires that I impose a sentence of not less than 45 years, unless there are “*substantial and compelling circumstances*”² in which case I *may* impose a lesser sentence.

[3] I have given careful consideration to the submissions made by both counsel on the question whether the first conviction of rape (in 1995) renders the present a “second or subsequent conviction”. At common law, the Court has an unfettered but judicial discretion to disregard previous convictions which are 10 years or older: In *S v Mqwathi* 1985 SA (4) 22, the following appears:

“[T]he court now exercises an unfettered but judicial discretion, [to] decide, having regard to the nature, number and extent of similar previous offences and the passage of time between them and the present offence, to leave out of account the previous convictions, even where the last previous conviction is less than 10 years old, and treat the accused as a first offender. The court can also, taking into account the aforementioned factors, nevertheless decide to take the previous convictions into account as an aggravating circumstance even where the last previous conviction is more than 10 years old.”

[4] The common law deals with the situation of what weight a Court must give to previous convictions, including ones which are 10 years or older. In

² *S v Lopez* 2003 NR 162 at 172 – 3C

that respect, the Court is entitled, because of the age of a previous conviction, to disregard it and to treat the accused as a first offender. The common law does not postulate that a previous conviction of 10 years or older must in all circumstances be disregarded. In an appropriate case it may in fact be an aggravating factor. The common law, therefore, does not suggest that a previous conviction which is 10 years or older, should always not count as a previous conviction.

[5] In respect of the offence of rape, the legislature has singled out a person who has a previous conviction of rape, for a minimum sentence of 45 years if he has a previous conviction of rape involving coercive circumstances or commits another offence of rape involving coercive circumstances. It therefore removes the discretion enjoyed at common law by the Court to this extent: once a previous conviction of rape is proved, and there are coercive circumstances, it triggers the minimum sentence provision; the Court is not at liberty to consider whether, because of its age, the previous conviction of rape should be disregarded - and in that way avoid imposing the minimum sentence. That would do violence to the clear and unambiguous language of the Act. Both counsel are in agreement on that score. Ms De Villiers for the state argued that the offence of rape ordinarily attracts a very long sentence and it would, in the nature of things, be the case that by the time the next offence of rape is committed by the same person, the last conviction would have occurred a very long time ago. She

gave the hypothetical example of a person sentenced, say, to 50 years for rape. When he comes out of prison that conviction would have occurred 50 years earlier and it cannot be right that because of the age of that conviction, he be treated as if he were a first offender. There is merit in this argument.

[6] Mr Dos Santos, for the convict, argued that the previous conviction of rape occurred a long time ago and that renders it a “*substantial and compelling*” circumstance calling for a sentence of less than the prescribed minimum. Counsel for the state argues that the previous conviction occurred in 1995; and the convict was released in around 2001. The present offence was committed in 2003. The passage of time between his release and the commission of the present offence is therefore very short, showing that he did not learn a lesson. Besides, he committed other offences during this time – a factor which should serve in aggravation of sentence instead of being a substantial and compelling circumstance. I agree. I am satisfied that there are no substantial and compelling circumstances in this case.

[7] The accused is now 33 years old. He is unemployed and has 2 children. The best part of his productive life has been spent in prison. He has been in prison now for about 3 years awaiting his trial. I cannot ignore that fact and I take it into account in the sentence I impose. He will be a very old man by the time he had served the minimum sentence required by

law. I do not therefore propose to impose a heavier sentence than what the law requires.

[8] Accordingly, I sentence you as follows:

- i) On the abduction count to 2 years imprisonment.
- ii) On the count of rape with coercive circumstances to 45 years imprisonment.
- iii) The sentence on the abduction count to run concurrently with the sentence on the rape count.

DAMASEB, JP

ON BEHALF OF THE STATE:

Ms De Villiers

Instructed By:
General

Office of the Prosecutor-

ON BEHALF OF THE ACCUSED:

Mr A I Dos Santos

Instructed By:

Dos Santos & Co