

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

**HALWEENDO MELALI SHIPANDENI**

**CORAM: MULLER, J**

Heard on: 03; 07- 08 May 2007

Delivered on: 09 May 2007

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**JUDGMENT**

**MULLER, J.:** [1] The accused pleaded not guilty to both the main charge of contravening s 2(1) of the Combating of Rape Act, No 8 of 2000 (the Act) and to the alternative charge of committing a sexual act with a girl under 16 in terms of s 7(1) of Act 21 of 1980, as amended. The girl he allegedly committed a sexual act with is K M.

[2] Ms Nyoni represented the State and Mr Bondai was instructed on behalf of the accused by the Directorate of Legal Aid. Mr Bondai read into the record the accused's reply to his indictment and this was confirmed by the accused. From this document the following admissions were recorded by the Court as confirmed by Mr Bondai:

- a) the identity of the complainant;

- b) the documents referred to in paragraph 8 of this reply; and
- c) that the accused was arrested by Constable Sakaria Haihambo at the Eenhana Open Market on 15 March 2004.

[3] The first State witness was the complainant, K M, a girl who is now 14 years old. Special arrangements to ensure that she could testify in a comfortable atmosphere and not be frightened by having to look at the accused during her testimony. The accused sat behind one-way glass window and could see the proceedings in Court. He had an interpreter with him. Counsel could see him by way of close circuit television. The complainant also had an interpreter. I did not wear a robe, merely a suit and sat down- stairs, close to counsel and the witness. K was sworn in after the Court established that she could distinguish between the truth and untruth and knew what it means to be sworn in. Mr Bondai confirmed his satisfaction with the arrangements.

[4] K testified that she came from school and found the accused sleeping. She wanted to remove her school uniform. The accused followed her and asked her to write a letter for him, which she did, whereafter she ate and he repeatedly ordered her to remove mahangu from water and put it back again. When she got tired and refused to do it, he grabbed her when she left the hut. She grabbed hold of a pole, but he grabbed her hand. She started to cry. He put her down and pinned her arms against her sides with his knees. He lifted her skirt and pulled her panties down to her knees. Then he undid his trousers and removed his penis, which he put into her female part and moved up and down. He also persisted to put his tongue into her mouth and even opened her mouth when she closed it. She felt something flowing from his penis on her. He left and said she can go. The complainant cried. She went to the neighbour's house, but there were no adults. Later she went to a neighbour's house where J found her. Because she had somebody with her K did not tell her anything. Later she told her mother. The following morning J went to the headman, who was not there. However, she told the headman's wife what happened. They went to the hospital where she was examined by the doctor, who had a nurse with him. During the act of the accused she felt pain in her female parts. She did not wash before going to the doctor.

[5] Cross-examination was directed at questioning the complainant how the accused could lift her skirt and take his penis out, while sitting on her and pinning her hands as she described. He remained adamant that he managed to do it by lifting himself up to perform this. Furthermore she was questioned about not sustaining any injuries or bruises during this process and the condition of her clothes after the manoeuvres of the accused. Mr Bondai had a disadvantage because of the accused's alibi defence when questioning the complainant.

[6] JM, the aunt of the complainant, testified that her relationship with the

accused, who was brought there by her husband, was good until this incident. She described that she saw marks resembling head and foot marks made by a person on the sand in the kitchen area. She asked the complainant about it, who told her what the accused did. She went to the headman who was away, but told his wife. Then she took the child to the police and to the hospital. She was present during medical examination. She denied the statement put to her that the accused was not there because he was already working somewhere else. She also denied that he relationship with the accused was strained before the incident and that that influenced her to report the incident.

[7] The State called the headman Thomas Katondoka. He confirmed that the accused is his brother's youngest child. He also confirmed that J told his wife about the incident, when he was away, but she told him the next day what had happened. He was adamant that the accused only started working for the wife of the person whose name the defence put to him after the incident. Before that he stayed at Michael's place. Michael is J's husband and the witnesses' son. He was instrumental in obtaining work for the accused with Lazarus Nhitewa's wife as a cattle herder.

[8] Dr Ongundiran conducted the medical examination of the complainant. A nurse and J was present and an interpreter translated what the complainant said. The doctor found that the hymen of the complainant was ruptured and the lower part of her abdomen was painful, as were the labia minora, labia majora and the vestibule of the complainant. There were no injuries. Only penetration one finger was possible and the doctor's conclusion was that his findings are suggestive of rape. The doctor was not cross-examined.

[9] The accused testified in his own defence. He persisted with his allegation that he was not there when the rape took place, because at that time he already worked for Lazarus Nghitewe as a cattle herder. He also testified that J slept out and he confronted her about it. This caused ill feelings between them and because thereof, he asks the Court to believe that J and the complainant concocted the accusation of rape against him. During cross-examination this allegation was watered down to one incident. He also had no answer to the evidence of his "father" Thomas Katondoka that he only left J's house after the rape incident. His only excuse was that Thomas Katondoka lied about this. Later he agreed that Tomas Katondoka as the headman and his "father" would know when he left J's homestead and who employed him

and when.

[10] Ms Nyoni submitted that the complainant was a very good witness, who testified in detail, not only in respect of the alleged rape, but also about what occurred before that. The complainant's evidence was also corroborated by that of J and her report to J. The marks on the ground is also consistent with somebody lying there. She further referred to the evidence of the headman Thomas Katondoka, who showed compassion to the accused by bringing food-stuff to him while he is in custody, but who testified that the incident, of which he had been told by his wife and later by J herself, occurred before the accused started working for the wife of Lazarus Nghitewa at Egambo village as a cattle herder. The accused regarded Tomas Katondoka as his "father" and told him everything. Ms Nyoni also submitted that the accused's attempt to indicate that J had her knife in for the accused, because he dared to question her sleeping out and had concocted the story of the rape just to get at him, is in direct contrast to J's evidence that their relationship was good. Ms Nyoni also pointed out that the statement put on behalf of the accused to J that she wanted the accused to leave and that he could only stay as a result of her husband's intervention, is not what the accused testified under oath. Finally, she submitted that the medical evidence proves that the complainant was sexually penetrated and that the State has proved the commission of the offence on the main charge beyond reasonable doubt.

[11] Mr Bondai conceded that with the alibi-defence of the accused, he had no answer to the rape allegation, if the Court should find that he was indeed staying at J's house at the time of the rape, unless the complainant's evidence is rejected. Mr Bondai submitted that the Court should treat the evidence of the complainant with caution, because she was a single witness in respect of that event. He submitted that it is strange that neither had the complainant any injuries nor were her clothes torn during the alleged rape. In respect of the evidence of Thomas Katondoka to the effect that the accused was still staying at J's house at the time of the rape, he submitted that Thomas Katondoka did not provide specific dates and that the State failed to call Lazarus Nghitewa or his wife, who could give the best evidence of when the accused started working there. He submitted that the accused should be acquitted.

[12] I have no doubt that the accused committed the offence of raping a child in terms of Combating of Rape Act. Her evidence was clear and absolutely reliable. The accused's only defence is that he did not commit this offence because he was not there and was at the time already a cattle herder for Lazarus Nghitewa. His defence is one of an alibi. Although the State bears the *onus* to prove that he committed the offence and consequently was there, I

accept that *onus* was discharged. In *S v Biya* 1952 (4) SA 514 (A) it was decided that an accused does not have an *onus* to prove his alibi. It is sufficient if it is reasonably true. The court does not consider the alibi in isolation. If there is sufficiently strong evidence that he may in fact have committed the act, his story can safely be rejected. (*R v Hlongwane* 1959 (3) SA 337 (A) at 346-1; *Hoffmann & Zeffert- The SA Law of Evidence*, 4<sup>th</sup> edition, p 619; and *Schwikkard & van der Merwe, Principles of Evidence*, 2 edition, p 526.) The accused's own "father", the headman, who impressed me as a stately person who did not attempt to accuse the accused in any way, only gave factual evidence and he said the accused was still living at J's house when the rape occurred. Thomas Kationdoka corroborates the evidence of J and the complainant. I accept both the evidence of J and the complainant that the accused was still living at J's house at the time. Thomas Katondoka's evidence absolutely contradicts the evidence and the defence of the accused that he was not there. That is the end of the only version of the accused. His lame excuse of why J apparently framed him, namely because he questioned her, is rejected as an absolute lie. Already in cross-examination he watered down his allegation that J slept out, to only one occasion. Whatever the inference is that he wanted the Court to draw from this, is further destroyed by his evidence that J took the complainant along when she slept out and the single occasion that he eventually could come up with, was when J slept at a neighbour's house. What is wrong about this, I do not know, even if it was true. This was also not what was put to Julia, who said that the accused was a well behaved boy with whom she had no problem.

[13] Mr Bondai submitted that the State should have called Lazarus Nghitewe or his wife to testify and to tell the Court when the accused started working for them. I do not agree with his submission. It must be remembered that the accused also did not provide a specific date of when he started working. The accused relied on an alibi as his defence. The State had to prove that he was at the homestead of J at the time when the offence was committed. This the State did by the evidence of the complainant, and Julia, absolutely supported by that of an independent witness who is regarded by the accused as his “father” and in whom he confides namely, Thomas Katondokwa I regard this as reasonably true. The State did discharge its *onus*. If the defence wished to disprove that evidence in respect of the date it had an opportunity to do so. Thomas Katondokwa was also the person who got work for him and should know when the accused started working for Lazarus’ Nghitewa’s wife. He said it was after the incident. The obvious witnesses to call, if their evidence could support that of the accused, were Lazarus Nghitewa or his wife. This was not done.

[14] Finally, in respect of the rape itself, it is only the evidence of the complainant that I have before me. I have treated her evidence with caution because she is a single witness. However, I regard her as an excellent witness. Despite her young age she gave a detailed account of everything that occurred prior to and during the rape. There is no contradicting evidence and Mr Bondai’s suggestions about the lack of injuries on her body and that her clothes were not torn, are based on nothing but speculation. Her report to J corroborates her evidence and there is nothing on behalf of the defence to contradict it, because of the accused’s alibi defence that did not succeed.

[15] The evidence of the complainant, J and Thomas Katondoka are accepted and the version of the accused is rejected. The accused is convicted of a contravention of s 2(1) of the Combating of Rape Act, No 8 of 2000.

MULLER, J

**ON BEHALF OF THE STATE:**

**MS I. NYONI**

**INSTRUCTED BY:**

**OFFICE OF THE PROSECUTOR-GENERAL**

**ON BEHALF OF THE DEFENCE:**

**MR G. BONDAI**

**INSTRUCTED BY:**

**DIRECTORATE OF LEGAL AID**

CASE NO.: CC 02/2007

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

**HALWEENDO MELALI SHIPANDENI**

**CORAM:**

**MULLER, J**



Heard on: 09 May 2007

Delivered on: 10 May 2007

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## **SENTENCE**

**MULLER, J.:** [1] The accused was convicted of contravening s 2(1) of the Combating of Rape Act, No 8 of 2000, in that he raped a young girl who was only 11 years old at the time, K M.

[2] The accused has no previous convictions.

[3] Mr Bondai made submissions from the bar in respect of the personal circumstances of the accused. He has a clean record and was only 16 years old at the time of the incident and is now 21. He had a difficult upbringing and after his parents died, he moved one place to another. Finally, he was housed by his brother and husband of J M at their home, where he attended looking after the cattle and working in the field. Since the incident he worked as a cattle herder for Lazarus Nghitewa for N\$100 per month. Since his arrest he was in police custody for 5 months until he got bail. The Court was asked to take into account the fact that the complainant suffered no external injuries.

[4] Ms Nyoni submitted that the personal circumstances of the accused are negligible in comparison with the seriousness of the offence and the expectations of the society. She also urged the Court to remember that while the accused was allowed to stay in M and J's house he abused that trust by raping the complainant. She also referred the Court to several other cases in which the seriousness of such an offence and the brutal invasion of the privacy and dignity of a girl or a woman were condemned. (*S v Chapman* 1997 (2) SACR 3 (SCA); *S v Amutenya Shapumba*, Case No SA 4/1999, delivered on 17 November 1999 and *Erich Rudath v S*, Case No 109/98, delivered on 21 September 1999 in the Namibian High Court). She also emphasized the demand of the Namibian society that such a perpetrator

should more stringently and effectively punished. She further urged the Court to take the circumstances of the complainant also into account and in particular because a young girl's innocence had been taken away against her will for no other reason to satisfy the accused's selfish sexual urge. She conceded that the prescribed mandatory sentences contained in the Combating of Rape Act are not applicable to the accused, because he was younger as 16 at the time, but urged the Court to sentence him to a similar sentence as the Court did in *S v Tomas Nakale* Case No CC 7/2007 and *Victor Nghifevali Shilongo*, Case No CC 6/2007, where those accused, despite being younger than 18 years old, were each sentenced to 15 years imprisonment of which 5 years were conditionally suspended.

[5] In considering what an appropriate sentence for the accused should be, the Court considers the elements of retribution, prevention, deterrence and reformation or rehabilitation and attempts to incorporate a combination thereof in the sentence to be imposed. Furthermore, a balance of the circumstances relating to the accused, the crime and society, coupled with a blend of mercy is the aim that the Court's attempts to achieve when imposing an appropriate sentence. (*S v Zinn* 1969 (2) SA 537 (A) and *S v Rabie* 1975 (4) SA 855 (A)).

[6] I do not disregard the personal circumstances of the accused, but when they are compared with the seriousness of the offence and the interests of society, there is no reason why the accused should not be sentenced to a long term imprisonment. The elements of retribution, deterrence, prevention and rehabilitation are considered and can only be accommodated in a punishment of a long term of imprisonment.

[7] This offence is serious. A very young girl's innocence has been taken

away and her privacy invaded by the sexual desire of the accused. He was given shelter and was trusted by J and the complainant, but when he had a opportunity to be alone with her, he forced himself upon her. Despite her crying he continued to satisfy himself. He even tried to force his tongue into her mouth. Then he lied about his presence there and continued with his lie in this Court. The implication of his alibi defence, which he knew was not true, is that he made the complainant a liar and that she fabricated the whole story.

[8] Society expects that the Court should protect its members by punishing a person who rapes children, severely. The minimum sentences, contained in the Combating of Rape act is a culmination of the expectations of society. Of course there must be a cut-off point, namely the age of the culprit, but the circumstances which are regarded as aggravating, remains the same. If the accused was older he would have been sentenced to 15 years imprisonment. The complainant was still younger than 13 and the accused more than 3 years older than her. When I consider all the relevant interests taken into account by the courts, I do not regard that the minimum sentence for this type of offence to be inappropriate and would sentence the accused also 15 years imprisonment.

[9] Because the accused is still young and may be rehabilitated, as well as showing some mercy to him, I have decided to suspend a third of the sentence. I can only hope that this trust is not abused.

[10] The accused is sentenced to 15 years imprisonment of which 5 years are suspended for a period of 5 years on condition that the accused is not convicted of a contravention of s 2(1) of the Combating of Rape Act, No 8 of 2000, committed within the period of suspension.

**MULLER, J**

**ON BEHALF OF THE STATE:**

**MS I. NYONI**

**INSTRUCTED BY:**

**OFFICE OF THE PROSECUTOR-GENERAL**

**ON BEHALF OF THE DEFENCE:**

**MR G. BONDAI**

**INSTRUCTED BY:**

**DIRECTORATE OF LEGAL AID**