IN HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

T. N.

CORAM: **MULLER, J**

Heard on: 16 April 2007

Delivered on: 16 April 2007

SENTENCE

MULLER, J.: [1] The accused was convicted of his plea of guilty on a charge of rape, namely a contravention of s2(1) of the Combating of Rape Act, No 8 of 2000 (the Act).

[2] Mr Bondai, who represented the accused, read and handed in a plea tendered by the accused in terms of s112(2) of the Criminal Procedure Act, No 51 of 1977 (CPA), which Ms Nyoni on behalf of the State accepted.

[3] The purpose of sentencing if of course to take into account the elements of retribution, prevention determine and reformation of the accused. In modern times a combination of these elements should be aimed at when a

sentence is imposed. It has often been recognised that the following phase of a criminal trial, namely that of imposing an appropriate sentence, is perhaps the most difficult one. The Court has to consider what has often been referred to a triad and which had been eloquently described in *S v Rabie* 1975 (4) SA 855 (A) at 865 G-866C, namely it must take into account the circumstances relating to the accused, the crime, and m society. The result must be a balanced weighing up of all these interests and the Court should apply mercy when appropriate.

[4] In achieving this difficult object of imposing a balanced sentence that contains all the elements referred to is not easy task. The Court has to weigh up all the facts of the particular case, as well as the aggravating factors in order to impose a suitable and appropriate sentence for this offender.

[5] The offence was that the accused was convicted of is a serious one. Not only did the accused commit the offence of raping the complainant in terms of s 2(1) of the Act, but the fact that the complainant was a child of 4 years old at the time of the offence, is an aggravating factor. The Court have seen the complainant and the defence counsel agrees that the complainant is still a very small girl, although she is now 6 years old. The legislator considered rape of a child under 13 years and who is exceptionally vulnerable in terms of s(3)(1)(a)(iii)(bb) (A) and (B) as circumstances which warrants a penalty for a first offender of 15 years imprisonment. In this case the complainant was much younger and definitely fell in the category of being considered “exceptionally vulnerable.”

[6] The circumstances of the rape did fortunately for the accused not include such coercive circumstances as the Act provides for in s2(2) thereof and which circumstances call for a more serious mandatory minimum sentence. The only coercive circumstances that existed are the age of the complainant and the age of the accused at the time.

[7] As far as the commission of the offence goes, the accused described in his plea explanation that he found the complainant playing with another boy, D.. The accused significantly described the complainant as “a small child”. They went into huts at the homestead, after which event the accused called her and took her to a certain spot under a Mopani tree. Although it was not referred to, it appears that the complainant must have known the accused, who lived in a neighbouring house at Onamukulo village. However, the accused removed the complainant’s panties and instructed her to lie on her back. He then pulled down his trousers, took out his penis and inserted it into the complainant’s vagina and commenced with sexual intercourse with her. When he heard D.’s voice, the accused alighted from the complainant. He realised that D. saw what he was doing.

[8] Both the record of s119 proceedings in the Magistrate’s Court and the medical report by Dr K. N. Selimaxy, dated 11 December 2004, were admitted. I have attempted to decipher the medical report, which was very cursorily completed, but failed to read it. What I could determine is that the doctor did find stained blood around the vagina of the complainant and that

there was apparently a “wound” the hymen which may have caused bleeding. This form, the medical examination report, is not at all satisfactory and I am very disappointed in the manner that it was completed. However, there was apparently no serious physical injury to the complainant and it is to be expected that bleeding would result of such sexual encounter by such a young child. From the record of the admitted s 119 proceedings, it appears that the accused already pleaded guilty at that stage to the offence. He admitted that he “raped the child”, when questioned by the magistrate. He admitted she was 4 years old. He further admitted that he did what he described in his plea explanation in this Court.

[9] In this Court the accused did not testify under oath, but Mr Bondai made certain submissions in mitigation. He argued that the accused is a first offender, showed remorse for his deed by admitting it. To this Ms Nyoni argued that the accused had no choice, having been caught red handed by D. and that the Court should not place too much weight on this subsequent conduct of the accused. The next issue is whether the accused should not be visited with the compulsory minimum sentence prescribed by the Act. I agree with Mr Bondai and Ms Nyoni in this regard. Because the accused was not yet 18 years at the time of the offence he is fortunate by the grace of 2 months to escape the mandatory minimum sentence in terms s3(3) of the Act. He was 17 years and 10 months at the time.

[10] I also agree with Ms Nyoni that although the accused is lucky in that regard, the fact of the matter is that a young child of 4 years at the time, was raped by a nearly 18 year old. The complainant was only 4 and definitely exceptionally vulnerable. Although no force or physical violence was used, the complainant lost her innocence to a person of the same village. I find it in comprehensible that an older person in the position of the accused would perpetrate such an offence with such a young child. The psychological injury can never be reversed, no matter how much the accused now apologises. A

nearly adult male abused his position to have sex with a child.

[11] If the accused was 2 months older, namely 18, he would have faced a minimum sentence of 15 years for his offence. I cannot see how this serious offence would exonerate the accused from a severe sentence. I have duly considered the mitigating factors that his counsel submitted, but I would have not have imposed a lesser sentence than 15 years for his offence, in any event, on the facts put before me.

[12] S 3(2) of the Act provides for the possibility of a suspension of a mandatory minimum sentence if the defence satisfies the Court that substantial and compelling circumstances exist, therefore. However, because this is not a matter where the minimum sentence prescribed in the Act have to be imposed, because of the accused's age, s 3(2) is not applicable and I am free to suspend any sentence that I impose.

[13] I have listened to and considered all the arguments submitted by Mr Bondai and Ms Nyoni for and against suspending part of the sentence. There are 2 factors that I believe should be taken into account in respect of the accused and the complainant, namely, record, as well as the fact that there is no record of physical injury to the complainant on the use of force.

[14] In the result the following sentence is imposed:

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 an offence in terms of section 2(1) of the Combating of Rape Act, No 8 of 2000 within the period of suspension.

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MULLER, J

ON BEHALF OF THE STATE: **Ms I. Nyoni**

Instructed By: **Office of the Prosecutor-General**

ON BEHALF OF THE ACCUSED: **Mr G. Bondai**

Instructed By: **Directorate of Legal Aid**