

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

V.N.S.

CORAM: MULLER, J

Heard on: 23 April 2007

Delivered on: 24 April 2007

SENTENCE

MULLER, J: [1] The accused was charged with a main count of contravening s 2(1) of the Combating of Rape Act, No 8 of 2000, an alternative count thereto and a second main count of assault with the intent to do grievous bodily harm. The State only put the main charge on count 1, namely the rape charge to the accused. The accused pleaded guilty to that charge, with a qualification that he did not hit the complainant with a stick, but only threatened to hit her with a stick before the accused raped her. The defence counsel read out, and after confirmation thereof by the accused, handed in a plea explanation in terms of s112 (2) of the Criminal Procedure Act, No 51 of 1977. The State accepted the accused's plea and he was

convicted accordingly.

[2] The accused was represented by Mr Bondai of the Directorate of Legal Aid and the State by Ms Nyoni. The doctor's medical examination report with regard to the complainant (Form J88), the accused's warning statement and the key and sketch plan of the scene of the offence were handed in by agreement.

[3] Mr Bondai did not call the accused to testify, but made submissions of mitigation from the bar. The personal circumstances of the accused are:

- He was 16 years at the time at the time of the offence;
- He is uneducated, never went to school and cannot read or write;
- He herds cattle and tends the mahangu field of his parents;
- He has a clean record; and
- He showed remorse by pleading guilty.

Furthermore, Mr Bondai submitted that 5 years have expired since the commission of the offence and no explanation for this delay was offered. Because the accused was not yet 18 when the offence was committed, Mr Bondai submitted that the mandatory minimum sentence in terms of Act is not applicable.

[4] Ms Nyoni agreed with Mr Bondai that the mandatory minimum sentences provided for the Act are not applicable, but referred the Court to its decision in *S v Tomas Nakale* Case No.: 7/2007 delivered on 16 April 2007, where that accused was also under the age of 18, but was sentenced for a similar offence to 15 years imprisonment of which 5 years were conditionally suspended. She also urged the Court to take the expectations of society as expressed by Namibian Supreme Court in *S v Amutenya Shapumba*, Case No.: SA 4/1999, delivered 17 November 1999, into consideration. Furthermore she submitted that the complainant was only 8 years of age at the time, and on her way to school, attempted to run away from the accused who accosted

her, was threatened to succumb by a stick, cried in vain and was finally raped by the accused. S 3(1)(a)(iii)(bb) of the Act deals with the situation of a girl under the age of 13 who is raped by an accused 3 years older than her for which offence a penalty of 15 years minimum is prescribed. Ms Nyoni submitted further that the accused should be treated in the same way as if this penalty of Combating of Rape Act is applicable. The accused invaded the privacy of a female and took her innocence away at such a young age. Finally, Ms Nyoni reminded the Court of the other factors that should be balanced when arriving at an appropriate sentence, despite the accused's personal circumstances, namely that of the nature of the offence involving the circumstances of the victim and the interests of society.

[5] When the Court considers what an appropriate sentence for the accused should be, it takes into account 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 himself, the nature of the offence and the interest of society, coupled with a blend of mercy is the aim that the Court attempts to achieve by imposing an appropriate sentence. In this regard I refer to *S v Zinn* 1969 (2) SA 573 (A) and *S v Rabie* 1975 (4) SA 855 A.

[6] The case of *S v Tomas Nakale, supra*, to which Ms Nyoni has referred, is indeed very similar to this one. Although the complainants and the accuseds ages in the 2 cases differ somewhat, both complainants were very young and

both accuseds were not yet 18 when the offences were committed. What makes this offence more serious is that the accused used a stick to threaten the complainant and after the complainant attempted to escape he committed this act without heeding her crying. This is an indication that the accused wanted to commit this heinous act and nothing would put to him off to continue with it. His intention is clear and the use of a threat with a stick to cause her bodily harm or to apply physical force, constitute coercive circumstances in terms of s2 (2) (b) or (c) of the Act, as proved by his admission. If the accused was over the age of 18, a minimum mandatory sentence in terms of s3 (1)(a)(iii)(bb) would have made him liable to a sentence of 15 years imprisonment.

[7] I have duly considered all the personal circumstances of the accused, as well as the fact that he pleaded guilty and the long delay in bringing this matter to trial. I have also considered the seriousness of the offence, as well as the interests of society. I accept the submissions that the accused is not subject to the minimum mandatory sentence, but despite that fact, I would not have imposed a sentence of less than 15 years for this offence under the circumstances and taking all these factors into account. Because the accused is still young and may be rehabilitated, I shall suspend a third of the sentence in the hope that such offence will never be repeated.

[8] The accused is sentenced as follows:

Imprisonment of 15 years of which 5 years are conditionally suspended for a period of 5 years, namely that he is not convicted of an offence of contravening s2(1) of the Combating of Rape Act, No 8 of 2000, committed within the period of suspension.

MULLER, J

**ON BEHALF OF THE STATE:
NYONI**

MS I.

**INSTRUCTED BY:
GENERAL**

OFFICE OF THE PROSECUTOR-

**ON BEHALF OF THE DEFENCE:
BONDAI**

MR G.

**INSTRUCTED BY:
AID**

DIRECTORATE OF LEGAL