CASE NO.: CC 03/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

FANUEL KANYUUMBO

CORAM: **MULLER, J**

Heard on: 24 – 25 April 2007

Delivered on: 26 April 2007

SENTENCE

MULLER, J.: [1] In this case Ms Nyoni represented the State and Ms Natanael, instructed by the Directorate of Legal Aid, appeared for the accused.

[2] The charge of contravening s 2(1) of the Combating of Rape Act, No 8 of 2000 (the Act) was put to the accused. He pleaded guilty to the charge and Ms Natanael read out an amended plea explanation in terms of s 112 (2) of the Criminal Procedure Act, No 51 of 1977 (CPA). It was confirmed and signed by the accused. The plea explanation was amended to include coercive circumstances after Ms Nyoni indicated that the plea of not guilty will not be accepted by the State without an admission to that effect. The Court also

indicated that because coercive circumstances, together with the intention of rape constitute the offence in terms of s 2(1) of the Act, and a plea of guilty without the admission of coercive circumstances, will not accepted. After such amendment of the plea explanation, the State was prepared to accept the accused's plea of guilty and led the evidence of the doctor who examined the complainant after the incident.

[3] Dr Anguel Madjaron, qualified in Bulgaria and has 15 years experience and was a medical officer at Eenhana Hospital. He testified that he conducted the medical examination on the complainant on 28 October 2005 and completed the medical examination report, form J88. The doctor commenced his evidence by providing a general introduction of the complainant's behaviour at the examination. He testified that a very frightened and hysterical little girl of 6 years old was brought to him by the police. It was alleged that she was raped and she was accompanied by her mother. Despite efforts by her mother, a nurse and the doctor to calm her down so that the doctor could conduct the medical examination, it was no possible. She hid hysterical in a corner. With the permission of her mother she was put to sleep by way of an anaesthetic. The doctor then conducted his examination. He found that there was blood in the vestibule of her vagina and that her hymen was perforated. The opening of the vagina of a child of that age should not even allow penetration of one finger, but the doctor found that 1-2 fingers could so penetrate. Laceration of the hymen, which is normally intact in a woman until the first penetration, also indicated, cumulatively with the other findings, consistency with the allegation of rape. This was not the only finding of penetration of the complainant's body. Her anus was wide open, while it is normally closed in any person. It allowed penetration of 2-3 fingers, while the anus of even an adult would not allow the penetration of a finger. There were also lacerations or cracks in the area of the complainant's anus. These injuries could only have been caused by penetration and is also consistent with forceful entry though the anus. According to the doctor such penetrations as he found, must have been painful and the conduct of the complainant before the examination indicates emotional stress.

[4] After the State presented medical evidence of the examination on the complainant, the Court convicted the accused of rape, namely a contravention of s 2 (1) of the Act.

[5] The accused did not testify in mitigation, but his legal representative made certain submissions. These submissions included his personal circumstances:

- The accused is 23 years old and was 21 years at the time when he committed the offence of which he was convicted.
- In respect of this kind of offence he is a first offender, although he is presently in prison serving a sentence for the discharge of a firearm, which previous conviction he admitted.
- He became the breadwinner after his father died and as I understand it, he contributed to the support of 13 minor siblings.
- It was submitted that he has remorse for his deed and ask the forgiveness of the complainant and her family.
- He averred that he reported the incident himself to the police.
- He further alleged that alcohol contributed to the commission of this offence.

[6] Ms Nyoni commenced her arguments in mitigation by calling the complainant into Court so that the Court could see her. She was not required to testify . My observation is that she is a small girl, even for her age, which is now 8 years.

[7] Ms Nyoni accepted that the accused saved the Court's time by pleading guilty, but submitted that his personal circumstances cannot weigh up to the seriousness of the offence, which includes the brutal rape on such a young complainant, as well as the interests of society. The young age of 6 years and the fact that she is very small are important factors to be considered. The injuries that the doctor found, the effect of the rape on this young child,

whose examination had to be conducted in the way the doctor described, and that the complainant was a very frightened young girl, aggravates the offence. Furthermore, Ms Nyoni submitted that the accused not only raped her he also violated her through penetration of her anus. She submitted that the life of an innocent girl has been changed forever by the conduct of a grown-up man. Ms Nyoni argued that this kind of offence is not tolerated by society and that the Namibian Supreme Court in the case of *S v Michael Katamba,* Case No 2/1999, warned that a too heavy emphasise is often placed on the circumstances of the offender, while that of the victim receives little attention. She further referred the Court to the seriousness with which the legislator regard such offences as expressed in the Combating of Rape Act. In this case there were coercive circumstances as admitted by the accused. Ms Nyoni submitted that the penalties contained in the Act are minimum sentences and that only a heavier sentence would be an appropriate sentence in the circumstances to do justice to the complainant and constitute a balanced sentence.

[8] The Court called the mother of the complainant and asked her certain questions. E.H. testified that the complainant is one of four children. The ages of her other children are 18, 11 and 4 years. She observed that since the incident the complainant has an abnormal release of wind for instance. The complainant is still frightened and in particular of men. She wets her bed, which she never did before the incident. E. withheld any suggestion of what should happen to the accused and said she leaves it in the discretion of the Court. Both counsel were allowed to question him and to submit further arguments. Only Ms Nyoni made use thereof and submitted that the Court should consider the evidence in respect of the psychological effects of the offence on the complainant.

[9] I am aware of all the factors that the Court should consider in its objective to impose a balanced and well considered sentence on the accused before him, namely the personal circumstances of the accused himself, the nature of the offence and the interests of society. To round this off, it has been suggested that such mercy as the Court may find, in its discretion, may

be included. (See: *S v Zinn* 1969 (2) SA 537 (A) and *S v Rabie* 1975 (4) SA 855 (A)). The function of imprisonment contains usually the elements of retribution, prevention, deterrence and reformation or rehabilitation and the Court attempts to incorporate these elements in its sentence.

[10] I refer to the elements of sentence before. In *S v Ndlovu* 1967 (2) SA 230 (R) Young, J said:

> "*The object of punishment is to hurt the offender and to hurt him sufficiently to prevent him committing a similar offence.*"

The accused is punished for his offence and imprisonment for a long period is part of the retribution that society would expect. This also shows to those who suffered by his conduct, the complainant in particular, as well as her family and the community, that he is punished for what he has done and that justice has been done. Imprisonment also serves the purpose of prevention and deterrence, namely to withhold the convicted accused from committing such an offence in future. Imprisonment is also aimed at deterring other members of society from committing such offences and it protects society by prevention not only against the particular offender, but also by removing the offender from the community. Finally, the rehabilitation or reformation function should not be forgotten. Hopefully the convicted person will be rehabilitated whilst in prison.

[11] I take cognizance thereof that the accused preferred not to testify in mitigation, but rather elected to provide the Court with some mitigating factors. The personal circumstances of the accused are in fact only 2, namely his age and that he contributes to the support of 13 minor siblings. The age of the accused does not carry much weight as a mitigating factor. He was already 21 and is regarded as an adult. He certainly knew what was right or wrong and could have appreciated the effect of his deed. I have no doubt that he knew he cannot have sex with a small child of that age, namely 6 years old. He was more than 2½ times older than she was. The fact that he is sorry that he committed this offence and that he wants to apologise to the

complainant and her family for what he did, is in my opinion something that could only be considered as a mitigating factor, if he had said so himself in evidence. In any event, to feel sorry now and apologise now for such a terrible offence does not carry much weight as a mitigating factor. He further provided the excuse of alcohol as a factor which apparently contributed to this conduct. It is the first and only time that the influence of alcohol on his deed has been mentioned and to carry any weight, he should have testified and subjected himself to cross-examination to determine the amount of alcohol he consumed, the effect thereof, etc. This he preferred to do. I am justified to ignore this factor entirely. No other factor was submitted in mitigation. The accused's previous conviction is not applicable, except that it has been committed since this offence and that he is presently serving a sentence of 10 months imprisonment.

[12] The offence is very serious. Not only was a very small young girl's privacy invaded and her innocence forever taken away, the offence was committed in the most brutal manner. She was raped and the accused also penetrated her anus as he admitted. This constituted two acts of penetration. This also caused what appears to be permanent physical harm and the psychological and emotional effects are still present to such an extent that she still frightened and wets her bed. There is no doubt that she will need psychological and other professional help in the future. There may also be physical damage that needs urgent medical attention. In respect of the offence, the accused made the following admissions in his plea explanation in paragraphs 2 to 5, which I quote hereunder verbatim:

"*2. I plead guilty to the main charge of committing a sexual act with a child under the age of fourteen years.*

3. I admit that on the 22nd of October 2005 and at or near Onakamwandi village in the district of Eenhana, I did wrongfully, unlawfully and intentionally committed a sexual act with A.S.S. by inserting my penis into her vagina and anus.

4. I admit that applied physical force to the complainant by removing her shorts and panties and threatened to kill her.

5. I knew that the complainant was 6 years old at the time and under the age of

fourteen whilst I was 21 years old, thus 3 years older than the complainant."

[13] I agree with Ms Nyoni that there existed coercive circumstances. S 3 (1) (a)(iii)(bb)(A) of the Act provides for a sentence of 15 years for an accused having committed a "sexual act" with the complainant, while she was under 13 and he was 3 years older.. The complainant was also by virtue of her age "exceptionally vulnerable" in terms of subsection (B) of that statutory provision. The age difference at the time between the complainant and the accused was 15 years, but what is important is that she was only 6 years old. I agree with Ms Nyoni that the seriousness of the offence, coupled with the circumstances of the victim of this heinous crime, warrants a sentence in excess of what the legislator provided.

[14] The third factor is the interest of society. I notice that several people of the community attend this session of Court in this case. The society looks upon the Court to prevent persons to take the law in their own hands and to maintain law and order. Society requires the Court to protect its members, in particular those that are vulnerable, like innocent children. In this instance, I believe society will expect the Court to impose a sentence that takes all the other factors into consideration and that the sentence mentioned, will be warning to all other Namibians that if they will be severely punished if convicted for this type of offence.

[15] Taking all the factors of the personal circumstances of the accused, the crime and interests of society into consideration in respect of this particular accused, as discussed earlier, I have no doubt at all that a long period of imprisonment is the only sentence that will be balanced one. Such a long term of imprisonment will also comply with the elements of retribution, deterrence and reformation. I totally agree with Ms Nyoni's submission that the sentence for this type offence contained in the relevant penalty provision of the Act is only a minimum and to impose that minimum sentence for this accused and this offence, will not do justice. I should consequently impose

the sentence that I believe is a balanced sentence, but which is in excess of the minimum sentence provided for in the Act of 15 years imprisonment.

[16] The accused is sentenced to 21 years imprisonment.

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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 DEFENCE: **MS R. NATANAEL**

INSTRUCTED BY: **DIRECTORATE OF LEGAL AID**