*"Reportable"*

**CASE NO.: CC 03/2010**

**IN THE HIGH COURT OF NAMIBIA**
**HELD AT OSHAKATI**

In the matter between:

**THE STATE**

**and**

**ANTONIUS THOMAS ELIFAS KASHIDULE**

***CORAM:*** LIEBENBERG, J.

Heard on: July 16 and 19, 2010; September 16 – 17, 2010.
Delivered on: September 24, 2010.

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**SENTENCE**

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**LIEBENBERG, J.:** [1] The accused's conviction follows from pleas of guilty on the following charges: (i) assault with intent to do grievous bodily harm; (ii) indecent assault; (iii) attempted rape; (iv) abduction; (v) rape read with the provisions of the Combating of Rape Act, No. 8 of 2000. Because of his young age when committing the aforementioned crimes, the Court requested a pre-sentence report which subsequently was compiled and presented by Ms. Jansen, a social worker from the Directorate: Child Welfare Services (Tsumeb) of the Ministry of Gender Equality and Child Welfare.

[2] The report reveals the following:

Although the age of the accused is not stated in the report, a document, titled *Abridged Certificate of Registration of Birth* (Exh 'B') bearing the names of the accused, was handed in by agreement and according to which the accused was born on November 11, 1988. Thus, even though he is currently twenty-one years old, he was seventeen years of age when he committed the crimes he now stands convicted of.
The accused comes from a family where there are eleven siblings with parents that did not positively contribute to the upbringing of their children. When the accused was fifteen years of age his mother died and although his siblings were taken in and cared for by family of his deceased mother, nobody was willing to take the accused and his brother because by then both had already shown serious behavioural problems. Their biological father also refused to provide for them as he was unable to discipline and control them due to old age; and therefore he sent them away to find employment elsewhere. Instead, they put up a hut in the bushes and sustained themselves by stealing from the surrounding homesteads. When his father again married the complainant (H M), the accused returned to his father's homestead but preferred to isolate himself and did not take part in the family activities. He continued stealing from the neighbours and when confronted, he became aggressive and violent.
For the sake of completeness I deem it necessary to quote *in extenso* paragraph 2 of the report styled under the heading: *INTERVIEW WITH CONCERNED OFFENDER.*

> "After a(n) interview with the accused, the social worker would describe him as a violent rapist. Violent rape is a form of violent assault where one individual forces a child to have sexual intercourse against that child's will, in this case a three month old baby.

*Characteristics of violent rapist(s) (are) they often target strangers, however they will target someone they know if they use rape as a form of punishment, as in this case, we can refer to it as revenge rape. The stepmother refuse(d) him sex and he punished her by abducting her three month old baby, run away and rape the baby.*
*The accused crime plan was to have sex with his stepmother. He did consume some traditional drink, but was sober enough to kept alternating his plans to succeed in his plan. For example he saw the opportunity when his stepmother was alone with the baby on her way back home and offer to accompany her. He offer(ed) his stepmother a stolen umbrella to soften her towards him. When she refuse(d) the umbrella he verbally asked her to have sex with him behind a bush. She refused and tried to talk to him while walking fast to the nearest homestead. The accused talk(ed) her out of seeking help at the neighbours and promise(d) to behave. The accused patiently waited and plan(ned) his next move and when the stepmother needed help to get through the fence with the baby he acted. When she gave resistance he violently attacked her, broke her arm, abducted the baby ran away and rape(d) the baby violently, ripping the small body apart, while the baby was screaming.*
*In the accused('s) distorted thinking he minimize and excuses the violent rape, by saying he felt sorry for the baby, because the mother was lying on top of her (try to protect the baby) and the baby was crying. <u>The accused show no remorse and blame H M, the stepmother for the rape and assault, because she refuse(d) to have sex with him, when he wanted sex.</u>*
*The offender showing the following signs of lying at the time of the interview: lip sticking, fidgeting in seat, fiddling with hands/fingers, won't look you in the eye, gaze at the ceiling, and rub his arm." (sic)* (My emphasis)

Regarding the accused's attitude towards the crimes committed by him, the following appears at paragraph 3 of the report:

> "The accused admit(s) he is guilty to all the convicted crimes, but he blame(s) his stepmother and the community members for his crimes. For example he stole a cell phone, a bob card and N$100-00 from the neighbour and was punished with a beating. It is because of them that he takes to violent behaviour and it is because his stepmother chase him away, he assaulted her and rape(d) the baby. *The accused take(s) no responsibility for his wrong behaviour and actions, he always shift(s) the blame. Therefore the social worker came to the conclusion that the accused have limited insight in his wrong behaviour and that he (has) to change his behaviour and make responsible choices."* (My emphasis)

The aforementioned conclusion reached by Ms. Jansen, in my view, casts serious doubt on the submission in mitigation, made on behalf of the accused, that he pleaded guilty and (therefore) was remorseful for what he has done. Although a plea of guilty can be indicative of contrition on the part of an accused, it should not be taken for granted to be the case; as in many cases the evidence against an accused is só overwhelming that it leaves the accused with no option other than to plead guilty. In that case, there is no reason why the accused should "benefit" from the situation and have his plea of guilty noted as a mitigating factor (*S v Landau* 2000 (2) SACR 673 (WLD) at 678a-c). It has also been said that remorse must be sincere and in order for the Court to adjudge whether the penitence is genuine, the accused must take the Court fully into his confidence; something the accused in this case did not do (*S v Seegers* 1970 (2) SA 506 (A) at 511G-H).

[3] The detail of the assault perpetrated on H and the consequences thereof also emerges from the report, from which she suffered permanent damage to her left arm in that it is "crooked … with limited use" which impedes on her daily activities such as pounding and affects her quality of life. The trauma of the assault and the raping of her daughter resulted in epilepsy and now require the permanent care of a certain Rebekka Petrus to protect the complainant against hurting herself during epileptic fits. As a result of her condition, she is incapable of sustaining her family. I pause here to observe that there is no medical evidence before the Court supporting the inference that the epilepsy the complainant suffers from, came as a result of the trauma she experienced during the assault on her and her baby.
Regarding the current condition of the baby (who is now almost five years old), the report states that she is *"a small, fragile child who experience poor overall health"* and it was observed that she *"has trouble walking, due to hip problems as the result of the rape"*, leaving her crippled. Once again it must be said that there is no medical proof that the hip injury was caused by the assault on her as a baby; and given the poor health condition she is currently in, it cannot be excluded that there might be other causes explaining the injury.

In her recommendation the social worker states the following:

"*The accused is a danger to society, who must be protected. Therefore the social worker recommend(s) that the accused stand(s) normal trial and judgment.*"

In her testimony Ms. Jansen confirmed her findings and recommendation and said that despite the accused's undesirable and unfortunate childhood, he, to some extent, chose to commit crime, particularly the ones in question, which makes him a danger to others as he does not take 'no' for an answer; nor does he take responsibility for what he has done.

[4] The crimes were perpetrated against his stepmother and her three and a half month old baby daughter (accused's half sister) and therefore fall within the ambit of the Combating of Domestic Violence Act, No. 4 of 2003. In view thereof the Court in terms of s 25 of the said Act, invited the complainant to give evidence in which she could express *" any views concerning the crime, the person responsible, the impact of the crime on the complainant, and the need for restitution and compensation"* before the accused is sentenced (s 25 (2)). From her evidence it emerged that when she had moved in with the accused's father (who died about two years ago), he was still a young boy and that she raised him and his elder brother like her own. Although the relationship between her and the accused was good, this changed completely since the incident and she now has become afraid of the accused for what he has done to her child. She felt angry at the accused as he had put her baby's life in danger by seriously injuring her and she therefore urged the Court to impose a harsh sentence upon the accused. Regarding the assault perpetrated on her, she explained that the accused struck her with an umbrella on her arm, fracturing it in the process but which healed completely. I pause here to observe that according to the social worker's report permanent damage was caused to the left arm, as the alignment of the healed fracture is not satisfactory for full functioning of the arm (which was evident during her appearance in Court).
The accused's plea explanation on the charge of assault with the intent of causing grievous bodily harm merely refers to the use of fists on the person of the complainant and not also the use of an umbrella during the assault.

[5] The background against which the accused stands convicted is the following:

On 5 February 2006 the accused accompanied H M and her baby daughter home and on the way the accused assaulted the complainant by beating her with the intent to cause her grievous bodily harm. When she at one stage stooped to put her baby on her back, the accused came from behind and put his penis between her buttocks (whilst she was still dressed). He then forcibly tried to have sexual intercourse with the complainant but without success. The accused then took the baby away from her and ran into the bushes with the intention of having sexual intercourse with her. He then committed sexual acts with the baby by inserting his penis into the anus and vagina of the child.
According to the medical report which was compiled in respect of the child and which was handed in by agreement (Exhibit 'D'), a medical examination was performed on the baby the following day by a medical practitioner, who found the following: *"Lacerations on the right leg and multiple lacerations on the anus and redness on the inner vagina. Hymen not intact."* A watery discharge from the anus was also observed and the examination was noted to be painful.

[6] From the medical report it is evident that the penetration was forceful, resulting in lacerations of the anus. Whereas the hymen is no longer intact and redness on the inner vagina was observed, this supports the conclusion that there was indeed penetration of the vagina. Although the medical evidence evinced by the report is rather scanty, it was testified by H that her child was seriously injured and that the baby's urine and faeces afterwards, were "just blood", which is indicative of the seriousness of the injuries inflicted. The penetration of the baby's anus resulting in multiple lacerations would have required substantial force and caused excruciating pain to such a young baby. The nature of the injuries inflicted against such small and frail baby as in the present instance, is an aggravating factor weighing heavily against the accused. How the accused could commit such a heinous and evil crime against a baby of three and a half months, is simply inconceivable – more so where she is his baby sister – despite his age. The accused admitted that he appreciated the wrongfulness of his acts and I have no doubt that he indeed knew that what he was doing, is criminal.

[7] Although the accused is now much older than what he was when committing the crimes, the Court must approach sentence with due regard to the accused's actual age at the time i.e. seventeen years. Because the accused was under the age of eighteen the prescribed minimum sentences set out in s 3 (3) of the Combating of Rape Act No. 8 of 2000, do not find application. However, had he been nine months older, the prescribed sentence would have been one of *not less* than fifteen years imprisonment. The State therefore urged the Court to take that into consideration when deciding what a suitable sentence would be.
Regarding the sentencing of juvenile offenders I have said the following in *The State v Iishuku Amunyela* (unreported) Case No. CC 01/2010 delivered on 03.03.2010 at p 3:

> *"[8] … The traditional aims of punishment had undoubtedly been affected by the Constitution and the relevant international conventions; to the extent that in every case involving a juvenile offender, the ambit and scope had to be widened in order to give effect to the principle that a child offender should only in exceptional circumstances be detained and then, only for the shortest possible period.*

*[9] From the aforementioned it is evident that, although the incarceration of juvenile offenders should as far as possible be avoided, neither the Constitution nor the international conventions forbid the incarceration of children; and it is inconceivable that there might be cases in which the incarceration of children was required. These would be cases where the seriousness and circumstances in which the crime was committed and the character of the juvenile offender are such, that he or she acted like an 'ordinary' criminal, despite their age and background (**Director of Public Prosecutions, Kwazulu-Natal v P** 2006 (1) SACR 243 (SCA))."*

[8] The accused in the *Amunyela* case (*supra*) was fourteen years of age when he raped a five year old girl and although she was forced into submission by the accused (by hitting her with a stick), the injuries inflicted were superficial. In that case the Court imposed a wholly suspended sentence of eight years imprisonment. The present facts however, differ substantially from the *Amunyela* matter in that the accused in the present case was seventeen years and the victim a mere three and a half

months old when he perpetrated the rape; inflicting multiple open injuries (lacerations) to the baby's anus whilst also rupturing the hymen during penetration of the genitalia. The nature of the injuries inflicted is indicative of the degree of force applied to the small and frail body of the victim. The reason for this repulsive conduct by the accused as evinced by the pre-sentence report is because he was unable to force H into submission in order to have sexual intercourse with her; whereafter he snatched her baby from her and ran into the bush where he committed sexual acts with her. In the circumstances it would thus appear that the accused took 'revenge' against H for having refused him sexual intercourse; the same conclusion reached by the social worker after her consultation with the accused.

[9] When regard is had to the circumstances of this case, including the personal circumstances of the accused and in particular his youthfulness and the fact that he is a first offender, I am of the view that, although the aforementioned factors are weighty in sentencing, the accused cannot today escape punishment simply because of his young age when he committed the crime. It seems worthwhile repeating that young offenders cannot (always) hide behind their youthfulness when they are guilty of committing serious crime. The message should also be clear to young people that they will not simply be excused by the courts on account of youthfulness and go out scot-free; but, where justice will not otherwise be done, they will be held accountable and punished accordingly for the pain and misery caused to others as a result of serious crimes committed by them. Although the young age of an offender is usually regarded as a mitigating factor counting in favour of the accused person, it is merely *one* of several factors that need to be considered when sentencing.

[10] Regard must also be had to the accused's personal circumstances, particularly to the undesired circumstances under which the accused was raised and which most probably had an adverse influence on his moral values and the manner he conducted himself after the death of his biological mother. As children they had to steal to survive and it seems to me that this has nurtured the perception with the accused that, if he wanted something, he could simply take it. According to the social worker's report – which information was mainly obtained from interviews held with the neighbours – the accused and his brother already at the age of fifteen years had developed serious behavioural problems, to the extent that the family was unwilling to care for them and their own father sent them away to fend for themselves at a very young age. The accused thereafter made a living from crime, which continued even after his father had taken him back into his house. I pause here to observe that Hendrina, during her testimony, had a different view about the accused's behaviour towards her prior to the day of the incident. According to her he was a good boy who used to help her (with chores) around the house and she did not know what got into him on that fateful day. Ms. Jansen testified that H was vague as regards the background of the accused and that she therefore had to rely on the information received from the surrounding neighbours and their perception of the problems experienced by their father with the accused and his brother. During her testimony H was also vague regarding the age and background of the accused and relied on estimations. Unfortunately, as a result of the death of both parents none of what had been said by either H or what came from other sources, could be verified.

[11] It is furthermore clear from the report that whenever the accused experienced opposition in his endeavours (even at the expense of others), he would become

aggressive and turn violent. Also, that he takes no responsibility for his wrongdoing and justifies his actions by shifting the blame onto others. Although mindful that the accused's background and circumstances may have influenced who he is, I believe that the accused himself is responsible for who he has become and what he did to others, no matter what his emotions were at the time.

[12] During his appearance in this Court on July 19, 2010 when the matter was postponed pending the pre-sentence report, the accused became aggressive in Court and threw a glass of water on the floor whilst loudly protesting his dissatisfaction, resulting in his forceful removal from Court. (He earlier displayed similar conduct in Court during his pre-trial appearances in Windhoek as *per* the records of proceedings.)

[13] From the pre-sentence report it is further evident that the accused admitted that he had planned his actions in advance and saw the opportunity of executing it by escorting his stepmother home. He stood in a domestic relationship with the one he assaulted and tried to commit sexual acts with – the wife of his father, whom he was supposed to respect and treat with dignity. He furthermore stood in a relationship of trust towards his stepmother – something she was entitled to rely on when he accompanied her home and which trust he sadly betrayed. He persisted in his conduct by trying to have sexual intercourse with her even after she declined his request; whereafter he became violent and assaulted her, fracturing her arm in the process and which resulted in permanent damage. All the aforementioned are aggravating factors weighing heavily against the accused.

[14] A weighty factor that cannot be ignored when it comes to sentencing is that, not only did H testify that she has become afraid of the accused, but also community members were terrified of the accused as he threatened to take revenge once he is released from prison. Another worrying aspect which emerged during the consultation with the accused is that he until now has used violence to overcome any resistance. When regard is had to the extent of the social worker's report on the view taken by the accused and his explanations "justifying" his conduct, there seems to me a real risk of the accused giving effect to his earlier threats, once released. I am therefore in agreement with the social worker's recommendation that the accused at this stage is still a danger to society.

[15] The circumstances of this case where a three and a half month old baby was raped, must top the list as one of the youngest, if not thé youngest victim ever of rape in this country – something that hurts one's soul and leaves a feeling within, that society has failed this child. To subject a defenceless baby to such barbarism and to inflict so much pain on such a small child, fills one with abhorrence and makes one wonder what has become of the moral values of society if criminals like the accused now set their sights on babies to satisfy their sexual lust? Such conduct is unjustifiable and inexcusable in any society and those making themselves guilty of such atrocious crimes must know that their acts will be met with severe punishment.

[16] The interests of society must be given sufficient weight when determining what sentence would be suitable in the circumstances; lest society will lose faith in the courts and its ability to uphold law and order and protect the innocent against unscrupulous criminals; otherwise they might take the law into their own hands. The

voice of the masses is being heard more regularly and becomes louder as society, almost on a daily basis, demonstrates its disapproval and indignation against those guilty of murdering and raping women and children. These crimes are committed with complete disregard for the rights of others or respect for anyone else. Although I am mindful of the fact that public expectation is not synonymous with public interest, the Court cannot ignore society's cries for justice – for that is what society is entitled to i.e. that justice be done not only to the offender, but that the courts must also have regard to the interests of society. After all, the courts must uphold the rule of law and maintain order; by so doing, it serves society.

[17] When considering the objectives of punishment namely, prevention; deterrence; rehabilitation and retribution, I am convinced that this is an instance where society needs to be protected against the accused and that justice dictates that the accused be duly punished for the horrendous crimes he committed. The emphasis should therefore fall on prevention and retribution. It does not mean to say that the objective of reformation must be over-looked as the accused is still a young person, but, here reformation will be required to take place within prison boundaries, as the accused cannot at this stage be allowed back into society. He first needs to learn self-respect and then learn to respect and appreciate the rights of others; and until such time he has learnt that, he will remain a threat to the innocent and vulnerable in society; who are entitled to be protected against criminals like him.

[18] Despite the young age of the accused and him being a first offender, I am of the view that the seriousness and circumstances in which the crimes were committed fall in the category of being "exceptional" and that the character of the accused, despite his background, is such that in sentencing, the Court can not treat the accused differently, as he acted like an 'ordinary' criminal. Therefore, despite the prescribed minimum sentences set out in the Combating of Rape Act No. 8 of 2000 (which are not here applicable but which serve as a guideline or benchmark of sentences the Legislature has in mind), I am of the view that the exceptional circumstances of this case justify a sentence in excess of the prescribed minimum sentence in respect of count 5. The aggravating factors undoubtedly outweigh the personal circumstances of the accused by far and, given the serious nature of the crimes, a lengthy custodial sentence is inevitable.

[19] In determining what sentence would be appropriate, regard must also be had to the period the accused was in custody awaiting trial. According to the charge sheet on which the accused appeared in the Tsumeb Magistrate's Court he was arrested on February 6, 2006 and remained in custody ever since; thus, for more than four years. This is a lengthy period which obviously would lead to a reduction in the sentence to be imposed (*S v Kauzuu* 2006 (1) NR 225 (HC) at 232F-H).

[20] Whereas the accused stands to be sentenced on several charges which arose from the same series of events, regard must also be had to the cumulative effect of the sentences to be imposed on each charge. In order to ameliorate the impact of the totality of these sentences, the Court will make appropriate orders.

[21] In the premises, I have come to the conclusion that the following sentences, in the circumstances of this case, are suitable:

Count 1 – Assault with intent to do grievous bodily harm: 1 year imprisonment.

Count 2 – Indecent assault: 1 year imprisonment.
Count 3 – Attempted rape: 4 years imprisonment.
Count 4 – Abduction: 4 years imprisonment.
Count 5 – Rape: 20 years imprisonment.

In terms of s 280 (2) of Act 51 of 1977 it is ordered that the sentences imposed on counts 1 – 4 are to be served concurrently with the sentence imposed on count 5.

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**LIEBENBERG, J**

**ON BEHALF OF THE STATE** **Mr. D. Lisulo**
**Instructed by:** **Office of the Prosecutor-General**

**ON BEHALF OF THE DEFENCE** **Ms. G. Mugaviri**

**Instructed by:** **Mugaviri & Associates**