CASE NO.: CC 24/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

MOSES VAPULENI NGHITEWA

CORAM: LIEBENBERG, J.

Heard on: 10 June 2011.
Delivered on: 15 June 2011

SENTENCE

LIEBENBERG, J.: [1] The accused stands convicted of the offence of Rape, read with the provisions of the Combating of Rape Act, 2000 (Act 8 of 2000) (hereinafter referred to as 'the Act'), in that he had sexual intercourse with H, aged two years, while he was more than three years older, to wit, sixteen-and-a-half years. The trial

commenced more than seven years after the accused's arrest and he is at present twenty-three years of age. The delay in bringing the accused to trial could not be explained by the State prosecutor as the record of proceedings held in the magistrate court is not available. For purposes of sentence I shall find that this delay was not brought about by the accused's doing. Of this period the accused was in custody for six months before being released in the care of his mother.

[2] Although the accused is at present much older than what he was when committing the offence, the Court must approach sentence with due regard to his actual age then viz. sixteen-and-a-half years. It is against this background that defence counsel argued that the Court should call for a report on the accused by a probation officer. I raised the issue with counsel whether it was necessary to call for a pre-sentence report in the present circumstances where the accused at the stage of sentence is twenty-three years of age; and whether information pertaining to the accused's personal circumstances relevant to sentence, could not otherwise be placed before the Court viz. by the accused himself or a close relative. The circumstances of this case substantially differ from those in *S v Begley*[1] where the trial court sentenced a nineteen year old, first offender convicted of possession of cannabis (on his plea of guilty) to two months imprisonment without calling for a probation report. The accused was unrepresented and Maritz, J (as he then was) at p. 114B-D stated the following:

> *"Moreover, I find it wholly unacceptable that such youthful offender should be sent to jail without any consideration by the magistrate of a probation officer's report – especially when the magistrate has not made any effort whatsoever to enquire into*

[1] 2000 NR 112 (HC).

the personal circumstances of the accused, the circumstances that gave rise to the commission of the offence or the effect such a sentence is likely to have on his personality." (Emphasis provided)

In the case of *S v Jansen and Another*[2] referred to in the judgment, as well as those cases cited therein with approval,[3] the accused persons were approximately seventeen years of age when they were sentenced; unlike the accused *in casu* who in the meantime has turned twenty-three.

[3] The circumstances under which the offence in the present instance was committed are before the Court and the accused is legally represented. At the age of twenty-three he is at this stage not considered to be a juvenile offender; and although the Court is enjoined to consider the accused's moral blameworthiness in those circumstances prevailing at the time the offence was committed, having full regard to his age then, there seemed to me to have been no compelling circumstances which necessitated the calling for a report by a probation officer in this instance.

[4] There also seemed to be no reason why the accused would not be capable (with the assistance of his counsel) to place before the Court his personal circumstances – inclusive of what it was seven years ago. Whereas the accused had intimated to the Court that he would be calling his mother and stepfather to give evidence in mitigation, this would obviously shed more light on the accused's background or social circumstances prevailing at the time of committing the offence. Another reason would be that a probation officer at this stage would hardly be able to independently

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[2] 1975 (1) SA 425 (A)
[3] *S v Adams*, 1971 (4) SA 125 (C); *S v Yibe*, 1964 (3) SA502 (E)

verify the information provided to him/her as prevailing during 2004 – an onerous duty resting on the probation officer when investigating an accused person's personal circumstances. More importantly, the probation officer would at this stage not be able to determine and evaluate the psychological development of the accused as it then was, due to the passage of time i.e. seven years. The request was accordingly declined whereafter the accused and his mother gave evidence in mitigation.

[5] Whereas the accused at the time was under the age of eighteen years, the minimum sentences prescribed by the Act are not applicable (s 3 (3)).

[6] When the Court considers what an appropriate sentence in the circumstances of this case would be, regard is had to the main principles applicable to sentence; while at the same time regard is had to the objectives of punishment which are prevention, deterrence, reformation and retribution (see *S v Khumalo and Others*[4]). In its determination of sentence the court looks at the personal circumstances of the offender, the particulars of the offence and the circumstances under which it was committed, as well as the interests of society. These factors are generally referred to by the courts as the *triad*.[5] In sentencing, the court must strike a balance between these factors without over- or under emphasising any one of them; however, it is not required that they are given equal weight as a situation may arise where justice requires that one is emphasised at the expense of the other.[6] It is therefore not uncommon to find in serious cases that deterrence and retribution as objectives of punishment come to the fore, and that rehabilitation is seen to play a much lesser role. Obviously, that will mainly depend on the circumstances of each case.

[4] 1984 (3) SA 327 (A).
[5] *S v Zinn*, 1969 (2) SA 537 (A); *S v Tjiho*, 1991 NR 361 (HC).
[6] *S v Van Wyk*, 1993 NR 426 (HC).

[7] When the accused's personal circumstances come under consideration the focus, in my view, should be on what these circumstances were at the time the offence was committed. As regards the effect of the punishment the Court considers imposing, regard should also be had to his present circumstances. The accused was the second born in a family of eight children where he is the only son and at the age of three years he went to live with his maternal grandmother in Angola. After about one year he returned to his mother who in the meantime got married and ever since the accused lived with his mother and step-father with whom he maintained a very good relationship. He attended school and proceeded up to grade two when he dropped out after his uncle fetched him and took him to herd cattle in the Okavango Region for one-and-a-half years. He was around ten years old when he left and about twelve when he returned. He did not return to school and according to his mother the accused did not see the need to do so. Ever since he has herded the family live stock up to the time of his arrest. According to his mother he was an obedient child and did not cause them any concern. Whereas her husband was employed in Walvis Bay she relied heavily on the accused's assistance as he had to attend to the live stock at home.

[8] The accused said that despite the good relationship between him and his step-father, he still misses his biological father whom he, according to his mother, had last seen when he was around two years old. When asked how he felt about his conviction he replied that he was shocked as he was not guilty of the offence for which he now stands convicted and to be sentenced.

[9] Given the background in which the accused grew up where he was sent at the age of three years to live with his grandmother for more than a year in Angola; that he did not have a father figure in the home up to the time his mother got married and him bonding with his step-father; and his lack of formal education, it seems fair to say that his personal circumstances at that young age were far from ideal and that the possibility cannot be excluded that these factors might have impacted on his mental abilities and maturity and therefore, his moral blameworthiness at the time of committing the offence. I am however satisfied that the accused's step-father largely compensated for the absence of the accused's own father and that the accused did not grow up without a father figure he could look up to for guidance.

[10] The offence of rape undoubtedly is serious – more so when the victim is merely two years of age. In this instance the victim was in the company of her two older brothers where she should have been safe, had it not been that the accused tricked them into believing that by having sexual intercourse with her, he could relieve her from the stomach pain she was suffering from at the time. He at that moment clearly exploited their youthful naivety, but in the process obviously misjudged him with their ability to afterwards report on what happened to the victim. To a certain extent the incident also demonstrates the accused's own naivety by pretending to the children that he could heal the victim by having sexual intercourse with her in their presence. To me this points at the immaturity of the accused and demonstrates his total lack of tact or good judgment in the circumstances which can only be contributed to his youthfulness. This is a mitigating factor weighing in favour of the accused as it lessens his moral blameworthiness. It is for that reason that young offenders are treated differently. Another factor to be taken into account in sentencing is that the

victim, despite her age, did not sustain serious injury except for being robbed at such young age of her virginity; another aggravating factor.

[11] There can be no doubt that society expects that persons, making themselves guilty of serious crime such as rape, and more so when it involves young children, must be severely punished by the courts for their misdeeds. In sentencing, the Court has a duty to give sufficient weight to the interests of society and not to shy away from its duty to impose severe sentences in deserving cases; lest society may lose faith in the courts and decide to take the law into their own hands. However, the principle is clear that society does not expect that children should be dealt with in the same manner as hardened criminals; and rather expects from the courts to consider each case on its own merits – including the age of the offender – and to impose a sentence that not only serves the interests of society, but also the interests of the particular accused whose age is a compelling factor; except where the circumstances of the accused are such that justice dictates that he or she should not be treated differently. This would only be in exceptional cases. I do not consider the present case to fall in the latter category of cases.

[12] When considering the objectives of punishment regard is had to the accused's present age and given the fact that he is still young and a first offender, there are indeed prospects of reform. Because of the seriousness of the offence the sentence should also serve as deterrence, not only to the accused, but generally to others as well. It seems noteworthy to mention that the accused has not acknowledged his wrongdoing and has up to now not shown any remorse; which is regarded as another aggravating factor. The sentence must furthermore reflect the Court's and society's

indignation and serve as a warning to likeminded criminals. Despite the mitigating factors weighing in favour of the accused, I am convinced beyond any doubt that, in the circumstances of this case, a custodial sentence would be the only appropriate form of punishment to impose. I have already alluded to the fact that, because of the accused's age at the time when committing the offence, the prescribed minimum sentences do not find application and the Court is thus at liberty to impose any suitable sentence. The accused was in custody for six months before being released in the custody of his mother; a factor I do not consider to be of much importance when sentencing.

[13] Although the accused seems to play an important role in his family at this stage where he is the only one capable of looking after the livestock in the absence of his step-father, I do not see this as an insurmountable obstacle the family is faced with because this task is not something unique that cannot be done by someone else. If someone else (a certain Muhafa) had been doing this up until recently when he left, then surely someone could be found who would be willing to do the job – even if it requires paying compensation. The accused has no dependants who otherwise might suffer as a result of his incarceration.

[14] In the result, the Court imposes the following sentence:

> Twelve (12) years' imprisonment of which four (4) years is suspended for a period of five (5) years on condition that the accused is not convicted of the offence of Rape; Attempted Rape; or Indecent Assault, committed within the period of suspension.

LIEBENBERG, J

ON BEHALF OF THE ACCUSED	**Ms. G. Mugaviri**
Instructed by:	**Mugaviri Attorneys**
ON BEHALF OF THE STATE	**Mr. N. Wamambo**
Instructed by:	**Office of the Prosecutor-General**