



CASE NO.: CC 08/2011

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

In the matter between:

THE STATE

and

JACOB SIMON

CORAM: LIEBENBERG, J.

Heard on: 28 September 2011

Delivered on: 03 October 2011

SENTENCE

LIEBENBERG, J.: [1] Jacob Simon, you stand convicted on charges of Rape (c/s 2 (1)(a) of Act 8 of 2000) and Murder, for which this Court must now pass sentence. You pleaded guilty on both charges and in amplification of

your plea explanation prepared a statement in terms of section 112 (2) of the Criminal Code¹, in which the following is stated (unedited):

"I was send by my mother to go and buy her traditional beer "Epwaka' at a certain Cuca Shop. Whilst there I decided to stay longer and enjoy myself. After some time and when it was already dark I decided to go home. Whilst walking home and when passing in the Oshana (valley) I came across the deceased, Sevelia Haidula whilst she was carrying firewood. I knew Sevelia because she is from the same area I come from. I decided to confront her and ask her why she insulted me on a previous occasion, but she did not want to talk to me. After that I decided to rape her. When I wanted to grab her she ran away from me and then I chased after her and grabbed her by the hair, forcing her to the ground and cut her panty with a panga. I then raped her by inserting my penis in her vagina. After that I released her but she shouted at me saying she was going to report me to the police. When I heard this I got scared and decided to kill her. I took out the panga I was carrying and decided to cut her all over her body. After that I left her in the Oshana and went home. I did not tell anyone what I have done as I was scared and confused. I could not believe what I have done and did not know what came over me to commit such a horrible crime. The police arrested me the following morning."

[2] You furthermore said the following pertaining to remorse:

"I am very sorry for what I did and apologise to the family of the deceased and ask for their forgiveness. I cannot explain the remorse that I feel as I am

¹ Criminal Procedure Act, 1977 (Act 51 of 1977)

constantly reminded of the horrendous deed I committed. I shall forever live with this guilt in my heart that I have raped and taken a young woman's life. I apologise to my community and every one else whom my actions have affected."

You did not give evidence in mitigation; neither did you call witnesses to do so on your behalf.

[3] Documents were handed in by agreement which, *inter alia*, include the post-mortem report and a photo plan with accompanying explanations (Exh's "C" and "D" respectively). Dr Vasin, a pathologist at Oshakati State Hospital, performed an autopsy on the deceased's body and made the following findings:

- (i) Multiple (total of seventeen (17)) chop, incised and stab injuries, placed on the side of the head, neck, upper back, upper and lower extremities (limbs);
- (ii) Four (4) penetrating chop fractures of the skull;
- (iii) Chop injuries to the brain;
- (iv) Severed arteries and veins on the distal aspect of the left forearm (nearly chopped away the left hand);
- (v) Systemic visceral paleness due to external blood loss.

The cause of death was: "Chopping (multiple). Chop injuries to the brain and exsanguination (external blood loss)".

[4] The severity of the injuries inflicted all over the deceased's body is evinced by photos no 9 – 14; and 28 – 43 taken before and after the autopsy, respectively. Gaping wounds on the head and limbs are clearly visible; with the left hand almost completely severed. It seems inevitable to conclude from the post-mortem report and the photos handed in, that the deceased succumbed after a brutal attack on her with a panga.

[5] The accused is represented by Ms *Nathanael-Koch*, who placed the accused's personal circumstances on record from the Bar. Accused, now twenty-four years of age, was two years younger during the commission of the offences and had formal education up to grade 9. He had casual employment with a security company where he earned N\$800 per month. He is single and besides caring for his mother and grandmother, has no dependants. He is a first offender and has been in custody since his arrest, a period of one year and ten months. It was further submitted that the accused, from the onset, accepted his guilt and gave his co-operation to the police during the investigation. He furthermore pleaded guilty to both charges.

[6] The State, in aggravation of sentence, led the evidence of the deceased's biological mother, who testified that the deceased was born on 16 March 1992 (17 years of age) and her youngest child. At the time of her death she was attending school and had passed grade 10. She was at a loss for words when asked what effect her child's death had on her and her family. She said that there was no need for the accused to kill the deceased after he had raped her and that she was still having sleepless nights over what happened to her

child. She conveyed to the Court that during a traditional meeting subsequently held between her and the accused's family, the chief awarded two head of cattle as compensation to her, but that only the money of one head of cattle was to date received. She accepted the accused's apologies when offered through his counsel.

[7] When it comes to sentencing, courts are often required to consider competing factors impacting on the interests of the offender and that of society, whilst at the same time, the seriousness of the offence and the circumstances under which it was committed must also be given sufficient consideration. Although the Court is obliged to consider each factor and determine the weight to be given thereto, it is not required to give equal weight to each factor; for in some cases, depending on the circumstances, it would be necessary to emphasis one or more factors at the expense of the others.² Not only must a court endeavour to arrive at a well-balanced sentence, it must also show mercy in deserved cases; and in *S v Rabie*³ it was said:

"Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances"

(emphasis provided)

At the same time regard must also be had to the different objectives of punishment; and which sentence, in the particular circumstances, would not

²S v *Van Wyk*, 1993 NR 426 (HC) at 448D-E

³ 1975 (4) SA 855 (AD) at 862G-H

only be in the best interest of the accused person, but would also serve the interests of society.⁴

[8] As regards the personal circumstances of the accused, factors weighing in favour are his relatively young age and him being a first offender. He was employed (albeit not on a permanent basis) and although the income he generated was small, he shared it with his family. I do not consider these persons to be totally dependent on the accused and from the facts before the Court it would appear that, should a custodial sentence be imposed, the impact thereof would not leave his family destitute. The accused has been in custody just short of two years and this factor will be taken into consideration when sentencing and would lead to a reduction in the sentence to be imposed.⁵ The accused, through his counsel, profoundly apologised to the family of the deceased, the community and the Court for what he has done. This notwithstanding, Mr *Wamambo*, representing the State, submitted that any contrition alleged to exist, should be ignored by the Court, as the accused should have taken the Court into his confidence by expressing his remorse in person, instead of doing so through his family and legal representative.

[9] It must be remembered that the accused remained in custody since his arrest and would not have had the opportunity to approach the family of the deceased in person sooner. Accused's mother on his behalf did apologise earlier during her meeting with the deceased's mother; and when this was again extended on his behalf in Court by defence counsel, she said she

⁴S v *Tjiho*, 1991 NR 361 (HC)

⁵S v *Kauzuu*, 2006 (1) NR 225 (HC)

accepted it. However, it is trite that in order for remorse to be a valid consideration as indication that the accused will not repeat the same offence in future, the court must be satisfied that penitence alleged to exist must be sincere; and the only manner in which this can be adjudged, is for the accused to take the court into his confidence and to give evidence.⁶ In the absence thereof, little weight can be given to what is claimed by others as to remorse on the part of the accused.

[10] I find the following to be mitigating factors: The relatively young age of the accused; that he is a first offender; that he was gainfully employed at the time and that he to some extent accepted the responsibility of supporting his mother and grandmother from his earnings; and that he pleaded guilty to the charges. Although compensation in pecuniary form was paid to the deceased's family as ordered by the traditional chief, I do not consider this to be a mitigating factor. Not only did it come from the accused's family and not him, but neither was full compliance given to the order which, in my view, is out of touch with the pain and loss suffered by the family of the deceased.

[11] The offences for which the accused stands convicted are very serious and usually, given the circumstances of a particular case, attract lengthy custodial sentences. In the present circumstances the accused's victim was a young girl busy doing chores around the house who, when approached by the accused, made it clear that she was not interested in making conversation with him. Probably realising that the accused had less noble intentions, she fled but did not succeed as the accused caught up with her and grabbed her

⁶S v *Seegers*, 1970 (2) SA 506 (A)

by the hair. He manhandled her and forced her into submission. He was armed with a panga which he used to cut her panties with. He thereafter had forceful sexual intercourse with her. Pertaining to the deceased's genital organs the post-mortem examination report reflects that no lesions were observed. It was submitted by Mr *Wamambo* that, because a weapon was used in the commission of the rape, the minimum sentence prescribed by section 3 (a)(ff) of the Combating of Rape Act 8 of 2000, finds application; which is one of imprisonment of not less than fifteen years on a first conviction where no substantial and compelling circumstances are present. It was further submitted that there are no substantial and compelling circumstances present, and that the Court should find accordingly.

[12] The accused on his own admission said that he was armed with a panga at the time and that he had used it to cut the deceased's panty prior to having sexual intercourse with her. There can be no doubt that the panga was used in the commission of the rape, and in all probability, sufficiently instilled fear in the heart of the deceased for her not to resist the accused's actions. In the circumstances, the prescribed minimum sentence, in the absence of substantial and compelling circumstances, is indeed imprisonment of not less than fifteen years.

[13] When the court is required to determine whether or not substantial and compelling circumstances are present, justifying the imposition of a lesser sentence, it is now well-established that the court must consider *all* the circumstances of the case, including the many factors traditionally taken into

account by the courts when sentencing offenders. It is further accepted that in order for circumstances to qualify as substantial and compelling, it need not be exceptional in any way. The meaning ascribed to the words “substantial and compelling”, appearing in similar legislation in South Africa, has been decided by their highest court and these cases have equally been adopted, with approval, in this jurisdiction.⁷ The approach a court must adopt was set out in *S v Blignaut*⁸, para [3] as follows:

*“The approach of a sentencing tribunal to the imposition of the minimum sentences prescribed by the Act is to be found in the detailed judgment of Marais JA in **S v Malgas** 2001 (1) SACR 469 (SCA). The main principles appearing in that judgement which are of particular application to the present appeal are: First, the court has a duty to consider all the circumstances of the case, including the many factors traditionally taken into account by courts when sentencing offenders. Secondly, for circumstances to qualify as substantial and compelling, they do not have to be exceptional in the sense of seldom encountered or rare. Thirdly, although the prescribed sentences required a severe, standardised and consistent response from the courts unless there were, and could be seen to be, truly convincing reasons for a different response, the statutory framework nonetheless left the courts free to continue to exercise a substantial measure of judicial discretion in imposing sentence. (See also **S v Fatyi** 2001 (1) SACR 485 (SCA) para 5; **S v Abrahams** 2002 (1) SACR 116 (SCA) para 13)”*

⁷*The State v Uiseb*, (unreported) Case No. CC 38/2001 delivered on 18.10.2001

⁸ 2008 (1) SACR 78 (SCA)

[14] When applying the foregoing principles to all the circumstances of this case, I am satisfied that there are indeed no substantial and compelling circumstances present that justify the imposition of a lesser sentence. On the contrary, it seems to me justifiable to find that, given the circumstances under which the offence was committed, a sentence in excess of the prescribed minimum is called for. The deceased was not far away from the homestead busy collecting firewood when the accused came upon her. This is a daily household chore done by thousands of young children in this part of the country and there is no reason why they should feel less safe than children walking the streets in towns and cities elsewhere. It is terrifying that we live in a society where children cannot move around freely in the streets (or in the fields of their homes) in safety any more; and where they are unable to grow up like ordinary children should do without fear; whilst enjoying the freedom and security of a democratically elected society where the fundamental rights of others are generally respected by its citizens.

[15] In my view, those criminals who subvert these basic rights of innocent victims must be brought to justice and in punishing such persons, the courts should ensure that the sentences imposed upon those who make themselves guilty of disturbing the harmony and order in society, adequately reflect the censure which society should and does demand, as well as the retribution which it is entitled to extract.

[16] In this case the victim was a seventeen year old pupil who suffered a horrendous ordeal at the hands of the accused because she stood up for what

she believed in namely, to report the accused to the police for having raped her. She was a young girl with her whole life and future lying ahead of her; but of which she was robbed simply because the accused firstly wanted to satisfy his sexual lust, whereafter he launched a brutal attack on her, hacking her to death with a panga all over the body. These blows were mainly directed at the head and the severity of the force behind it is evident from the injuries inflicted. There were four penetrating chop fractures of the skull, causing chop injuries to the brain itself. The left hand was almost completely severed which, in all probability, came as a result of the deceased trying to block the blows by raising her arms. In the civilized society we live in, I do not only find the brutality of the assault perpetrated on such a young defenceless girl horrendous and shocking, but also barbaric. The accused was not provoked and I can only repeat the words of the deceased's mother who said in her testimony that *"after raping her, there was no need to kill her"*.

[17] This Court too often is called upon to decide cases in which pangas are used to mutilate and kill others and although it is not uncommon to see people walking the streets carrying pangas hanging from their sides, it seems to me that law enforcing officers should take a different view of the situation and disarm those persons who are not in possession of these lethal weapons for legitimate reasons. Simply too many people in this country lose their lives or are mutilated with pangas in the hands of criminals who would not hesitate to use it against a fellow human being.

[18] The brutality of the assault, the use of a dangerous weapon in the commission of both the offences and the assault being directed against a young defenceless child, are aggravating factors weighing heavily against the accused when it comes to sentence.

[19] Turning to the objectives of punishment, I am alive to the young age of the accused and that in itself, there might be reasonable prospects of rehabilitation. On the other hand, given the gravity of the crimes and the circumstances under which it was committed as well as the legitimate interests of society in cases of this nature, justice would not be done unless the accused is duly punished. The interests of the accused in this instance are by far outweighed by the aggravating factors present, the gravity of the offences committed and the interests of society. In these circumstances, it is my considered view that justice dictates that the emphasis should fall on prevention, deterrence and retribution and that rehabilitation, despite the accused's age, plays a lesser role. The accused was unable to explain his irrational behaviour and as such, he can only be seen to be a danger to others; hence the need to remove him from society and prevent him from repeating similar conduct in future. The sentences to be imposed should furthermore not only deter the accused, but also other like-minded criminals. It is disconcerting to see that the accused has shown no respect for the sanctity of life; nor the fundamental rights of his victim. It would therefore be prudent until such time that he has learnt to respect the rights of others and holds no further threat to members of society, to ensure that he does not move around freely and has no further adverse impact on the lives of other

law abiding citizens, enjoying life in a civilised society. Society expects from the courts to protect it against people like the accused and the courts undoubtedly are under a duty to give effect thereto.

[20] The imposition of lengthy custodial sentences on each charge is inescapable; however, the Court will ameliorate the cumulative effect thereof by making the appropriate order. In determining the extent of the sentences, regard will further be had to the period the accused has already spent in custody, awaiting trial.

[21] In the result, Jacob Simon, you are sentenced as follows:

Count 1- Rape: Eighteen (18) years imprisonment.

Count 2 – Murder: Thirty-five (35) years imprisonment.

In terms of section 280 (2) of Act 51 of 1977 it is ordered that ten (10) years of the sentence imposed on count 1 be served concurrently with the sentence imposed on count 2.

LIEBENBERG, J

ON BEHALF OF THE ACCUSED

Ms. Nathanael-Koch

Instructed by:

Directorate: Legal Aid

ON BEHALF OF THE STATE

Mr. N. Wamambo

Instructed by:

Office of the Prosecutor-General