CASE NO.: CC 23/2010

IN THE HIGH
COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

PETRUS MATEUS

CORAM: LIEBENBERG, J.

Heard on: March 11, 2011.
Delivered on: March 14, 2011.

SENTENCE

LIEBENBERG, J.: [1] The accused, an adult male, was earlier convicted on his plea of guilty on a charge of rape, read with the provisions of the Combating of Rape Act, 2000 (Act 8 of 2000). We have now come to the stage where the Court needs to consider what sentence would be suitable and just to impose upon the accused.

[2] It seems common cause that the accused was twenty-eight years of age, whilst his victim was a one year old girl. Accused's plea is based on the following admissions: On the 1st of November 2001 he went to the house where the victim resided with her mother to collect money, and during the course of the afternoon, he 'approached' the baby girl lying naked on a blanket; and after unzipping his trousers, he had sexual intercourse with her.

[3] The victim was medically examined at St. Martin Hospital, Oshikuku that same day, and from a medical report compiled by a certain doctor Baluti Kongo handed in by agreement, the following noteworthy findings were made: The hymen was absent; the vagina admitted two fingers; white thick discharge present. The doctor described the examination as 'easy' and noted under remarks, 'impression of penetration in child's vaginal canal'. These findings confirm the accused's admission that he indeed penetrated the victim.

[4] When it comes to sentencing, the Court has a judicial discretion as to the nature of the sentence to be imposed; and this process is guided by well-established judicial principles where regard is had to the personal circumstances of the offender, the crime, and the interests of society.[1] In addition thereto, regard must also be had to the objectives of punishment because ultimately, it is the accused, within his unique situation, that needs to be punished.[2] This would require a process where the interests of the accused are weighed up against the interests of society; and although all factors relevant to sentence must be considered, it does not require that it should be given equal weight, as a situation may arise where one has to be emphasised at the expense of the other.[3] As was stated in *S v Rabie*[4]*: "Punishment should fit the*

1 *S v Tjiho* 1991 NR 361 (HC).
2 S *v Khumalo and Others* 1984 (3) SA 327 (A).
3 *S v van Wyk* 1993 NR 426 (HC).
4 1975 (4) SA 855 (AD) at 862G-H.

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

[5] Accused gave evidence in mitigation and placed his personal circumstances before the Court, which are the following: Despite the accused's age reflected on the indictment being twenty-eight years, he was unable to confirm this in Court. This notwithstanding, from his appearances, I am satisfied that he is an adult person. He did not receive any formal education and was raised by an aunt of his as both his parents are deceased. He has an elder brother, in whose house he is currently staying; as the brother works permanently in Walvis Bay. Accused makes a living from cultivation and the income he received during last year for fencing work he did for others. This is clearly not a full-time occupation from which he can make a living. He is a first offender and admitted that what he has done was wrong and that he was sorry for that. He was at a loss for words as to the sentence he should be given. Before being released on his own recognisance, he was in custody for one-and-a-half years.

[6] I enquired from the prosecution why it took over ten years to bring the case to trial, but Mr. *Matota* was unable to come up with any explanation. There is nothing suggesting that the delay was brought about by any wrongdoing on the accused's part. It seems unthinkable to take over ten years to finalise pre-trial proceedings in a case as simple as the present; where the accused's agony for having

to wait that long to have the case tried, is unduly protracted - more so, where he intended pleading guilty. Could it reasonably be expected from a person in the accused's position to put his life on hold for such a long period? I believe the answer to that question lies in the negative as an accused in terms of Article 12 (1)(b) of the Constitution has a right to be heard by a court of law within a reasonable time, failing which the accused shall be released. In the absence of any explanation by the prosecuting authority explaining the unreasonable delay, this, in my view, would be a factor to be taken into consideration in sentencing, weighing in favour of the accused.

[7] Mr. *Matota* contended that little weight, if any, should be given to the accused's expression of remorse, as it cannot be seen to be genuine because, in his view, it comes too late. He argued that the accused should have expressed remorse immediately when confronted by Maria Mwatila, the victim's mother, shortly after the incident. Mwatila testified that the accused at first denied any wrongdoing, but when they came to the police, he admitted guilt. It is common cause that the accused, ever since, acknowledged his guilt; which eventually culminated in him pleading guilty to the charge. In evidence in mitigation he said that he knew that what he did was wrong and that he was remorseful ('sorry'). It was also submitted that the accused's plea of guilty should not readily be seen as a sign of remorse, as he was left with no choice.

[8] I am mindful that contrition, as an indication that the accused will not again commit the offence, is an important factor to be taken into consideration insentencing, but, in order to be a *valid* consideration, it must be sincere (S *v Seegers*[5]). Furthermore, that there may be instances where it is clear to the accused that there is no way out and therefore, he pleads guilty. A guilty plea under those circumstances should not be given too much weight, *unless* accompanied by genuine and demonstrable expression of remorse (S *v Landau*[6]). I am unable to agree with Mr. *Matota* on this point, as I fail to see why the Court should find that the accused's expression of remorse was *not* genuine, simply because he did not immediately admit his guilt the moment he was confronted by Mwatila. This would imply that an accused who does not immediately admit his guilt, could not be seen to have genuine remorse; an assumption I find without merit and untenable. In this case the accused did not only admit his wrongdoing from an early stage, but also took the Court into his confidence and testified, expressing himself in the simplest of way, by saying he was sorry. What more could be expected from him? I suppose he could have approached the victim's family and asked for their forgiveness; but can it be said that, because he did not do that, therefore, his expression of remorse was not genuine? I believe not. Thus, I am satisfied that the accused was honest and that his expression of contrition was indeed sincere.

[9] The offence of rape in itself is considered to be serious - more so, when the victim, a one year old child, is subjected to such a heinous crime. I will bear in mind that it does not appear from the mother's

5 1970 (2) SA 506 (A) at 511G-H.
6 2000 (2) SACR 673 (WLD).

testimony or the medical record, that the victim suffered any physical harm - which, in the circumstances, is almost incomprehensible. Whereas no physical injuries, other that the broken hymen, were observed, it would imply that minimal force accompanied the sexual act. This notwithstanding, there is another form of pain the victim, now ten years old, has to endure; which is truly unfortunate. That is, that presently at school, she is teased and mocked by fellow pupils, as to her having been raped as a baby, by the accused. This demonstrates the collateral psychological suffering endured by rape victims, even long after they fall victim to rape - even where the parents *in casu*, tried to keep this away from the victim. It underscores the need to assist rape victims afterwards to come to terms with such an horrific ordeal; or as in this case where a child is simply too young to recall the incident independently but it is later brought to her attention -to assist these young children to deal with and overcome psychological issues arising from the incident i.e. to assist this child to overcome the scorn and contemptuous treatment she receives from fellow pupils. To that end the Ministry of Gender Equality and Child Welfare should be approached by the child's mother, for assistance and to arrange counselling for the victim.

[10] It is clear from the accused's audacious conduct to have sexual intercourse with the baby left behind in the room by the mother when taking a bath, that he merely saw an opportunity to satisfy his sexual desires without having regard to, and fully appreciating the consequences and blameworthiness of his conduct. When asked under cross-examination why he did this, he replied that he does not know. It was hinted in his plea explanation that he was sexually aroused by the child having been naked; however, according to the

mother, the child was dressed and not naked as the accused alleged. Hence, there is no merit in this contention that should favour the accused. I personally find it repulsive that an adult person could be sexually arousedby a one year old baby; something that seems to be symptomatic of a distorted mind. Unfortunately, the courts are lately frequently required to decide cases in which extremely young children are subjected to terrible crimes of rape and murder; which inevitably raises the question as to what has happened to the moral values of our society? Children should not be molested or become victims of crime, irrespective whether they are in the safety of their homes or playing on the streets; as there is simply no justification to exploit young and innocent children, irrespective of the circumstances they, or the accused persons, may find themselves in. The fact that the victim was still a small baby, who was raped in the safety of her own home by the accused, a known and trusted person to the family, are all aggravating factors, weighing heavily against the accused.

[11] A factor not to be overlooked is the interests of society; for society looks up at the courts for protection against unscrupulous criminals who apparently have no respect for their fellow human beings and their rights. In this regard the courts fulfil an important function in applying the law in the community, by maintaining law and order through its decisions and sentences it imposes. It is therefore of utmost importance for the sentencing court, to also be in touch with reality and the requirements of society; lest society might take the law into its own hands. Serious crimes, such as the present, should not be punished too leniently and must not only reflect the shock and indignation of society and serve as just retribution for the

crime committed, but should also deter others from similar conduct. In *S v Chapman*,[7] an oft quoted dictum, endorsed in this jurisdiction, it was stated:

> *"The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women [and children I may add], and we shall show no mercy to those who seek to invade those rights."*

In this instance, I believe society expects from this Court to impose a sentence that will not only reflect that regard was had to the interests of the accused, but also to that of society; and the seriousness of the crime committed. It does not mean to say that the interests of the accused carry no weight with the Court - only that it should not be attributed too much weight.

[12] It has been said in *S v Van Wyk*[8] that the duty the sentencing court is under to harmonise and balance the principles applicable to sentence, does not imply that equal weight ought to be given to the different, and sometimes opposing, factors; but that the one may be emphasised at the expense of the other. That, obviously, needs to be determined in the circumstances of the particular case.

7 1997 (2) SACR 3 (SCA) at 5e.

8 *Supra* at 448D-E.

[13] The accused stands convicted of the offence of rape, read with the provisions of the Combating of Rape Act 8 of 2000, in circumstances where the victim is under the age of thirteen years and the accused more than three years older, for which the prescribed minimum sentence is one of imprisonment of not less than fifteen years for

a first offender (s 3 (1)(a)(ii)(bb)(A)). Only when there are substantial and compelling circumstances present, the court *may* impose a lesser sentence. It is now well established that in its determination whether the circumstances of a particular case could be seen to be substantial and compelling, regard must be had to the usual factors traditionally taken into consideration for sentence, and therefore, does not require the existence of any 'special circumstances' before a finding on the presence of substantial and compelling circumstances, can be made.

[14] Given the circumstances of this case, I am satisfied that, despite accused being a first offender and him having been in custody awaiting trial for one-and-a-half years, the seriousness of the offence, coupled with the circumstances under which it was committed, warrants a sentence in excess of the prescribed minimum of fifteen years imprisonment. The aggravating factors by far outweigh the mitigating factors and a lengthy term of imprisonment seems inevitable. The circumstances of this case call for the deterrent and retributive objectives of punishment to be brought to the fore and that rehabilitation, as a sentencing objective, plays a minor role. However, I am of the view that the accused should not be sacrificed on the altar of deterrence, simply because of the prevalence of the crime; ultimately, it is the accused person in his unique circumstances who must be punished. Accused should be given the opportunity, once he has paid his dues, to prove to society that he has reformed and is therefore entitled, to once again, take up his position amongst them as a law-abiding citizen.

[15] In the result, the accused is sentenced as follows:

Twenty (20) years imprisonment of which three (3)

years is suspended for five (5) years, on condition that the accused is not convicted of the offence of rape or attempted rape, committed during the period of suspension.

LIEBENBERG, J

ON BEHALF OF THE ACCUSED	**Ms. G. Mugaviri**
Instructed by:	**Directorate: Legal Aid**
ON BEHALF OF THE STATE	**Mr. Matota**
Instructed by:	**Office of the Prosecutor-General**