CASE NO.: CA 09/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE **APPELLANT**

and

VASCO LIBONGANI KANGULU **RESPONDENT**

CORAM: Shivute, J *et* Siboleka, J

Heard on: 2011 August 08

Delivered on: 2012 February 17

APPEAL JUDGMENT

SHIVUTE, J: [1] The State has appealed in this matter against the sentence that was imposed on the respondent by the learned Regional Magistrate, after the respondent was convicted of the offence of rape contravening section 2 (1)(a) of the Combating of Rape Act, 2000 (Act No. 8 of 2000). The brief facts of the case are that the respondent, who was 21 years old, committed a sexual act under coercive circumstances with a minor who was 10 years old when the offence was committed. He was convicted as charged and sentenced to 12 years' imprisonment. This was after the trial court found that there were substantial and compelling circumstances present necessitating the departure from the imposition of the mandatory sentence of 15 years' imprisonment provided for by section 3(1) of the Combating of Rape Act

[2] The appellant advanced the following grounds of appeal:

"(i) The sentence is shockingly lenient when regard is had to the circumstances of the offence and the mandatory sentence prescribed by the Act.

(ii) The learned magistrate failed to consider or gave insufficient weight to the deterrent and preventive function that sentences in these circumstances should have.

(iii) The learned magistrate over emphasized the personal circumstances of the accused.

(iv) The learned magistrate underemphasized the serious nature of the offence.

(v) The learned magistrate failed to take into account that the accused raped the victim on two separate occasions on the evening in question.

(vi) The learned magistrate disregarded the coercive circumstances under which the rape was committed, which called for the imposition of the mandatory sentence of 15 years' imprisonment. The coercive circumstances being that the victim was below the age of 14 years, namely 10 years of age at the time she was raped and that the accused was 21 years old which is more than three years older than the victim.

(vii) The learned magistrate erred by finding that the 21 months that the accused had spend in custody constituted substantial and compelling circumstances that warranted the imposition of a sentence below the mandatory minimum sentence prescribed by the Act."

[3] The appellant was represented by Ms Nyoni whilst the respondent appeared in person.

[4] The appellant submitted among others that the respondent was convicted of a serious offence which was committed against a young victim. Therefore, the youthfulness of the victim should have been considered as an aggravating factor. The respondent is a grown man and a father of one child. He was 21 years of age at the time the crime was committed. The victim was raped twice on the same night in the sanctuary of her home where she should have been most secured. The respondent threatened to stab the victim with a knife if she should report to her father. He further threatened to wait for her and harm her on the way from the place where she fetches water. It was submitted that the threats traumatized the victim. It was again

the appellant's submission that the respondent showed no remorse because he did not apologise to the victim and her family. Due to the seriousness of the offence and its prevalence in the country, the Namibian society expects the courts to deal harshly with offenders convicted of the offence. Counsel for the appellant further argued that the learned magistrate had a duty to properly consider the interest of society when he sentenced the respondent.

[5] Counsel for the appellant continued to argue that the circumstances of the respondent were far outweighed by the seriousness of the offence and the interest of society. Although the learned magistrate mentioned the mitigating as well as aggravating circumstances of the case he disregarded or did not sufficiently consider the fact that the mitigating circumstances were negligible when regard is had to the offence that the respondent stood convicted of and the interest of society.

[6] It was further a point of criticism by counsel for the appellant that the learned magistrate trivialized the offence committed by the respondent because the court *a quo* failed to take into account the fact that the respondent was proved to have committed two separate counts of rape on that same night. By sentencing the respondent to 12 years imprisonment it meant that the respondent effectively went unpunished for the other rape

[7] It is worth to mention that although it has been proved that the respondent had had sexual intercourse with the victim twice on that night unfortunately the respondent was charged with only one count of rape. It is therefore this Court's opinion that the argument by the appellant that the

respondent should have been sentenced on each sexual act which was committed against the victim was misplaced; the respondent could not have been sentenced for the sexual act he had not been convicted of.

[8] Counsel for the appellant further submitted that the learned magistrate erred by finding that the fact that the respondent had spent 21 months in prison constituted “substantial and compelling circumstances” warranting a departure from the imposition of the mandatory minimum sentence. It was further argued that taking into account that the respondent had raped the minor victim on diverse occasions, he deserved a sentence that was higher than the minimum sentence prescribed by the Act. Counsel for the appellant additionally contended that the learned magistrate acted improperly when he in the absence of medical evidence concluded that the respondent’s health was so poor that he would “very soon” become a burden to prison authority as a reason for departing from the mandatory minimum sentence; that the learned magistrate failed to take into account that the respondent’s medical needs would be taken care of in prison.

[9] Counsel for the respondent argued further that the magistrate deviated from imposing a mandatory sentence for “flimsy reasons” as there were no substantial and compelling circumstances. Therefore, so counsel concluded her submissions, the finding that there were substantial and compelling circumstances should be reversed and the court should interfere by overturning the sentence imposed on the Respondent and replacing it with a sentence that is in line with the provisions of the Combating of Rape

Act. This Court was referred to several well-known authorities concerning sentencing on rape cases and it is not necessary to mention them all herein.

[10] The respondent, on the other hand, argued that the court *a quo* had exercised its discretion properly and that this Court should therefore confirm the sentence and dismiss the appeal. The respondent had also referred us to some of the cases also cited by the appellant concerning the question when an appeal court should interfere with the sentence of the trial court.

[11] In *S v Tjiho* 1991 NR 361 (HC) at 364G-H Levy J pointed out that a trial court had a judicial discretion in sentencing the accused. The learned Judge went on to state as follows:

> *". This discretion is a judicial discretion and must be exercised in accordance with judicial principles. Should the trial court fail to do so, the appeal Court is entitled to, not obliged to, interfere with the sentence. Where justice requires it, appeal Courts will interfere, but short of this, Courts of appeal are careful not to erode the discretion accorded to the trial court as such erosion could undermine the administration of justice".*

Conscious of the duty to respect the trial court's discretion, Levy, J in *S v Tjiho* (*supra*) at 366A-B listed the following guidelines which will justify such interference. The appeal court is entitled to interfere with the sentence if:

(i) "the trial court misdirected itself on the facts or on the law;

(ii) an irregularity which was material occurring during the sentence proceedings;

(iii) the trial court failed to take into account material facts or overemphasized the importance of other facts;

(iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that would have been imposed by the court of appeal."

[12] Before it sentenced the respondent, the trial court in this matter considered the following factors:

(a) That the imposition of the applicable mandatory minimum sentence was befitting the offence, offender as well as the society at large.

(b) It considered whether or not to take into account the period the respondent spent in custody awaiting trial.

(c) The trial court concluded that pre-sentence incarceration could not be ignored especially if the accused is not the author of such incarceration, for example, by jumping bail or committing other crimes whilst on bail or warning.

(d) The trial court considered pre-sentence incarceration where a prescribed minimum sentence is called for in the absence of substantial and compelling circumstances, regard being had to the fact that the trial court had considered and found 15 years' imprisonment being the starting point before factoring in mitigation and aggravation.

(e) Regarding the ground that the trial court did not call medical evidence, the trial court did not deem it fit to do so as it was in a position to observe the respondent exhibiting what it described as “badly swollen legs, walking and standing with difficulty”, adding that the court was least concerned with the nature of that illness but the fact of it.

[13] I will proceed now to decide whether there were substantial and compelling circumstances for the court below to deviate from the imposition of a mandatory sentence as prescribed by the Combating of Rape Act or whether the learned magistrate deviated lightly or “for flimsy reasons” from imposing the mandatory sentence.

[14] There are no specific factors which are listed to be substantial and compelling. All factors traditionally taken into account in sentencing thus continue to play a role, none is excluded at the outset from consideration in the sentencing process. (See S v Malgas 2001 (2) SA 1222 (SCA)) at 1231C)

[15] The trial magistrate pointed out that after he had considered the factors stated in paragraph [12] above, he turned to the consideration of this Court’s decision of *S v Lopez* 2003 NR 162 (HC) at 173 F-G which cited with approval the South African case of *S v Malgas* (supra) as to the meaning of “substantial and compelling circumstances”. In *Malgas* the South African Supreme Court of Appeal pointed out at 1236B that “[t]he ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yard stick (‘substantial and compelling’) and must be such as

cumulatively to justify a departure from the standardized response that the Legislature has ordained".

[16] I am alive to the facts that the offence the respondent has been convicted of is a serious one which ordinarily calls for a mandatory minimum sentence and that the offence is committed under coercive circumstances against a vulnerable minor child. However, sitting as an appellate Court, and applying the principles that have already been mentioned and at the pain of a repetition, we are only entitled to interfere with the discretion of the trial court if there are convincing reasons that that court failed to exercise its discretion judiciously; that the sentence imposed is startlingly inappropriate in the sense that it induces a sense of shock and/or that an irregularity took place during the proceedings which leads to the miscarriage of justice. Taking into account the principles relevant to sentencing, the trial court's reasons for imposing the sentence under scrutiny, I am not persuaded that any of the factors upon which a court of appeal may interfere is present in this matter.

I do not find any misdirection in the approach of the trial court on the contended grounds of appeal or at all. The trial court spelt out and entered on the record the circumstances it considered to be taken cumulatively to amount to substantial and compelling circumstances. In my view, the cumulative traditional mitigatory factors "measured against the composite yardstick ('substantial and compelling') above justified the Magistrate to impose a lesser sentence than the minimum mandatory sentence. The fact

that the appeal Court could have imposed a different sentence does not mean that the learned magistrate did not exercise his discretion judiciously. It can also not be said that the sentence of 12 years imposed on the respondent after substantial and compelling circumstances were found to exist is so startlingly inappropriate that it induces a sense of shock. I would therefore dismiss the appeal.

[17] In the result, the following order is made:

The appeal is dismissed.

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SHIVUTE, J

I agree.

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SIBOLEKA, J

Appearance for the parties:

For the Appellant:	Mrs Nyoni
Instructed by:	Office of the Prosecutor-General
For the Respondent:	In Person