NOT REPORTABLE

CASE NO: CA 11/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GAVETO GAESEB **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: HOFF, J *et* MANYARARA, AJ

Heard on: 03 October 2008

Delivered on: 03 October 2008 (*Ex tempore)*

Reasons on: 14 March 2012

APPEAL JUDGMENT

HOFF, J: [1] The appellant was convicted in the Regional Court of the crime of rape on 3 November 2000 and sentenced on the same date to 20 years imprisonment. The appellant in his grounds of appeal referred to a number of issues the magistrate apparently failed to take into account. The appeal is against sentence only. These grounds of appeal had been drawn up without the assistance of a legal representative.

[2] Mr Kavendjii who appeared on behalf of the appellant indicated that he would argue the appeal only in respect of two points, namely, the fact that the offence was committed before the Combating of Rape Act, At 8 of 2000 came into force, and secondly, the failure of the magistrate to consider that the appellant had spent 2 years in custody before he was sentenced.

[3] In addition this Court was referred to the legal principles regarding sentence in particular the triad mentioned in *S v Zinn* 1969 (2) SA 537 A, as well as other case law relevant to the issue of sentencing.

[4] It is common cause that the rape was committed prior to the promulgation of the Combating of Rape Act, 8 of 2000. The magistrate in this regard stated in his reasons for sentencing that the appellant was convicted under the common law.

It is further common cause that the appellant had a previous conviction for the crime of rape. The previous conviction does not form part of the appeal record since it was lost in the process of lodging this appeal. Nevertheless it appears from the reasons of the magistrate, prior to sentencing, that the appellant had been convicted and sentenced of the crime of rape during the year 1992.

[5] It was submitted on behalf of the appellant that when the magistrate imposed sentence this “judgment was clouded by the Combating of Rape Act, and this was clearly a serious misdirection”.

It was also submitted that the presiding magistrate misdirected himself by merely paying lip serve to the consideration of the personal circumstances of the appellant. Furthermore the contention was that the sentence imposed would have the effect that the appellant had been visited with punishment “to the point of being broken”.

[6] Regarding the period the appellant had been trial awaiting it was submitted that the magistrate conceded that this period seemed not to have been taken into account and that the appellant should get the benefit of any doubt. This, so it was contended, amounted to an irregularity. Mr Kavendjii suggested that a sentence of 10 years imprisonment of which 2 years imprisonment are suspended on certain conditions would be an appropriate sentence.

[7] The facts found to have been proved by the Court *a quo* in respect of the conviction was the following:

The complainant, a 15 year old girl, was on 6 June 1998 in the company of another girl, Adolfine, and her younger brother. They went into the Agra camp to collect wood. The appellant approached them claiming to be the watchman on those grounds and ordered them to accompany him to the owner. He told the boy to leave and took the two girls up to a spot where he told them to take off their panties. He informed them that it was his practice to sleep with ladies who used to come to collect wood there. When they refused, he tripped the complainant, causing her to fall down. Whilst on the ground he stepped on her body and hit her several times with a piece of wood while she was rolling on the ground, crying. The appellant than threw his panga at Adolfine whereupon she ran away. The appellant then partly undressed the complainant of her tights and panty, forced open her legs whereafter he had sexual intercourse with her. When he had finished he ran away. The complainant afterwards met with constable Nauseb who had arrived there and gave a description of the appellant who was subsequently arrested. The magistrate rejected the version of the appellant that for some time prior to the day of the incident he had a sexual relationship with the complainant, but that he never had any sexual intercourse with the complainant on that particular day.

[8] The appellant admitted his previous conviction for the crime of rape. It appears from the record of the proceedings in the court *a quo* that the appellant had been sentenced on 29 October 1992 to 6 years imprisonment of which 2 years imprisonment were suspended on certain conditions.

[9] The appellant in mitigation of sentence stated that his mother had passed away four years earlier, that he took care of two brothers (twins) aged eleven years and two sisters aged 20 years and 21 years respectively. He was self-employed prior to the incident. The twins were attending school and his two sisters looked after them on a farm. He was married but the father of two children. These two children were cared for by their respective mothers.

[10] The contention that the magistrate's "judgment was clouded by the Combating of Rape Act" when he imposed the sentence is in no way supported by the record of the proceedings in the court *a quo* and should be rejected. Regarding the submission that the personal circumstances of the appellant was not afforded due weight, this is in my view also without any substance.

[11] The magistrate was alive to the triad of principles referred to in *Zinn* (*supra*) and considered the nature of the crime, the interests of society and the personal circumstances of the appellant. He also considered the purpose of punishment namely prevention, deterrence, rehabilitation and retribution.

[12] The magistrate further found that aggravating factors justified the sentence imposed. These factors were as follows:

(a) the appellant had a record of a previous conviction for the crime of rape;

(b) the age of the complainant i.e. 15 years;

(c) the fact that the appellant mislead the complainant by telling her and her sister that he was taking them to the owner of the farm;

(d) the appellant was armed with a panga and threatened to kill the witness Adolfine; and

(e) the appellant never showed any remorse but kept on misleading the court.

[13] In *S v Mathews Matheus u*nreported appeal judgment CA 74/2000 delivered on 21 December 2001 Maritz J expressed himself as follows on the question what is to be considered on appeal:

"An enquiry on appeal into the appropriateness of a sentence is therefore not really focussed on whether the sentence is right or wrong, but whether the presiding officer exercised his sentencing discretion properly and judicially. This approach was confirmed by the Supreme Court (per Ackermann AJA) in *S v Van Wyk* 1992 (1) SACR 147 (Nm) at 165 E – G:

> 'Punishment being pre-eminently a matter for the discretion of the trial Court, the powers of a Court on appeal to interfere with sentence are limited. Such interference is only permissible where the trial Court has not exercised its discretion judicially or properly. This occurs when it has misdirected itself on facts material to sentencing or on legal principles relevant to sentencing ...'

[14] To determine whether the trial court exercised its sentencing discretion "judicially and properly", a Court of Appeal will enquire whether or not the sentence "is vitiated by irregularity or misdirection or is disturbingly inappropriate" (per Holmes, AJ in *S v Rabie,* 1975 (4) SA 858 (A) at 857 E).

It must be kept in mind that not just any irregularity, misdirection or disproportionality will justify interference: only an irregularity or misdirection which, by its "nature, degree, or seriousness ... shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably (*S v Pillay*, 1977 (4) SA 531 (A) at p. 535

E – F) or a disproportionality that is disturbing, startling, striking or induces a sense of shock, will suffice (compare e.g. *R v S* 1958 (3) SA 102 (A) at 104 B).

[15] It was also held in *Matheus (supra)* that it remains in the discretion of the sentencing court what weight should be afforded to a previous conviction.
(See also *Jason Rene Joly v The State* an unreported appeal judgment of this Court, CA 177/2007 delivered on 30 January 2008).

[16] I am of the view that the magistrate afforded appropriate weight to the personal circumstances of the appellant and that there is no ground for this court to interfere with the sentence on this point.

[17] Regarding the period the appellant had been trial awaiting the magistrate in his additional reasons stated as follows on p. 123 of the record:

> "Appellant's personal circumstances were considered in sentencing him and although the record does not specifically reflect that Appellant was in custody awaiting trial for two years, it is a factor to be taken into consideration. Appellant himself failed to mention it in mitigation, but having been unrepresented at the time, the Court should have raised it with him. It seems impossible now, eight years later, to say whether this factor was indeed taken into account in sentencing the Appellant, or whether the Court simply omitted to mention it when sentencing. The Appellant should get the benefit of any doubt.
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> Despite this omission (which can be regarded as an irregularity) it should not vitiate the proceedings (See *S v Shikunga & Another*, 1997 NR 156 (SC).
> Appellant had a previous conviction of rape, which, in the circumstances, warranted a sentence beyond the twenty years imposed, being the maximum this Court could have imposed at the time. (Under the Combating of Rape Act 8 of 2000, the prescribed minimum sentence is one of 45 years imprisonment)."

[18] Time spent in custody awaiting trial or sentence is an important factor giving cause for a reduction in sentence a court would normally have imposed.

(See *Abiud Kauzuu v The State* unreported judgment of this Court, case no. CA 19/04 delivered on 2 November 2005 per van Niekerk J and the authorities referred to on p. 14 of the record).

[19] If the magistrate did not take into account the period the appellant had been trial awaiting this would be a misdirection. However as was stated in *Matheus (supra)* not just any misdirection will justify interference on appeal. If one has regard to the fact that the appellant was a repeat offender, the tender age of the complainant and that violence preceded the sexual intercourse, then the sentence imposed, in my view, does not show that the magistrate exercised his discretion improperly or unreasonably or that the sentence is disturbing, startling, induces a sense of shock or that there is a striking disparity between the sentenced imposed by the magistrate and the sentence this Court would have imposed sitting as a court of the first instance.

[20] I fully endorse the sentiments expressed by Strydom CJ in *S v Shapumba* 1999 NR (SC) at 343 J – 344 A – D:

> "The crime of rape, being an unlawful and forceful invasion of the body and privacy of a woman, mostly with the purpose to satisfy the sexual urge of the offender, can, except in the most exceptional circumstances, not contain mitigating factors which could explain the commission of the crime and diminish the moral blameworthiness of the offender. Whereas there is very little that can mitigate the commission of the crime of rape there are certain specific factors which would further aggravate and contribute towards the seriousness of the crime and the consequent punishment thereof. Examples of these are the rape of young children, the amount of force used before, during or after the commission of the crime, the use of weapons to overcome any resistance by means also of threats of violence, rape committed by more than one person on the victim, the fact that the rapist is a repeat offender, etc. These factors, or a combination thereof, resulted in heavy punishments imposed by the Courts. See in this regard *S v P* 1991 (1) SA 517 (A); *S v G* 1989 (3) SA 695 (A); *S v R* 1996 (2) SACR 341 (T); *S v W* 1993 (1) SACR 319 (SE); *S v D* 1991 92) SACR 543 (A) and *S v F* 1990 (1) SACR 238 (A)."

[21] If the magistrate had afforded more weight to the seriousness of the crime and the fact that the appellant was a repeat offender, or to some of the objects of punishment, then in my view he would have been justified to do so in the circumstances.

[22] Maritz J in *Matheus (supra)* at p. 11 remarked as follows on this topic:

> "Whilst mindful of the "equilibrium and tension" between the elements of Zinn's triad and that a court "should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of others" (per Friedman J in *S v Banda and Others* 1991 (2) SA 352 (B) on 355 A – B), the increasing prevalence of this crime makes it necessary to emphasise the interests of the community and to impose deterrent sentences if we are to combat it successfully. Such emphasis is permissible. As Ackermann AJA said in *S v Van Wyk* 1992 (1) SACR 147 (NmS): "The duty to harmonise and balance does not imply that equal weight or value must be given to the different factors. Situations can arise where it is necessary (indeed it is often unavoidable) to emphasise one at the expense of the others."
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> I fully endorse these remarks.

[23] These are the reasons why the appeal against the sentence imposed in the Regional Court was dismissed.

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HOFF, J

ON BEHALF OF THE APPELLANT: **MR KAVENDJII**

Instructed by; **HENGARI, KANGUEEHI & KAVENDJII-INC.**

ON BEHALF OF THE RESPONDENT: **ADV. MATOTA**

Instructed by: **OFFICE OF THE PROSECUTOR GENERAL**