



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 18/2011

THE STATE

versus

MICHAEL GARISEB

Neutral citation: *S v Gariseb* (CC 18/2011) [2013] NAHCMD 192 (10 July 2013)

Coram: SHIVUTE, J

Heard: 25 June 2013

Delivered: 10 July 2013

Fly note: Criminal procedure – Sentence – Previous conviction – On a charge of rape – Whether or not charged previously under the common law – Mandatory sentence.

Summary: Criminal procedure – Sentence - The accused was convicted of three counts of rape in contravention of s 2 (1) (a) of the Combating of Rape Act 8 of 2000 – He has a previous conviction of rape in contravention of the same section committed during 2008 – The court is bound to impose a mandatory sentence in terms of the Act – The accused is accordingly sentenced to 45 years' imprisonment in respect of each count.

SENTENCE

1st Count: Rape contravening section 2 (1) (a) Act 8 of 2000, 45 years' imprisonment.

2nd Count: Rape contravening section 2 (1) (a) Act 8 of 2000, 45 years' imprisonment.

3rd Count: Rape contravening section 2 (1) (a) Act 8 of 2000, 45 years' imprisonment.

The sentence on the 3rd count is to run concurrently with the sentence imposed in respect of the 2nd count.

SENTENCE

SHIVUTE J:

[1] The accused person was convicted of three counts of rape in contravention of s 2 (1) (a) of Act 8 of 2000 of the Combating of Rape Act. All three rape acts were committed under coercive circumstances. The accused assaulted the complainant and threatened to kill her should she refuse to comply with his instructions.

[2] The accused was represented by Mr Karuaihe on the instructions of the Directorate of Legal Aid and Ms Esterhuizen appeared on behalf of the State.

[3] The accused person gave evidence in respect of sentence and called no witnesses. The accused is 25 years old. He is a father of a minor child who is 7

years old. The child is being looked after by her mother. The accused testified that he was sorry for what he did and asked for forgiveness from the victim's family and the court. He claimed that at the time he committed these offences he was very drunk. The accused expressed his desire to continue with his school if he gets out of custody.

[4] On the other hand, counsel for the State called the mother of the victim to testify in mitigation. She testified that she was very hurt because of what had happened to her daughter. The victim was affected by this incident because she has changed a lot. She has symptoms of withdrawal and she feels that parents do not care about her. Although the victim was a clever student who used to perform well, this incident had affected her performance at school. The victim had to go through psychological counselling. At the moment she is afraid to be on her own and preferred to be in the company of an elder person. The witness has asked the court to protect women and children.

[5] The State further called Sergeant Kazora, a member of the Namibia police, who testified that he investigated the rape case in respect of which the accused is currently serving. The accused committed the offence of rape on 17 May 2008 and his victim was a minor child of 10 years.

[6] Counsel for the accused asked the court to be lenient in imposing sentence in terms of which the 2nd and 3rd counts are to run concurrently with the sentence in the 1st count in order for the accused to be given a chance to rehabilitate.

[7] Counsel for the State submitted that the accused is not a first offender. The court should impose a sentence that would instil confidence in victims of these crimes that the court is there to protect their interest. The court should impose a mandatory sentence provided for by the Act as there are no substantial and compelling circumstances for the court to deviate from imposing the mandatory sentence.

[8] I have duly considered all the arguments placed before me. The accused is a subsequent offender. He had committed this offence whilst he had another rape

charge pending. It appears to me that the accused has a propensity of targeting minor children and rape them in order to satisfy his devious sexual desires.

[9] Section 3 of the Combating of Rape Act 8 of 2000 provides as follows:

'(1) Any person who is convicted of rape under this Act shall subject to the provisions of ss (2) (3) and (4), be liable -...

(b) in the case of a second or subsequent conviction (whether previously convicted of rape under the common law or under this Act)-

(ii) where the rape in question or any other rape of which such person has previously been convicted was committed under any of the circumstances referred to in sub paragraphs (iii) of paragraph (b) imprisonment for a period of not less than 45 years.'

Subsection (2) of section 3 says that if a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the applicable sentence, it shall enter those circumstances on the record of proceedings and may there upon impose such a lesser sentence.

[10] The offences the accused committed are serious and prevalent. Although the accused has apologised, he is a clear and present danger to society. As such there is a greater need to isolate him from the public so as to protect its vulnerable members, namely women and children.

[11] There are no substantial and compelling circumstances placed before me to allow me to deviate from the mandatory sentence. The sentence I will impose must act as deterrence to the accused and to others who may be minded to follow the accused's bad ways and to commit similar offences. However, because of the severity of the cumulative effect of the mandatory sentences, I have considered imposing a sentence that will run concurrently.

[12] In the result the accused is sentenced as follows.

1st Count: Rape contravening section 2 (1) (a) of Act 8 of 2000, 45 years' imprisonment.

2nd Count: Rape contravening section 2 (1) (a) of Act 8 of 2000, 45 years' imprisonment.

3rd Count: Rape contravening section 2 (1) (a) of Act 8 of 2000, 45 years' imprisonment. The sentence on the 3rd count is to run concurrently with the sentence imposed in respect of the 2nd count.

N N Shivute
Judge

APPEARANCES

STATE : Ms Esterhuizen
Office of the Prosecutor-General

ACCUSED: Mr Karuaihe
Instructed by Directorate of Legal Aid