



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

Case No: CC 15/2008

In the matter between:

**THE STATE**

and

**RALPH MZUVUKILE MTSHIBE**

**Neutral citation:** *The State v Mtshibe* (CC 15/2008) [2012] NAHCMD 58 (5 March 2013)

**Coram:** SHIVUTE, J

**Heard:** 11 February 2013

**Delivered:** 5 March 2013

**Flynote:** Criminal Procedure – Sentence – Previous conviction – On a charge of rape – Whether or not charged previously under the common law.

- Criminal procedure – Sentence - Previous convictions of offences committed ten or more years ago – Such previous convictions not to be necessarily disregarded or without due consideration of the weight to attach to them.

**Summary:** Criminal procedure – Sentence – Court finding that accused has a previous conviction on a charge of rape committed under the common law in such a case the court should consider a second or subsequent conviction on a charge of rape under the Combating of Rape Act as such

Sentence – Previous convictions – for purpose of sentence under the Act .

Previous convictions on offences committed ten or more years ago, court holding that such previous convictions should not necessarily be disregarded neither should due weight not be attached to such previous convictions.

The accused was convicted on one count of assault with intent to do grievous bodily harm and two counts of rape committed under coercive circumstances in contravention of the Act. The previous conviction under the common law is taken into account and a mandatory sentence imposed in terms of the Act.

Sentence:

3<sup>rd</sup> Count: Assault with intent to do grievous bodily harm, 12 months' imprisonment.

5<sup>th</sup> Count: Rape c/s 2 (1) (a) Act 8 of 2000, 45 years.

6<sup>th</sup> Count: Rape c/s 2 (1) (a) Act 8 of 2000, 45 years.

The sentence on the 3<sup>rd</sup> count is to run concurrently with the sentence imposed in respect of counts 5 and 6.

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## SENTENCE

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### **SHIVUTE J:**

[1] The accused was convicted on one count of assault with intent to do grievous bodily harm and two counts of rape in contravention of s 2 (1) (a) of Act 8 of 2000 the Combating of Rape Act. The rape acts were committed under coercive circumstances within the meaning of s 2 (1) of the Act because the accused pointed a knife at his victim before and during the sexual acts.

[2] The accused was represented by Ms Mbome on the instructions of Legal Aid Directorate, and Mrs Nyoni appeared for the State.

[3] Ms Mbome called the accused to the witness stand to testify in mitigation. The accused was 37 years of age, single and had two minor children, aged 11 and 9, respectively. Both children live with their mothers. The accused's highest level of education is Grade 7. He suffers from high blood pressure. Before his arrest he was working as a sea-man. He contributed to the household of his parents and maintained his children, as well as his siblings. He maintained that he did not commit the crime and that he was not happy with the DNA test results. He did not place any evidence to rebut the DNA findings.

[4] The accused is not a first offender, he has previous convictions dating as far back as 1989. His previous convictions include, inter alia, housebreaking with intent to steal and theft, robbery with aggravating circumstances, assault with intent to do grievous bodily harm and rape.

[5] The accused had been released on bail in this matter. However, he has been in custody since 2008 because he was serving a sentence of three (3) years' imprisonment on a charge of housebreaking with intent to steal and theft.

[6] Counsel for the State argued that the accused was convicted of serious offences involving violence to the complainants' persons. Accused has (10) ten previous convictions and that he is a second offender as far as the rape counts were concerned. She further called for a mandatory sentence provided for in the Act in respect of an accused who has a previous conviction of rape.

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

'(i) 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) –

(iii) 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 subparagraphs (iii) of paragraph (b), to imprisonment for a period of not less than 45 years.'

(2) 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 the proceedings and may there upon impose such a lesser sentence.

[8] The accused was previously convicted of rape under the common law on 29 January 1997. He was sentenced to 7 years' imprisonment of which two years were suspended for five years on certain conditions. He was released in 2002, and in 2003 and 2005 he committed the offences for which I must now impose a sentence on him. No substantial and compelling circumstances were presented to me and I do not find any, of such circumstances to exist, justifying me to depart from the prescribed mandatory sentence.

[9] The offence of rape committed by the accused is serious. The accused's conduct show that he has no respect for women's physical integrity and he does not attach any value to their dignity. He goes around targeting young women who are new in Luderitz pretending to be a good Samaritan, yet he is a monster with a devious mind, and planned to take them to a secluded place in order to rape them to satisfy his sexual desires. The accused is a callous rapist, and from the evidence I conclude that the complainant must have had a terrifying experience.

[10] Although the accused testified that he was providing for his family before he was incarcerated, I have my reservations about it because the accused is a jailbird who spent most of his life in prison.

[11] The accused's previous conviction of rape is more than ten years old, however, this does not render the present convictions not to be second or subsequent convictions. At common law the court has an unfettered but judicial discretion to disregard previous convictions which are ten years or older. In *S v Mqwathi* 1985 (4) SA 22 (T) the following appears in the English head note at 23 E – F as quoted with approval by Damaseb JP in *S v Bezuidenhout* 2006 (2) NR 613 HC at 614.

'(T)he court now exercise an unfettered but judicial discretion, (to) decide, having regard to the nature, number and extent of similar previous offences and the passage of time between them and the present offence, to leave out of account the previous convictions, even where the last previous conviction is less than ten years old, and treat the accused as a first offender. The court can also, taking into account the aforementioned factors, nevertheless decide to take the previous convictions into account as an aggravating circumstance even where the last previous conviction is more than ten years old.'

[12] The common law does not rule out that if a previous conviction is ten or more years old, it should not be disregarded or that no weight should be attached to it. The Legislature considers the offence of rape in a serious light and this is evident from the mandatory sentence of 45 years provided for in the Act.

[13] The accused's past and present conduct of resorting to violence or rape is an aggravating factor, justifying the removal of the accused from society by imposing a mandatory sentence. The aggravating factor overrides the personal circumstances of the accused.

[14] In the result the following sentence is imposed:

3<sup>rd</sup> Count: [Assault with intent to do grievous bodily harm] 12 months' imprisonment.

5<sup>th</sup> Count: [Rape c/s 2 (1) (a) Act 8 of 2000] 45 years' imprisonment.

6<sup>th</sup> Count: [Rape c/s 2 (1) (a) Act 8 of 2000] 45 years' imprisonment

The sentence imposed on the 3<sup>rd</sup> count is to run concurrently with the sentence imposed in respect of counts 5 and 6.

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N N Shivute  
Judge

APPEARANCES

STATE : Mrs Nyoni  
Office of the Prosecutor-General

ACCUSED: Ms Mbome  
Instructed by Directorate of Legal Aid