REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

Case No: CC 15/2013

In the matter between:

THE STATE

And

JOHANNA LUKAS **ACCUSED**

Neutral citation: *S v Lukas* (CC 15-2013) [2015] NAHCMD 186 (10 August 2015)

Coram: **DAMASEB, JP**
Heard: 18 and 25 June 2015; 2 July 2015; 04 August 2015
Delivered: 10 August 2015

Flynote: Criminal Procedure – Sentence – Prisoner convicted on five counts of Contravening s 15 read with s 1 of the Prevention of Organized Crime Act 29 of 2004 (POCA) – Trafficking in persons and four counts of Contravening s 2 (1)(b) read with ss 1, 2(2), 2(3), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 (CORA) – Rape with coercive circumstances and one count of Rape without coercive circumstances – Sentence to be imposed in terms of the POCA and CORA – Existence of 'substantial

and compelling circumstance – Mandatory minimum sentence departed from – Cumulative effect of sentence considered – Sentences ordered to run concurrently.

ORDER

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1. '**COUNT 1**: Contravening s 15 read with s 1 of the Prevention of Organized Crime Act 29 of 2004 – Trafficking in persons **– 5 years;**

COUNT 2: Contravening s 2 (1)(b) read with ss 1, 2(2), 2(3), 3, 5, 6 and 7 of Combating of Rape Act 8 of 2000 – RAPE; with coercive circumstances – **8 years;**

COUNT 3: Contravening s 15 read with s 1 of the Prevention of Organized Crime Act 29 of 2004 – Trafficking in persons **– 5 years;**

COUNT 4: Contravening s 2 (1)(b) read with ss 1, 2(2), 2(3), 3, 5, 6 and 7 of Combating of Rape Act 8 of 2000 – RAPE; with coercive circumstances – **8 years;**

COUNT 5: Contravening s 15 read with s 1 of the Prevention of Organized Crime Act 29 of 2004 – Trafficking in persons **– 5 Years;**

COUNT 6: Contravening s 2 (1)(b) read with ss 1, 2(2), 2(3), 3, 5, 6 and 7 of Combating of Rape Act 8 of 2000 – RAPE; with coercive circumstances - **8 years;**

COUNT 7: Contravening s 15 read with s 1 of the Prevention of Organized Crime Act 29 of 2004 – Trafficking in persons - **5 years;**

COUNT 8: Contravening s 2 (1)(b) read with ss 1, 2(2), 2(3), 3, 5, 6 and 7 of Combating of Rape Act 8 of 2000 – RAPE; with coercive circumstances **– 8 years;**

COUNT 9: Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in person – **5 Years;**

2. The sentences on counts **3,5,7** and **9** will run concurrent with count **1**;
3. The sentences on counts **4, 6,** and **8** will run concurrently with count **2**.

Therefore, you are sentenced to a total of **13 years** imprisonment.

JUDGMENT

Damaseb, JP: [1] I convicted the prisoner at the bar on five counts of contravening s 15 read with s 1 of the Prevention of Organized Crime Act 29 of 2004 (POCA): Trafficking in persons. I also convicted her on four counts of contravening s 2 (1)(b) read with ss 1, 2(2), 2(3), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 (CORA): Rape with coercive circumstances; and one count (count 10) of '*Rape without coercive circumstances'.*

[2] After the parties' submissions on sentence, I was concerned about the conviction on count 10. I therefore invited counsel to address me on the following questions of law:

1. 'Given the finding of the absence of 'coercive circumstances' in respect of the sexual act perpetrated by Pretorius on M, with - as the court found- the accused's procurement - was it competent to convict her of 'rape without coercive circumstances'?[1]

2. Was it not appropriate in those circumstances to acquit the accused on count 10?

3. The Combating of Immoral Practices Act 21 of 1980 (IPA) creates the following offence:

Section 14

'14. Sexual offences with youths

Any person who-

(a) commits or attempts to commit a sexual act with a child under the age of sixteen years; or

(b) commits or attempts to commit an indecent or immoral act with such a child; or

[1] On reflection, I am satisfied that it is not an offence cognizable in law.

(c) solicits or entices such a child to the commission of a sexual act or an indecent or immoral act,

and who-

(i) is more than three years older than such a child; and

(ii) is not married to such a child (whether under the general law or customary law),

shall be guilty of an offence and liable on conviction to a fine not exceeding N$40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.'

4. Section 261 of the Criminal Procedure Act, 1977 states:

'261 Rape and indecent assault

(1) If the evidence on a charge of rape or attempted rape does not prove the offence of rape or, as the case may be, attempted rape, but-

(a). . .

(b). . .

(c). . .

(d). . .

(e) the statutory offence of-

(i) unlawful carnal intercourse with a girl under a specified age;

(ii) committing an immoral or indecent act with such a girl; or

(iii) soliciting or enticing such a girl to the commission of an immoral or indecent act;

. . . .

the accused may be found guilty of the offence so proved.

5. In view of the finding that no coercive circumstances were found concerning M, was a conviction of an offence under s 14 of the CIPA read with s 261 of the CPA a competent verdict on a charge of rape with coercive circumstances under the CORA?

6. At this stage of proceedings, what course is open to the court if it is satisfied that the accused was improperly convicted on count 10?'

[3] As the questions posed to counsel were intended to indicate, the conviction on count 10 was incompetent; in other words it was a nullity as no such offence exists under our law and as such, not sustainable. I agree with Mrs Nyoni for the State that it is too late for this court to alter the conviction to any competent verdict. That said, this is a court of justice and it will offend Article 12 of the Constitution to sentence a convicted person for an offence not cognizable under law. Doing so will be inconsistent with the ethos of the Constitution which is premised on legality. Being a nullity it behooves me, in

proceeding to impose sentence, to treat it as such and ignore it. I will therefore only proceed to sentence the accused in respect of counts 1-9.

[4] It is now my duty to impose an appropriate sentence on the prisoner. In so doing, I am guided by the triad, expressed in the following terms by Levy J in *S v Tjiho*[2]*:*

> 'When sentencing an accused, the trial court must bear in mind the nature of the crime, the interests of society and the interests of the accused. These three factors are frequently referred to as the triad. The sentencing Judge or magistrate must keep in mind the purposes of punishment and must try to effect a balance in respect of the interests of the accused, and the interests of society in relation to the crime itself and in relation to those purposes.'(Footnotes omitted)

[5] It is trite that punishment falls within the discretion of the trial court, to be exercised judicially.

[6] Since it is *the* person who committed the crime who is to be punished, personal circumstances play an important role and must not be ignored. The personal circumstances of the convicted person must be weighed against the interests of society. It is in the interest of society that the prisoner receives a sentence that fits her circumstances and the seriousness of the crimes she committed. Should society feel that the punishment imposed on a criminal is inadequate, it may well hesitate to accept such person back; and the criminal herself must feel that having paid her 'debt to society' she will be accepted back. Society's expectation of condign punishment must be tempered by the imperative of mercy where necessary and possible.

[7] Law and order are conditions precedent for an orderly society; therefore society expects the court's protection against lawlessness. The convict must be prevented from repeating her crime and, if possible, reformed and other persons must be deterred from doing what she did. It is in the interest of society that criminals who have served their sentences be accepted back into society.

[8] The net result is that sentences for similar offences frequently differ because personal circumstances differ. The sentence I impose today is, therefore, not

[2]1991 NR 361 (HC) at 365B-F.

necessarily precedent for the future, save in so far as similar circumstances repeat themselves in future.

[9] I want to make mention of the lack of urgency with which this matter was handled by the authorities. The events had taken place in April-May 2012, but the actual investigation only started in October 2012. Early intervention in order to assess the needs of the two minor victims therefore never happened. Even more inexplicably, it became apparent during the trial that even at that stage no attempt had been made to offer counselling to the child victims and their families, yet it was conceded by the social welfare officers that such counselling was needed. No satisfactory explanation was given on the record for this dereliction of duty. It appears that the preoccupation (and rightly so) was more on pursuing criminal charges against the accused than the welfare of the minor victims. That calls for censure.

[10] Section 15 of the POCA reads as follows:

> **'15 Trafficking in persons**
>
> Any person who participates in or who aids and abets the trafficking in persons, as contemplated in Annex II of the Convention, in Namibia or across the border to and from foreign countries commits an offence and is liable to a fine not exceeding N$1 000 000 or to imprisonment for a period not exceeding 50 years.'

Implication of penalty clause reading: fine or imprisonment

[11] In the case of *S v Mali and Others*[3] Accused 3 was found guilty of 'pointing a firearm', in contravention of s 39 (1) (i) of Act 75 of 1969. In this case, the matter went for review after the magistrate imposed direct imprisonment as a sentence. The relevant penalty clause reads:

> 'a fine not exceeding R500 or to imprisonment for a period not exceeding six months'

[12] The court held:

[3] 1981 (2) SA 478 (E).

'However it seems to me that s 39 (2) (d) must be interpreted in such a way that imprisonment can only be imposed as an alternative to a fine. Admittedly the terms thereof do not include the usual phrase "or in default of payment thereof", which would place the matter beyond doubt. However there are sound reasons for reading such words into s 39 (2) (d) as a necessary implication. Accordingly, the use of the words "or to both such fine and such imprisonment" can only mean, in my view, that the words "or to imprisonment" which follow the provisions for a fine are intended to provide an alternative to the fine, and, by implication, operate only in default of payment of such fine.'[4]

[13] This approach was not followed in the following cases: *S v Mathabela 1986 (4) SA 693 (T); followed by S v Nkwane; S v Takwana 1982 (1) SA 230 (Tk) and S v Arends 1988 (4) SA 792*. The position in South Africa now is that where a penalty clause reads 'a fine not exceeding R300 or... imprisonment for a period not exceeding three months', the use of the words 'or to both such fine and such imprisonment' in s 39(2)(b) of Act 75 of 1969 cannot be said to convey that the words 'or to imprisonment' which follow the provision for a fine in that section were intended to make provision for imprisonment merely as an alternative to the fine in the event of non-payment thereof'. It was held that the omission of the words 'or to both such fine and such imprisonment' from s 39(2)(d) of Act 75 of 1969 is not an indication that the Legislature did not intend imprisonment to be a competent sentence unless coupled with the alternative of a fine. The result of this conclusion is that the penal provisions of s 39(2) (d) of Act 75 of 1969 should have been interpreted in *Mali's* case to mean that those provisions give the court a discretion to impose either a fine not exceeding R500 or imprisonment for a period not exceeding six months, which means that it is competent to impose a period of imprisonment without the option of a fine. That is the plain meaning of the words used in the section and is the meaning which should be given to them.[5] That is also the proper approach to be followed in Namibia. The legislative intent I discern from the penal provision in the POCA, seen against the backdrop of the seriousness of the offence of trafficking in persons[6], is that a sentence of direct imprisonment without the alternative of a fine is competent. Given the poverty of the prisoner a fine would in any event be unreasonable.

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[4] At page 479H-G.
[5] S v Arends, p 794F-I.
[6] An offence which the State correctly submitted is seen as a modern manifestation of slavery.

[14] Section 3 of the CORA reads:

> **'3 Penalties**
>
> (1) Any person who is convicted of rape under this Act shall, subject to the provisions of subsections (2), (3) and (4), be liable-
>
> (a) in the case of a first conviction-
>
> (i) where the rape is committed under circumstances other than the circumstances contemplated in subparagraphs (ii) and (iii), to imprisonment for a period of not less than five years;
>
> (ii) where the rape is committed under any of the coercive circumstances referred to in paragraph (a), (b) or (e) of subsection (2) of section 2, to imprisonment for a period of not less than ten years;
>
> (iii) where-
>
> (aa) the complainant has suffered grievous bodily or mental harm as a result of the rape;
>
> (bb) the complainant-
>
> (A) is under the age of thirteen years; or
>
> (B) is by reason of age exceptionally vulnerable;
>
> (cc) the complainant is under the age of eighteen years and the perpetrator is the complainant's parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant;
>
> (dd) . . . .
>
> (ee) . . . .
>
> (ff) . . . .
>
> to imprisonment for a period of not less than fifteen years;'

[15] The case before me is one where the prisoner is convicted of trafficking in two minor girls, and rape with coercive circumstances in respect of one of them. The victims are two minor girls who fell prey to the prisoner's greed because of their poor backgrounds. This aggravates the crime considering that she exploited the victims' poverty to groom them for sexual exploitation.

[16] In respect of the convictions of rape under coercive circumstances, the law prescribes that the sentencing court can only deviate from the mandatory minimum

sentence of 15 years, if the prisoner establishes substantial and compelling circumstances.[7]

Seriousness of offences and factors in aggravation

[17] The seriousness of the crimes is apparent form the sentences provided by the legislature. What militates against a proper balancing of society's interest and that of the prisoner, is the fact that the court does not know the full story as the prisoner has not taken the court into her confidence to come clean about what truly happened. There is definitely more here than meets the eye.

[18] In aggravation, the offences were committed out of greed and with little regard for the wellbeing of the minor complainants and the corrupting influence this conduct had on the children. I was satisfied beyond reasonable doubt that the prisoner's conduct therefore results in grooming in that the prisoner used her position of power over the minor children to expose them to sexual exploitation. I want to make special mention of the fact that this corrupt influence was particularly apparent in the case of complainant D who became completely desensitized and related what are otherwise despicable acts of sexual depravity as if they were so mundane. Her description of those acts would make even the most hardened adult shudder.

Does the Prisoner show remorse for her actions?

[19] In mitigation of sentence, the prisoner said she was sorry and asked for forgiveness from D and her mother. In order for remorse to be a valid consideration at the stage of sentencing, it has to be sincere.[8] The prisoner at the bar has persisted with her denial of criminal culpability. All she says is that she is sorry that she took D to Pretorius who, in turn, raped her in the way D alleged. She persisted that she had no part in the rapes perpetrated on complainant D by Pretorius, and she still maintains that she never took M to Pretorius. As I understood her, the reason she asks for forgiveness is that her taking D to Pretorius was the reason that she landed in the trouble she finds

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[7] Section 3(2) of the Combating of Rape Act, 2000 reads:

'(2) If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the applicable sentence prescribed in subsection (1), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.'

[8] Ibid, at 58A.

herself today. It is obvious, therefore, that the prisoner shows no remorse for what she did. The true test of remorse is acceptance of what one has done wrong and atoning one's wrongdoing by making a clean breast of what happened. That is lacking in the case of the prisoner at the bar. In fact, her continued denial of her wrongdoing has the effect that we do not know what role others played or did not play in this matter and the extent of Pretorius' exploitation of the girl children of Swakopmund. The evidence pointed to Pretorius as a sexual deviant with a rapacious appetite for pedophilia.

[20] It is however not lost on me that a prisoner, whose defense during trial was based on complete denial, might feel conflicted and embarrassed to, during the sentencing procedure, admit wrongdoing and plead for mercy.

Substantial and compelling circumstances

[21] But what are substantial and compelling circumstances? Mr Justice Marais JA's venerable legal chestnut in *S v Malgas*[9] has been accepted in this jurisdiction as the test for what are substantial and compelling circumstances.[10] It becomes apparent from that case that:

(a) the minimum prescribed sentence is not to be departed from lightly and for flimsy reasons;

(b) undue sympathy for the accused should not blind the court to the standardized response to the crime chosen by the legislature;

(c) the legislature has left the discretion to the court to decide whether the circumstances of any particular case justify departure from the prescribed sentence: in latter regard, all factors normally considered by the court either as aggravation or mitigation, do play a role;

(d) for circumstances to be substantial and compelling, they must be such as cumulatively justify a departure from the standardized response chosen by the legislature;

[9] 2001 (2) SA 1222(SCA).
[10] See S v Lopez 2003 NR 162 at 172-174.

(e) the circumstances would be substantial and compelling as to justify a departure in favour of the convict from the minimum sentence prescribed in favour of a lesser sentence, if imposing the prescribed sentence would be so unjust and disproportionate to the crime, the criminal and the interest of the society;

(f) each case must be considered on its facts.

Personal circumstances of the convict

[22] The prisoner's personal circumstances are truly heart-wrenching. This is not to be equated to undue sympathy for the prisoner for reasons I fully set out throughout this judgment. She is currently 23 years of age and a mother of three minor children. She is fairly young and was incarcerated since 3 October 2012. She dropped out of school early and became a mother at the rather young age of 18 years. She gave birth to two other children; one of them whilst she was incarcerated awaiting trial in this matter. The latter event shows a great deal of immaturity and irresponsibility. It demonstrates to me that she does not carefully think through the consequences of her actions. That she could go on and get herself pregnant whilst already bearing the brunt of raising two children without the support of their fathers is a sign of immature behaviour.

[23] The prisoner is part of a family unit which I can only describe as afflicted by poverty and misfortune: the mother is the only breadwinner in a family which comprises of four siblings, a poorly, disabled father and children of the prisoner and that of another of her siblings, Evangeline, a young lady of 23 who also dropped out of school and is staying at home looking after her own child and the children of the prisoner while the mother, a woman of 48 years, has to struggle daily by selling kapana to keep the entire family alive.

[24] The prisoner's mother testified and enlightened me about the stress and burden she bears in keeping her family alive. The gist of her evidence was corroborated by the prisoner's sister, Evangeline. The prisoner's mother had since the incarceration of the prisoner become diabetic as a result of the burden she now carries alone in the absence of the prisoner who was the only other person who assisted her to carry the financial burden of caring for the family. She does casual jobs for the Swakopmund

Municipality and on average brings home N$ 600 - N$ 800 per month from selling kapana and doing casual jobs. From this income, she supports the entire household, including the convict's grandmother in the North, and pays for the water and electricity that is often cut off because she can't always pay up. The prisoner's grandmother who is at the moment taking care of the elder child of the prisoner in the north has indicated that she is unable to cope and wants to return the child to the prisoner's mother.

[25] I have only given a snapshot of the very saddening story of the prisoner which calls out for mercy. The record speaks for itself. Although she has not shown remorse for her actions, it is the duty of this court to place all these factors in the scale in weighing whether the mandatory minimum sentence on the rape under coercive circumstances is called for.

[26] The prisoner is a first offender and has to date been in custody for a period approaching three years. The offences were committed when she was 20 years old.

[27] In a case where the prisoner was a juvenile at the time of the commission of the crime, the court stated in *S v Erickson*[11] that it is necessary for the court to determine what appropriate form of punishment in the peculiar circumstances of the case would best serve the interests of society, as well as the interests of the juvenile. The interests of society are not best served by disregarding the interests of a youthful offender, for an ill-considered form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society. Young offenders should ordinarily be treated differently compared to adults when it comes to sentencing. The reason for this is that youthful offenders, such as the convict are, prima facie, regarded as immature. A youthful person often lacks maturity, insight, discernment and experience and, therefore, acts in a foolish manner more readily than a mature person.[12]The soundness of this rule of practice is fortified by the conduct of the prisoner both before the crimes and while awaiting trial.

[28] As I have already shown, the law requires of me to record the substantial and compelling circumstances which I find to justify departure from the mandatory minimum sentence for the rapes with coercive circumstances. Imposing the prescribed mandatory

[11] 2007 (1) NR 164 at 167A-B.
[12] Ibid at p 166F-G.

minimum sentence on the convict will be manifestly unjust and not in the interest of society for the following reasons:

a) Her age at the time that she committed the crime and her age now;
b) The time she already served awaiting trial;
c) The inability of her sickly mother to care for her children while she is in prison;
d) The demonstrable need for her to be allowed to return to society to give a fighting chance to her innocent children whose fathers are absent;
e) The poor state of health of her parents and the apparent poverty afflicting the entire family – a factor that is relevant in so far as it affects her minor children in whose care they will be left whilst she serves her punishment; and
f) The absence of an obvious relative to care for her children.

[29] Seen cumulatively, I am satisfied that the prisoner's circumstances constitute substantial and compelling circumstances for the purposes of s 3(2) of the CORA. This finding leaves me at large to depart from the mandatory minimum sentences for rape under coercive circumstances in respect of complainant D who , as I found , was not less three years than her rapist's, Pretorius.

Should the sentences run consecutively or concurrently?

[30] The sentencing court is obliged to consider the cumulative effect of the sentences to be served, especially where the charges are part of the same course of action. Where, therefore, the cumulative effect is likely to be disproportionate to the blameworthiness in relation to the offences committed, or will be so excessive as to evoke a sense of shock, the individual sentences can significantly be ameliorated by ordering the sentences to run concurrently.[13] That is what I propose to do in the present case.

[31] Miss Lukas, you are a young woman and you were even much younger when you committed these despicable crimes. To be precise, you were below the age of

[13]S v Ndikwetepo and Others 1993 NR 319 (SC) at 325C-D.

majority when you committed the crimes. The lure of money might have blinded you to the seriousness of the crimes. You are a first offender and have been in prison awaiting trial for a considerable period of time. You became a mother at the rather young age of 18 and even went on to give birth to two other children. These three children are going to grow up without your love and care for the best part of their formative years. The sentence I will impose is deliberately tailored to ensure that your offspring are able to face the challenges of teenage life with the support of a mother. Although it was suggested by the State during cross-examination of your mother when she testified your behalf in mitigation of sentence, that the State's social welfare programme can assist in taking care of your children whilst you are serving a prison term, no evidence was led to show how that works. I can't take judicial notice of the existence of such a programme and proceed from the premise that no such programme exists. I have found that your personal circumstances constitute substantial and compelling circumstances. The sentence I impose will be long enough to mark society's disapproval of your conduct but sufficiently measured to allow you a chance to return to society to take care of your children.

[32] With this sentence, this court wishes to send a message that what you did is not acceptable. The poverty of a child must never become the license for others to exploit them for financial greed or for others' sexual gratification. The poor in our society, especially children, need our empathy and support, not to feed greed and sexual deviance. I therefore reject your mother's plea that you be given a suspended sentence. A non-custodial sentence will send a wrong message that trafficking in children is acceptable. I will be mocking justice if I were you impose a non-custodial sentence. In your case a custodial sentence is inevitable.

Order

[33] In light of the above reasons, I find the following to be the appropriate sentence:

4. '**COUNT 1**: Contravening s 15 read with s 1 of the Prevention of Organized Crime Act 29 of 2004 – Trafficking in persons **– 5 years;**

COUNT 2: Contravening s 2 (1)(b) read with ss 1, 2(2), 2(3), 3, 5, 6 and 7 of Combating of Rape Act 8 of 2000 – RAPE; with coercive circumstances – **8 years;**

COUNT 3: Contravening s 15 read with s 1 of the Prevention of Organized Crime Act 29 of 2004 – Trafficking in persons **– 5 years;**

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COUNT 5: Contravening s 15 read with s 1 of the Prevention of Organized Crime Act 29 of 2004 – Trafficking in persons **– 5 Years;**

COUNT 6: Contravening s 2 (1)(b) read with ss 1, 2(2), 2(3), 3, 5, 6 and 7 of Combating of Rape Act 8 of 2000 – RAPE; with coercive circumstances - **8 years;**

COUNT 7: Contravening s 15 read with s 1 of the Prevention of Organized Crime Act 29 of 2004 – Trafficking in persons - **5 years;**

COUNT 8: Contravening s 2 (1)(b) read with ss 1, 2(2), 2(3), 3, 5, 6 and 7 of Combating of Rape Act 8 of 2000 – RAPE; with coercive circumstances **– 8 years;**

COUNT 9: Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in person – **5 Years;**

5. The sentences on counts **3,5,7** and **9** will run concurrent with count **1;**
6. The sentences on counts **4, 6, and 8** will run concurrently with count **2**.

Therefore, you are sentenced to a total of **13 years** imprisonment.

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PT Damaseb

Judge-President

APPEARANCE:

The State	I Nyoni
Of	Office of the Prosecutor-General, Windhoek
The accused	L Karsten
On instructions of	Directorate of Legal Aid, Windhoek