



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

CASE NO: CC 09/2013

In the matter between:

THE STATE

Versus

PINIAS KASHAWA

ACCUSED

Neutral citation: *S v Kashawa* (CC 09/2013) [2016] NAHCMD 162 (07 June 2016)

CORAM: SIBOLEKA J

Heard on: 23 May 2016

Delivered on: 07 June 2016

Flynote: Criminal law: Sentence – multiple counts – cumulative effect minimized by co-current serving order of sentences.

Summary: The accused had earlier on broken into a house and stole a 7.65 mm pistol without being noticed by the sleeping occupants. He later burgled two houses and used the weapon to rob the victims of several valuables before he was shot and wounded in the leg by a police officer. He was convicted on three counts of assault, two counts of housebreaking with intent to steal and theft, two counts of rape, pointing a firearm, two counts of attempted murder, illegal possession of a firearm and ammunition.

SENTENCE

In the result the accused is sentenced as follows:

WANAHEDEA – CR 539/04/2010

Count 9: Assault with intent to do grievous bodily harm:

Two (2) years' imprisonment;

Count 10: Housebreaking with intent to rob and robbery:

Six (6) years' imprisonment;

Count 12: Rape: Fifteen (15) years' imprisonment;

Count 13: Rape: Fifteen (15) years' imprisonment;

Count 14: Pointing a firearm: Two (2) years' imprisonment;

Count 11 and 15: Assault by threat are taken together for purposes of sentence: Four (4) months' imprisonment.

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Count 16: Housebreaking with intent to rob and robbery:

Six (6) years' imprisonment;

Counts 17 and 18: Attempted murder taken together for purposes of sentence:

Six (6) years' imprisonment;

Count 19: Housebreaking with intent to steal and theft:

Four (4) years' imprisonment;

Counts 20 and 21: Possession of a firearm and Possession of ammunition are taken together for purposes of sentence:

Six (6) years' imprisonment.

The following order is made in terms of section 34(1)(b) of Act 51 of 1977 as amended: That the CZ 7.65 mm pistol serial no. 688194 with magazine be returned to the rightful owner, Mr. Pius Heita.

In terms of section 10(6) of the arms and ammunition Act 7 of 1996, the accused is declared unfit to possess a firearm for a period of five years which period will only take effect after he had finally served the sentences imposed on him in this matter.

JUDGMENT ON SENTENCE

SIBOLEKA J

[1] On 27 March 2016 I convicted the accused on the following counts of the indictment: three counts of assault; two counts of housebreaking with intent to rob and robbery; two counts of rape; pointing a firearm; two counts of attempted murder; and illegal possession of a firearm and ammunition.

[2] It is now my duty to consider an appropriate sentence for him. In doing that, I have to take into account his personal circumstances; the crime itself and the interests of society. Closely associated to the sentencing process are the objectives of punishment such as prevention; retribution; reformative and deterrence. Caution must be exercised so that one factor is not overemphasized at the expense of the other. However, this result may sometimes be unavoidable due to the circumstances of each case.

[3] I will start with his personal circumstances.

[4] The accused called his girlfriend, Suama Shikomba and his younger brother Tobias Kashawa to give evidence in mitigation of sentence on his behalf. He also mitigated under oath.

[4.1] The accused is now 43 years old, he was 37 at the time of the incident. He went up to Grade 7 in school at Ongolo in Ombalantu, Omsati Region. Before his arrest he worked for a building contraction company as well as putting interlocks for those who hired him. He thereby maintained his four children and his girlfriend. His eldest daughter with his girlfriend aged 16, other two girls aged 15, and a boy aged 12 years respectively are from different ladies. Two children resided with him and the other two with his mother in Owambo.

[4.2] The accused was arrested in April 2010 and has so far spent six years one month and half in custody awaiting for the finalization of this case. He urged the court to give him an option of a fine or a suspended sentence. His erf in Havana is in arrears since nobody can pay for it, that is why he is asking for a lighter sentence to enable him to go back and look after his family.

[5] Ms. Shipopyeni, the accused's counsel urged the court to consider the concurrent serving of various sentences and she requested the following for the accused: Count 9: six (6) months imprisonment; Counts 12 and 13 taken together for purposes of sentence: Each N\$4 000 or two (2) years imprisonment; Count 14: N\$4 000 or two (2) years imprisonment; Counts 20 and 21: one year imprisonment each also made to run concurrently.

[6] On his part Mr Kumalo, counsel for the prosecution described the counts on which the accused has been convicted of as very serious. His argument was based on the fact that the accused had a firearm during the commission of all the offences. The homes of all the victims were burgled and their privacy was

exhibited, when he sexually assaulted some of them.

[6.1] He referred to several authorities in support of his contention that the accused be sentenced as follows: fifteen (15) years on the counts of rape without an order of concurrency; two (2) years for each assault; five (5) years each for the aggravated robbery and housebreaking charges; ten (10) years for the two attempted murder charges; four (4) years each for the illegal possession of a firearm and ammunition. Mr Kumalo further urged the court to declare the accused unfit to possess a firearm for a period of ten (10) years.

[7] On the crime the accused went on a housebreaking spree; burgling in two houses during the night of the incident. He raped and robbed others, others he only robbed, all at gun point. He narrowly missed two of his victims, one of which was a police officer who came to the rescue of the victims. These crimes were committed during the night, the time the victims just like other people, were peacefully sleeping in their homes.

[8] On the interest of the community, it is common course that the accused was intruding homes occupied by defenseless women and children. The victims did not expect such disturbances from any person during the middle of the night when everybody is supposed to be asleep. It is here that the court must send a strong message to would be offenders out there that breaking into people's houses and robbing them of their property would not be tolerated at all.

[8.1] The first female victim did not even detect the breaking in. They were alerted by the light of their house being switched on, and the accused was standing there with a gun. He subjected them to his directives which in the main entailed demanding for money which they didn't have.

[8.2] Had it not been for the selfless brave police officer who went to rescue the defenceless women victims by shooting at the accused in the leg when he

caught him in the act, his identity would have remained an unresolved mystery to this day.

[9] The accused did not show any remorse for what he has done. Although he was caught in the act and the victims property found next to him where he fell down and some in his pockets, he still testified during mitigation that he has done nothing wrong. His last previous conviction on housebreaking with intent to steal and theft was on 08 February 2006. In this incident, a firearm was also one of the items he stole. This time around he stealthily broke into the first house and took away a firearm undetected, which he later used to rob and force his victims to submission and raped them.

[10] In considering the appropriate sentence I have taken all the above into consideration and in particular the six years he spent in custody awaiting the finalization of the matter. However, the use of the firearm during the robbery and sexual assault of some of the victims as well as the number of the offences he committed on that one night weigh heavily against him

[11] In the result the accused is sentenced as follows:

WANAHEDEA – CR 539/04/2010

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Two (2) years' imprisonment;

Count 10: Housebreaking with intent to rob and robbery:

Six (6) years' imprisonment;

Count 12: Rape: Fifteen (15) years' imprisonment;

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Counts 11 and 15: Assault by threat are taken together for purposes
of sentence: Four (4) months' imprisonment.

[12] WANAHEDE – CR 540/04/2010

Count 16: Housebreaking with intent to rob and robbery:

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Counts 17 and 18: Attempted murder taken together for purposes of sentence:

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Count 19: Housebreaking with intent to steal and theft:

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Counts 20 and 21: Possession of a firearm and Possession of ammunition are taken together for purposes of sentence:

Six (6) years' imprisonment.

[13] The following order is made in terms of section 34(1)(b) of Act 51 of 1977 as amended: That the CZ 7.65 mm pistol serial no. 688194 with magazine be returned to the rightful owner, Mr. Pius Heita.

[14] In terms of section 10(6) of the arms and ammunition Act 7 of 1996, the accused is declared unfit to possess a firearm for a period of five years which period will only take effect after he had finally served the sentences imposed on him in this matter.

A M SIBOLEKA

Judge

APPEARANCES

STATE : Mr. P. S. Kumalo
Office of the Prosecutor-General, Windhoek

ACCUSED : Ms. F. K. Shipopyeni
Directorate of Legal Aid