

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

CASE NO.: CA 87/2016

In the matter between:

JOHANNES HAIMBODI

APPELLANT

And

THE STATE

RESPONDENT

Neutral citation: *Haimbodi v S* (CA 87/2016) [2017] NAHCMD 263 (8 September 2017)

CORAM: NDAUENDAPO, J and SHIVUTE, J

Heard: 17 July 2017

Delivered: 8 September 2017

Flynote: Criminal Procedure – Appeal – Conviction on a charge of rape – Complainant was the Appellant’s step daughter and resided with the Appellant and her mother who was his girlfriend – Complainant not a single witness – Complainant’s evidence corroborated in material respects by that of her mother and the Appellant’s

biological daughter – Appellant raped complainant for the first time when she was eleven years old – Appellant raped complainant on numerous occasions thereafter over a period of about four years – Appellant’s biological daughter had no reason to fabricate such serious allegations about her father – Complainant thus did not fabricate the allegations against the Appellant – The Appellant’s biological daughter corroborated the evidence of the complainant that the Appellant inserted his penis into her vagina on numerous occasions.

Criminal Procedure – Appeal – Sentence of 19 years – Trial court duly considered the personal circumstances of the Appellant – Personal circumstances weighed against the seriousness of the offence and the interest of society – No misdirection on the part of the trial court in giving the Appellant a custodial sentence which exceeds the prescribed minimum sentence of 15 years.

Summary: The Appellant was convicted of raping his step daughter. The Appellant and his girlfriend co-habitated in Outjo. His two daughters and his girlfriend’s daughter all lived together as family. The girlfriend’s daughter started living with them since 2000. They first lived at a place called Kamp 5 in Outjo, then they moved to a location called Herero location, also in Outjo. The Appellant raped the daughter of his girlfriend for the first time when she was eleven years old. At this point, they had already moved from Kamp 5 to Herero location. He had since been raping her by inserting his penis into the her vagina on numerous occasions between the years 2008 and 2012. He threatened to kill the complainant and her mother if she told anyone about him raping her. Out of fear for her life and that of her mother, she remained silent. However one day, she saw the Appellant sharpening a panga that used to be kept in the bathroom and while they were looking for her mother’s money they saw the same panga placed between the ‘bed and the mattress’. She could not sleep in that house that night and told her mother to accompany her to the police station. She then narrated the incidences of rape to the police. The Appellant’s biological daughter with whom he had no issues and who also had no issues with the Appellant testified in the trial court to having seen the Appellant inserting his penis in the vagina of the Appellant.

Held; in the circumstances of the case and the evidence before the trial court, this court cannot fault the trial court for convicting the Appellant.

Held; the complainant was not a single witness, her evidence of the sexual act committed against her was corroborated by the Appellant's biological daughter's testimony.

Held; the court cannot be faulted for making special arrangements for vulnerable witnesses to testify without fear or intimidation by the Appellant, in fact such arrangements were in the interest of justice.

Held; the trial court did not err in sentencing the Appellant to 19 years imprisonment. This sentence is not inappropriate nor shocking in the circumstances of this case.

ORDER

In the result:

1. The appeal against the conviction is dismissed.
2. The appeal against the sentence is dismissed.

APPEAL JUDGMENT

NDAUENDAPO, J (SHIVUTE, J concurring):

Introduction

[1] The Appellant was arraigned in the Regional Magistrate's court sitting at Otjiwarongo on two charges of statutory rape and one charge of incest. He was discharged on the charge of incest and one charge of rape as the Respondent failed to adduce evidence in respect of those charges. On 6 March 2015, the Appellant was convicted on the remaining count of statutory rape and sentenced to 19 years

imprisonment. During the proceedings in the trial court, the Appellant was legally represented. He now appeals against both the conviction and the sentence.

[2] The Appellant lodged his written notice of appeal with the clerk of the criminal court of the Otjiwarongo Magistrate's Court on 16 March 2015. In terms of Rule 67(1) of the Magistrate's Court Rules, the Appellant must 'lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based'. This document which I assume is the Appellant's notice of appeal and titled 'application for appeal against conviction and sentence', falls short of the requirement in Rule 67(1) above. The notice does not indicate whether the magistrate erred in law and or on facts or on both facts and law. The Respondent, however failed to raise a point *in limine* in this regard and the matter proceeded to hearing. This appeal would otherwise have been struck from the roll.

[3] The Respondent in compliance with Rule 118(7) of the Rules of this court, filed its Heads of argument on 23 November 2016. The Appellant, as he was not represented during the proceedings before this court, was not required to file his heads of argument, but did so nonetheless on 27 March 2017.

Brief Background

[4] To contextualize this judgment, a brief background is given here as far as the nature of the relationship between the Appellant and the complainant is concerned as well as snippets of the events that have brought about this matter.

[5] The Appellant and the mother of the complainant were in a romantic relationship. The couple co-habitated and since 2002, the complainant resided with them in Outjo. Based on the Appellant's own testimony in the trial court, they lived as a family. They were the parents of the complainant and his two biological daughters who lived with them. It would appear that for a short while they were the happy family.

[6] It appears from the evidence of the complainant in the trial court that in 2012, the complainant asked her mother to accompany her to the Police Station as she had something to tell the Police. They went to the Police station and that is where she, in the presence of her mother, told the Police that the Appellant had raped her and that he

started raping her in 2008 already. She informed the Police that the Appellant had been raping her from 2008 to 2012 and that he raped her by inserting his fingers and penis into her vagina. She narrated that she did not tell her mother of what the Appellant was doing to her as she was afraid for her life and that of her mother and because the Appellant told her not to tell anyone and threatened to kill her and her mother if she did. It is clear from her testimony that she was in grade 5 and was eleven or twelve years old when the Appellant first raped her.

[7] She testified that on the day she reported the offence to the police, she saw the Appellant sharpen a panga and placing same between 'the bed and the mattress'. As the Appellant had threatened to kill her and her mother before, she feared that the Appellant was going to use that panga to honour his threats. This thought, it seems terrified her and she for the fear of their lives did not want to sleep in their house that night. This possible threat to her life seemed very real especially after the Appellant had smite her for sending his air time to a boy who came over to their house.

[8] The complainant's mother testified in the trial court, that the Appellant would beat the complainant while she was at work and when she enquired about the reason for the beatings, she was informed that the complainant was 'arrogant' toward the Appellant. She further testified about another incident when the Appellant beat the complainant. This was when the complainant brought a boy home and sent N\$ 2.00 air-time from the Appellant's phone to the boy's phone. It was her testimony that she only saw this boy once at their house. The Appellant's biological daughter also corroborated this evidence. She testified that the boy in question came over to their house once and the Appellant fought with this boy. The complainant also testified that the boy only came over once and that was when she sent N\$ 2-00 air-time from the Appellant's phone to that of the boy.

[9] The Appellant referred to the complainant as his daughter when he testified in the trial court. Only during cross-examination by counsel for the Respondent did the Appellant mention that he reprimanded the complainant for having sexual intercourse with this boy in their house. When he reprimanded the complainant about this conduct, she went to the police and falsely accused him of raping her. The Appellant however

never put this version of the complainant having had sexual intercourse with the boy in their house, to the complainant, her mother or his own daughter, all of whom were witnesses in the trial court and all of whom referred to this particular boy. He never challenged their evidence which related only to the N\$ 2-00 air-time that was sent from his phone to that of the boy. Thus, these witnesses were deprived of the opportunity to challenge this new evidence. This evidence of the Appellant can only be a fabrication, a desperate attempt by the Appellant to taint the character of the complainant.

[10] It was the testimony of the Appellant's biological daughter that she saw the Appellant insert his penis into the vagina of the complainant and that this happened more than once. She also testified that the Appellant told her not to tell the mother of the complainant. During her testimony, the Appellant's biological daughter was truthful, where she could not recall events she did not try and fabricate any and she was clearly having a hard time talking about these events, this is illustrated by the frequent silences in her testimony.

Submissions by parties before this court

[11] Hereunder are the written and oral submissions of the respective parties.

Submissions by the Appellant

[12] Before this court, the Appellant submitted that one of the Respondent's witnesses was his daughter. He further submitted that he was aggrieved by the fact that he was not allowed in the court room when she testified. He argued, that if her testimony was truthful, she would not have found it challenging to testify in his presence. He concluded that the Respondent used his daughter to fabricate evidence against him. The Appellant also submitted that there was no evidence before the trial court that proved that he raped the complainant. According to him, the absence of a J88 and the failure by the Respondent to call the doctor who 'did the DNA' tests to testify, left the Respondent with no proof.

[13] In his written submissions, the Appellant submitted that the Respondent failed to discharge the burden of proof which rested on it. In that, the complainant was a single witness, whose evidence was not corroborated by 'any other evidence in court'.

According to him, the court should thus have approached the evidence of the complainant with 'great caution', which it failed to do. Further, that the Respondent failed to prove that he, the Appellant had committed a sexual act in respect of the complainant. The Appellant is of the firm view that the trial court erred when 'it failed to allow the Appellant to re-cross examine the witness, Erika Gaeses'. He argued that such failure is not in the interest of justice and according to him, is indicative of the fact that the magistrate was bias. Furthermore, that the magistrate erred when she failed to call the doctor to allow him the opportunity to cross-examine the doctor. In the absence of the doctor's testimony, the court a quo was in the dark and should not have convicted him. It is notable to add here that throughout the proceedings in the trial court, the Appellant vehemently maintained that he did not rape the complainant.

[14] The Appellant questioned; why the complainant did not fall pregnant at any one point if he raped her on various occasions between the years 2008-2012, without the use of a condom. Why did the complainant not inform her mother about the supposed repeated rapes?

[15] The Appellant indicated in his 'notice of appeal' that the trial court over emphasized the seriousness of the offence at the expense of the material facts.

[16] In respect of the sentence the Appellant submitted, that the 19 years of imprisonment is excessive and that the trial court failed to balance the principles of sentencing. He maintained that his age and the fact that he was a first offender should have been given more weight. He is of the view that the sentence is so shocking that it 'induces a sense of . . . disbelief'. He also maintains that the magistrate overemphasized the seriousness of the offence and the interests of society over his interests.

Submissions by the Respondent

[17] During oral arguments, Ms. Jacobs appearing for the Respondent referring to *Savage v State*¹ submitted, that she was aware of the caution that needs to be applied with respect to a single witness, however such caution should not trump common

¹ *Savage v The State* (CA 71/2016) [2017] NAHCMD 174 (23 June 2017).

sense. In the Respondent's written submissions it is argued, that; the trial court did not err in its decision. In that, it was alive to the burden that rested on the Respondent, it found corroboration in the evidence of the biological daughter of the Appellant and that s 158A of the Criminal Procedure Act,² makes provision for special arrangements being made in respect of vulnerable witnesses. Therefore, his complaint that he could not see the 'heavily traumatized' witnesses carries no weight. Furthermore, he was legally represented and his legal representative should have and did in fact cross-examine both the complainant and the Appellant's biological daughter.

[18] Regarding the sentence it was submitted that this case falls under s 3 (1)(a)(iii) (bb) of the Combating of Rape Act³. The complainant was 11 years old when the crime was first committed and thus a minimum of 15 years imprisonment is applicable. The magistrate applied her mind to the principles of sentencing as described in *R v Zinn*⁴. Furthermore, sentencing is a prerogative of the trial court and the court of appeal should only interfere if there is an irregularity or misdirection. Furthermore, there is nothing preventing the presiding officer from imposing a sentence beyond the prescribed minimum sentence. It was pointed out that in light of the fact that the offence was committed over a period of three to four years and left the complainant severely traumatized, the sentence was appropriate.

Legal Principles and their application to the facts

The conviction

[19] Section 7 of the Combating of Rape Act,⁵ provides that 'in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature, the court shall not draw any inference only from the length of the delay between the commission of the sexual or indecent act and the laying of a complaint'. The trial court was thus correct not to draw any inference from the complainant's failure to report the offence only after three or four years since it commenced.

² Criminal Procedure Act, 51 of 1977.

³ Combating of Rape Act, 8 of 2000.

⁴ *R v Zinn* 1969 (2) SA 537 (A).

⁵ Combating of Rape Act, 8 of 2000.

[20] In respect of the Appellant's complaint about the special arrangements that were made in order to allow the vulnerable witnesses to testify, this court cannot fault the trial court. In terms of s 158A of the Criminal Procedure Act,⁶ the trial court acted within its rights when it made special arrangements for the two vulnerable witnesses so as to ensure that they testify without fear of the Appellant. The trial court noted that the two witnesses feared the Appellant and struggled to testify freely in his presence. It was only when these special arrangements were made and the Appellant was out of sight that they were able to narrate their testimonies with more ease.

[21] The Appellant's assertion that the complainant's evidence was not corroborated by any other evidence in the trial court is false. The complainant was not a single witness. The Appellant's biological daughter, who had no reason to fabricate lies about her dad testified that she saw the Appellant insert his penis into the complainant's vagina. The cautionary rule is not even a question here. It is also clear that the Appellant raped the complainant more than once. It was his daughter's testimony that the Appellant raped the complainant sometimes on weekends and sometimes on work days. She also corroborated the complainant's version that the Appellant sharpened the panga on the day the offence was reported to the police. Her evidence that the Appellant placed the panga under the bed also corroborated the evidence by the complainant. She testified that the panga was usually kept in the bathroom, but that day the Appellant sharpened it and placed it under the bed. The complainant also testified to this effect and further informed the court that she could not bear to sleep in that house that night as she feared for her life and that of her mom, since the Appellant had threatened to kill them before. The complainant's evidence was thus corroborated in material respects by the testimony of the Appellant's biological daughter.

[22] It is true that the J88 was not presented to court and the doctor did not testify, however considering the evidence of the complainant and that of the Appellant's biological daughter, the Appellant's version cannot be reasonably possibly true. It cannot be true that the Appellant never inserted his penis into the vagina of the

⁶ Criminal Procedure Act, 51 of 1977.

complainant and that she only fabricated these lies because she was angry at him for reprimanding her.

[23] It is highly improbable that the complainant would out of the blue accuse the Appellant of raping her. Even more interesting is the fact that she would be very specific about when exactly the Appellant started raping her. She testified that the Appellant started raping her when she was in grade 5. It is clear from the Appellant's own evidence that the complainant started living with him and his girlfriend (the complainant's mother) from the year 2000. If complainant really fabricated this story out of anger for being disciplined by the Appellant, why did she not testify that he started raping her already in 2000? She was also specific that he only started raping her when they moved to Herero location and not when they stayed at Kamp 5. If she really was fabricating these allegations against the Appellant out of anger, why would she lessen the years? Why would she say he only started raping her in Herero location, if she could say it started already at Kamp 5? Furthermore, why would the Appellant's biological daughter with whom he clearly had no problems lie to the court about such serious allegations about her own father? The court was correct to accept that the complainant could not have fabricated the fact that she was raped by the Appellant on repeated occasions since 2008 to 2012. The court was also correct to accept that the Appellant's daughter's testimony corroborated that of the complainant and that the complainant was not a single witness.

[24] Furthermore, the Appellant was legally represented during the proceedings in the trial court. Thus, if he had any questions for any of the witnesses he had the opportunity to instruct his legal representative to that effect, but he failed to do so. His failure cannot now be imputed onto the magistrate. If he had questions for his daughter, he could have instructed his legal practitioner to that effect.

The sentence

[25] The Appellant did not give evidence in mitigation under oath. His legal representative made submissions from the bar. It was submitted that he was 48 years old, was employed before he got arrested, was a father of nine children, the oldest being 35 years old and that he was a first offender.

[26] It was submitted on behalf of the Respondent, that when the Appellant raped the complainant for the first time, she was a minor only 12 or 13 years old. He raped her on diverse occasions over a period of about five years. He was the father figure in the complainant's life, she thought of him as her father and he abused that trust. He knew that with 'threats of violence as well as (the risk of) withdrawal of financial support', the complainant was not going to reveal his evil deeds.

[27] The court took into account the personal circumstances of the Appellant; that he was a productive member of society before he committed this offence, he has nine children, six of whom he still took care of and he was a first offender.

[28] The court also took into account that the Appellant raped his step daughter on numerous occasions over a period of five years. The court took into account that the Appellant started raping the complainant when she was just eleven years old and over the five year period threatened to kill the complainant and her mother if she told anyone about what he was doing to her. It was the expression of those threats and the sharpening of the panga that finally convinced the complainant to go to the police.

[29] The court also took into account the interests of society. That is, that the most vulnerable members of our society, being women and children deserve to be protected. That courts should mete out appropriate sentences against those who commit these heinous offences.

[30] In terms of s 3 (1)(a) of the Combating of Rape Act,⁷ the prescribed minimum sentence is fifteen years. 'The question ultimately is whether the sentence imposed, which is in excess of the prescribed minimum sentence, is disturbingly inappropriate. It is quite permissible, and more often than not inevitable, that in considering and affording appropriate weight to the conflicting considerations relevant to sentence, more weight will be attached to one or more considerations, and lesser weight to others It is a realistic fact that the imposition of substantial custodial sentences is not the ultimate panacea for this scourge. That does not detract from the fact that the courts should play their role as part of the collective effort to eradicate this violence from society. More often than not, our courts when considering an appropriate sentence in cases of this kind, ought to afford more weight to the punitive,

⁷ Combating of Rape Act, 8 of 2000.

retributive and deterrent aspects of sentence. The personal circumstances of the accused, although relevant and worthy of consideration, must yield to the other competing considerations. . . . For these reasons, (I) conclude that the sentence imposed was not disturbingly inappropriate'.⁸ I associate myself fully with these sentiments.

[31] There were no compelling and substantial circumstances that would have justified a deviation from the prescribed minimum sentence. The trial court cannot be faulted for exercising its discretion in the manner it did. The prescribed minimum sentence is exactly that. The court, considering the facts of the case before it and in the absence of compelling and substantial circumstances, must sentence a perpetrator to fifteen years, but this does not bar the court from going beyond that minimum.

[32] The conviction and sentence cannot thus be faulted.

Conclusion

[33] In this case before me, the Appellant is a father of nine children and was the complainant's 'step father' at the time the offence was committed. He was in a position of authority and trust as the parent of the complainant. The complainant, then an 11 year old girl child considered the Appellant to be her father. He was the financial provider of the family with the help of the complainant's mother.

[34] In our society, the role of the father is reduced to insignificance by the actions of men like the Appellant. A father is endowed with the sacred duty to protect and defend the honour of his wife and daughters' including step daughters. Furthermore, it is the moral duty of every men to respect, protect and honour any and every woman, young or old, whether she is related to him or not. Being a man means taking responsibility not abusing trust. We do not need men of this caliber in our society. Men who abuse sacred trust, who take advantage of the very people they are meant to protect and who have the audacity to call themselves men, should go out of the society for a lengthy period. Perhaps, time in gaol will give them an opportunity to reflect and re-evaluate their lives.

[35] Nineteen years of incarceration is nothing, compared to the emotional, psychological and physical scars which the complainant will now have to live with for the

⁸ *S v Ndakolo* 2014 (2) NR 371 (HC) at paras. 10, 12 & 13.

rest of her life. This court only hopes that she will find some sort of solace in the fact that the Appellant will duly pay his dues. This court also hopes that others will be deterred from stooping so low as to abuse the trust and confidence which the most vulnerable members of our society have in them. How I long for that day when our men will not kill, but protect; will not steal innocence, but treasure and guard the innocence of our girls and children and will not abuse trust, but value the trust the most vulnerable members of our society have in them.

[36] In the result, the appeal against both the conviction and the sentence is dismissed.

GN NDAUENDAPO

Judge

NN SHIVUTE

Judge

APPEARANCES

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