

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT (SENTENCE)**

Case No: CC 8/2016

In the matter between:

**THE STATE**

v

**JESAYA BOOIS**

**ACCUSED**

**Neutral citation:** *S v Boois* (CC 8/2013) [2018] NAHCMD 291 (18 September 2018)

**CORAM:** NDAUENDAPO J

**Heard:** 4 September 2018

**Delivered:** 18 September 2018

**Flynote:** Criminal procedure – Sentence – Murder, rape, assault by threat and defeating or obstructing the course of justice – Serious offences – Rape has a prescribed mandatory minimum sentence in an instance where there is a previous conviction – Mandatory minimum sentences prescribed by the

Combatting of Rape Act 8 of 2000 for repeat offenders not amended or declared unconstitutional - High Court is bound under the doctrine of *stare decisis* by the Supreme Court in the *Geingob* judgment.

**Summary:** This court convicted the accused of 1 count of murder, rape, assault by threat and defeating or obstructing the course of justice. It was proven beyond a reasonable doubt that the accused suffocated the deceased, Bonaventura Jahs, to death, after raping her, hiding her cellphone and blouse and then sweeping the scene in order to obstruct or defeat the course of justice. Following the conviction of the accused on 27 July 2018, this court, faced with the unenviable burden of passing an appropriate sentence, has to have due regard to the triad of factors to be considered, to wit, the personal circumstances of the accused, the interest of society as well as the seriousness of the offences committed, whilst heeding the principles relating to the various theories of punishment and the decision in *Gaingob v The State* (SA 7 and 8 – 2008) [2018] NASC (6 February 2018). The accused has a previous conviction of rape and is not the primary care-taker of his children. The seriousness of the offence and interest of society, particularly, the brutal killing of a visibly pregnant woman, demand a sentence of life imprisonment.

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### ORDER

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Count 1: Murder – life imprisonment.

Count 2: Rape – 20 years imprisonment

Count 3: Assault by threat – 1 (one) year imprisonment

Count 4: Attempting to defeat or obstruct the course of justice – 1 (one) year imprisonment.

In terms of s 280(2) of the Criminal Procedure Act 51 of 1977 it is ordered that the sentences imposed on counts 2, 3 and 4 be served concurrently with count 1.

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## Introduction

[1] This court convicted the accused of 1 count of murder, rape, assault by threat and defeating or obstructing the course of justice. It was proven beyond a reasonable doubt that the accused suffocated the deceased, Bonaventura Jahs, to death, after raping her, hiding her cellphone and blouse and then sweeping the scene in order to obstruct or defeat the course of justice.

[2] It is now my duty to sentence the accused for the crimes he committed. In terms of our law there are three factors to be taken into account, namely: (a) the personal circumstances of the accused; (b) the nature of the crime and (c) the interest of society.<sup>1</sup>

[3] At the same time the sentence to be imposed must satisfy the objectives of punishment which are: (i) the prevention of crime; (ii) deterrence or discouragement of the offender from re-offending and would-be offenders from committing crimes; (iii) rehabilitation of the offender and (iv) retribution. Thus, if the crime is viewed by society with abhorrence, the sentence should also reflect this abhorrence.

[4] The prevention of crime, otherwise known as 'direct prevention' is premised on the notion that by making it impossible for the offender to commit at least a certain type of crime again, crime would be reduced, however, other jurists advocate for 'indirect prevention' which school of thought postulates that the offender is persuaded to cease his activities 'voluntarily' by means of three different methods; namely through *retribution*, *deterrence* and *rehabilitation*.<sup>2</sup>

[5] In *S v Rabie*<sup>3</sup> the court held that:

'Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances'.

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<sup>1</sup> *S v Zinn* 1969 (2) SA 537 (A) at 540G.

<sup>2</sup> DP Van Der Merve. *Sentencing Service* 5. 1996 at 3-11.

<sup>3</sup> *S v Rabie* 1975 (4) SA 855 at 862 G-H.

### Personal circumstances of the accused

[6] The convict testified in person and called no other witnesses. He testified that he is 43 years of age, single and that he has twin boys, who are 8 years old. He testified further that his parents and grandparents (with whom he grew up) are all deceased. He further testified that he has three sisters the eldest of whom is 46 years of age. He testified that he did odd jobs prior to his arrest earning approximately N\$1500 per month and that his children were receiving a government grant for their maintenance. He further testified that he felt bad for having killed another human being and that he leaves everything in the hands of God. When asked about whether he sought forgiveness from the family of the deceased, he mentioned that he did not have the opportunity to speak to the mother of the deceased.

[7] In cross-examination it emerged that the mother of the convict's children is also the complainant in the assault by threat charge for which he stands convicted. It further emerged that the convict has been in custody for the past four years and the children have survived without him. It was also put to the convict that his talk of regret is not genuine.

### The Interest of Society and the Seriousness of the Offences

[8] The state called one witness in aggravation of sentence, to wit, Aletha Jahs, the mother of the deceased, who testified that the deceased was her only child. She further testified that she, the deceased, was 28 years old and she, the deceased, lived with her. She further testified that the deceased had an 11 year old son whom

she is currently taking care of. She testified that the convict is not the biological father of the deceased's son, however, she testified that the biological father of the deceased's son, sometimes helps with looking after the child. She further testified that the deceased was not employed on a full-time basis and that she did odd jobs from which earnings she would give to her mother, who would then in turn use such earnings to pay bills.

[9] She testified further that she is unemployed and that she receives a grant from her late husband's estate and with that she maintains the child. She further testified that the child is aware that his mother had died and that he has been bunking school since and has also developed an aggressive attitude. She testified that she has not taken him for counselling. She testified further that the deceased was four months pregnant at the time of her death and that her pregnancy was visible. She was also in a romantic relationship with another person at the time of her death.

[10] The mother of the deceased further testified that she never heard anything from the convict, but instead stated that the sister of the convict attended the funeral and gave a N\$300 contribution towards the funeral costs. She testified that she is heartbroken and that the deceased was the one that 'kept the fire burning', which fire, the convict blew out. She testified that she is suffering and that the accused is a threat and a danger to the community of Tses and he should be sentenced to life imprisonment.

Submissions by counsel

[11] Mr. Mbaeva, counsel for the convict, made no further submissions in mitigation on behalf of the convict and left the matter in the hands of the court.

[12] Ms Ndlovu, counsel for the State submitted that the accused stands convicted of murder, rape, assault by threat and defeating or obstructing the course of justice. She referred this court to *S v Zinn*<sup>4</sup> where it was held that the court is required to consider the triad of factors and the objectives of punishment. Counsel further submitted that murder is a serious offence and was in the present case, committed with direct intent, because the suffocation of another person amounts to direct intent which in itself is aggravating.

[13] Counsel further argued that although the *Geingob*<sup>5</sup> judgment propagates that lengthy custodial sentences that take away hope of ever being released on parole, should be decreased, counsel argued that in this case, the *Geingob* judgment would not do justice due to the fact that the accused has a previous conviction of rape and therefore in terms of the Combatting of Rape Act 8 of 2000, this would amount to a second conviction and on that basis, he should be sentenced to 45 years imprisonment. Counsel further submitted that the convict should be sentenced to life imprisonment for murder as per the *Geingob* judgment.

[14] Counsel further submitted that the provisions of the Combatting of Rape Act 8 of 2000 have not yet been amended and are therefore still valid and of force and effect. Counsel for the state further submitted that in *S v Elifas Hailonga*<sup>6</sup> it was held

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<sup>4</sup> *S v Zinn* 1969 (2) SA 537 (A) at 540G.

<sup>5</sup> *Zedikas Gaingob and 3 Others v S* (SA 7/2008, SA 8/2008) [2018] NASC 4 (06 February 2018)

<sup>6</sup> *S v Elifas Haolonga* (CC 5/2012) [2014] NAHCMD 304 (14 October 2014).

that the fact that an accused who kills a woman who is pregnant and especially if he is aware thereof, is an aggravating factor. Counsel for the state submitted further that the interest of society must be taken into account – the deceased had a child whom she left behind. Counsel submitted further that the accused is not remorseful for his actions. Counsel argued that the accused being in prison for four years is a factor to be considered with other factors such as blameworthiness, however, in the present case, his moral blameworthiness is so high that it should not be taken into account.

[15] Counsel for the state submitted further that the crimes committed were premeditated. The state is therefore asking for 45 years imprisonment for rape, life imprisonment for murder and one year for defeating or obstructing the course of justice. The sentences are to run concurrently which effectively means 45 years imprisonment.

#### Analysis of the Law and Finding

[16] The Combatting of Rape Act 8 of 2000 provides for penalties in respect of convicts who hold previous convictions. It states that;

'Any person who is convicted of rape under this Act shall, subject to the provisions of subsections (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 [my emphasis] or under this Act) –

(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 ten years;

(ii) where the rape in question or any other rape of which such person has previously been convicted was 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 twenty years;

(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 subparagraph (iii) of paragraph (a), to imprisonment for a period of not less than forty-five years.'

[17] The previous convictions record submitted into evidence indicates that the convict has a previous conviction of Housebreaking with the intent to rape and rape for which he was convicted and sentenced on 14 April 1997 to 10 years imprisonment, that is prior to the coming into effect of the Combatting of Rape Act 8 of 2000, therefore section 3(b)(ii)<sup>7</sup> would be the most relevant provision under the circumstances taking into account that it refers to a common law conviction, which was only possible prior to the coming into force and effect of the Combatting of Rape Act 8 of 2000. The circumstances under which the previous rape occurred i.e. whether there were coercive circumstances remain unknown as they were not placed before court, however the circumstances of the rape of which this court convicted him showed that there were coercive circumstances as the convict used physical force before raping the deceased, for that reason, the court is required to give the convict the benefit of the doubt and employ the provisions of section 3(b)(ii) and not section 3(b)(iii), as argued by the state and which prescribed a minimum mandatory sentence of 45 years. Section 3(b)(ii) sets the minimum sentence of not less than 20 years imprisonment unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence. No substantial and compelling

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<sup>7</sup> of the Combatting of Rape Act 8 of 2000.



circumstances were placed before me to deviate from the prescribed minimum 20 years. The prescribed 20 years is a minimum and there is nothing to prevent the court to impose a sentence exceeding the prescribed 20 years minimum.

[18] It is also of note to highlight at this point that the provisions of the Combatting of Rape Act 8 of 2000 have not yet been amended or declared unconstitutional by a competent court of law and as such I do agree with counsel for the state that they are still valid and of force and effect. What is however fundamental is whether or not the provisions of the Rape Act, specifically as they relate to the prescribed minimum mandatory sentences for repeat offenders were intended to run concurrently with any other sentence imposed.

[19] Section 3 (4) of the Rape Act 8 of 2000 provides that 'If a minimum sentence prescribed in subsection (1) is applicable in respect of a convicted person shall, notwithstanding anything to the contrary in any other law contained, not be dealt with under section 297(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) [my emphasis]: Provided that, if the sentence imposed upon the convicted person exceeds such minimum sentence, the convicted person maybe so dealt with in regard to that part of the sentence that is in excess of such minimum sentence.'

[20] This in my view demonstrates that the intention of the legislature was to deter repeat as well as would-be offenders from committing rape by requiring them to serve either the 10, 20 or 45 years minimum imprisonment in full without the option of having any part of such sentence suspended.

[21] In *Zedikas Gaingob and 3 Others v S*<sup>8</sup> the Supreme Court held that ‘the phenomenon of what academic writers have termed ‘informal life sentences’ where the imposition of inordinately long terms of imprisonment of offenders until they die in prison, erasing all possible hope of ever being released during their life time is ‘alien to a civilized legal system’ and contrary to an offender’s right to human dignity protected under Art 8 of the Constitution and that the absence of a realistic hope of release for those sentenced to inordinately long terms of imprisonment would in accordance with the approach of this court in *Tcoeib* and other precedents offend against the right to human dignity and protection from cruel, inhumane and degrading punishment ’

[22] The effect of this judgment is that the convict, although marred by a previous conviction of rape, cannot be given an inordinately long sentence which will effectively erase all possible hope of ever being released in his lifetime.

[23] My brother Liebenberg J in his recent judgment could not have phrased it more aptly when confirming that the ‘Courts are not only under a duty to uphold the rule of law and to give effect to the fundamental rights of all persons as enshrined in the Namibian Constitution – the rights of children and the right to life – but equally has the duty to reflect society’s indignation and antipathy towards those making themselves guilty of such heinous crimes. This usually finds expression where retribution and deterrence are the main objectives of punishment.’<sup>9</sup>

[24] I do agree with my brother Liebenberg, J that retribution and deterrence require the most severe punishment available in our legal system. Such punishment is apposite, in my view, for the rape and brutal killing of a visibly pregnant woman. I cannot find any other appropriate sentence other than life imprisonment, where the

<sup>8</sup> *Zedikas Gaingob and 3 Others v S* (SA 7/2008, SA 8/2008) [2018] NASC 4 (06 February 2018)

<sup>9</sup> *S v Seas* (CC 17/2017) [2018] NAHCMD 245 (17 August 2018).

convict will be required to serve at least 25 years before having the chance of being considered for parole.

[25] In the result I make the following order;

Count 1: Murder – life imprisonment.

Count 2: Rape – 20 years imprisonment

Count 3: Assault by threat – 1 (one) year imprisonment

Count 4: Attempting to defeat or obstruct the course of justice – 1 (one) year imprisonment.

In terms of s 280(2) of the Criminal Procedure Act 51 of 1977 it is ordered that the sentences imposed on counts 2, 3 and 4 be served concurrently with the sentence imposed in count 1.

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**G N NDAUENDAPO**

**Judge**

**APPEARANCES:**

**FOR THE STATE:**

Ms. Ndlovu  
Of the Office of the Prosecutor General

**FOR ACCUSED:**

Mr. Mbaeva  
Of Mbaeva & Associates