



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 3/2018

In the matter between:

THE STATE

v

BRENDAN VAN WYK

ACCUSED

Neutral citation: *S v van Wyk* (CC 3/2018) [2019] NAHCMD 116 (24 April 2019)

Coram: USIKU J

Heard: 5 April 2019

Delivered: 24 April 2019

Flynote: Criminal Procedure – Sentence – Minimum sentences in terms of the Combating of Rape Act 8 of 2000 applied – No substantial and compelling circumstances found to exist – Court not entitled to depart from minimum sentences – Two rape committed after one another – Threats of violence used against the rape victims – Court concluding that due to the circumstances in which the rape were committed the accused deserve very little mercy from the Court – Accused having a string of previous convictions of which some involve violence against other persons.

Summary: The accused was charged with several counts of rape. After the trial he was subsequently convicted on counts three, four and five. He was however found not guilty in respect of counts 1 and 2 and was accordingly acquitted.

ORDER

Count three : 15 Years imprisonment.

Count four : 15 Years imprisonment.

Count five : 15 Years imprisonment.

The sentence in count five is ordered to run concurrently with the sentence on count four.

SENTENCE

USIKU, J

[1] The facts pertaining to the rape in contravention of section 2 (1) (a) read with sections 1, 2 (2), 3, 5, 6 and 7 of the Combating of Rape Act, Act 8 of 2000 on counts three, four and five are clearly set out in the judgment on conviction; delivered on the 6 March 2019. It is now the duty of the Court to consider what would be the appropriate sentences under the circumstances of the accused.

[2] Mr Kumalo represents the state and Mr Dube appears on behalf of the accused on instructions of the Directorate of Legal Aid.

[3] In the exercise of its duty to impose sentences on the accused, the Court is guided by the triad factors consisting of the crime, the offender and the interest of society. *S v Zinn*.¹ A fourth factor has emerged which is a measure of mercy but not misplaced pity; that is a measure of mercy according to the circumstances of each particular case.

[4] It is of importance for the Court to further take into account the main purposes of punishment, which are namely, deterrent, preventive, reformatory and retributive.

[5] When considering the triad factors and the factor of a measure of mercy and the main purposes of punishment for the purpose of imposing appropriate sentence, one has to strike a balance which must be reasonable between competing factors in order to do justice to the accused and society and in doing so, one may give more weight to certain factors than to others *S v Van Wyk*,² but of course one should not do so at the expense of the other factors.

[6] The accused person's personal circumstances as placed before Court by his counsel are as follows: He is currently aged 31 years. At the time of this offences he was 28 years. They are eight siblings and his father passed away. His mother is a pensioner and suffers from ill health. He used to take care of his mother who is residing with his sister. Accused left school in grade 8 and did not go further for tertiary education. He has however acquired skills from his brother who is a carpenter and have been self-employed. He would earn about N\$5000 per job done. His job mainly depended on the availability of contractors. Accused used the money he earned for their household and assisted his mother in paying her medical bills. He is a father of a 13 year old boy who resides with his mother. He used to make some contributions towards his upbringing.

[7] In his submissions Mr Dube argued the Court to consider a sentence which would have a rehabilitative effect on the accused because he is still a fruitful member of his community. He regrets that he has been associated with bad company. It was further argued that the Court must consider the three years spend in custody awaiting the finalisation of the case. Further that when imposing sentences the Court

¹ *S v Zinn* 1969 2 SA 537 (A).

² *S v Van Wyk* 1993 NR 426 (SC).

should order the sentences to run concurrently. On the issue of compelling and substantial circumstances it was argued that the period spent in custody as well as his family circumstances relating to his mother's ill health be considered to be compelling and substantial circumstances.

[8] On the other hand the state submitted that the offences of which the accused have been convicted of are of a serious nature. The Court was referred to several decisions all touching on the seriousness of the crimes of Rape in particular.

[9] It is trite that in sentencing the Court should also strike a balance between the principles of equality and consistency of treatment on the one hand and individualisation on the other. Individualisation relates to one's personal circumstances as an accused. Equality and Consistency of treatment on the other hand means that punishment meted out to different offenders convicted of similar offences must not be so different so as to attract the label of unfairness. If a sentence is sanctioned by State, that should be the guiding sentence, or where sentences imposed by the Court are similar in nature. One must however not lose sight that no two cases are the same.

[10] I shall now move to the offence committed that is Rape, in terms of the Combating of Rape Act 8 of 2000. Accused did not testify in mitigation of sentence neither did he call any witness. According to his counsel, it would have been embarrassing for him to testify after the long trial. The accused's personal circumstances were placed before Court, and to my mind those personal circumstances carry very little weight. Accused's son is residing with his mother, what he did for him in the past was not something substantial such as paying his school fees or staying with him at his own house none of it. To a certain extent one can say that the accused was an unemployed man at the time of his arrest.

[11] What carries considerable weight is that accused has shown no remorse whatsoever to date for the terrible crimes he committed against the vulnerable women and the girl child who was aged 15 years at the time of the incident. She was on her way to school when accused way lay her and attacked her threatening her with a knife. She will have to live with the scar of having been raped for the rest of her

life. The knife was placed on her back and she had no choice but to submit to the sexual act. It must have been a traumatic event for her.

[12] With regard to counts four and five, in respect of Helvi Jones who at the time of the rape was 22 weeks pregnant. She suffered a brutal invasion of her right to privacy and dignity which are guaranteed to her by the Constitution. Accused even after he was informed that she was expecting a child, did not stop but went on with his evil deed and threatening to kick out her unborn child. He did not show any mercy towards her. He should therefore feel the full weight of the law.

[13] In my view the facts on the commission of these crimes are shocking and chilling to say the least. They were committed barely four days apart. One can imagine if accused had not been arrested soon thereafter the two crimes were reported. He could probably have repeated his crimes. Society need protection from the like of the accused and as such justice demands that accused is sentenced to long prison terms.

[14] This Court is alive to the fact that the sentences to be meted out for the crimes of Rape – will look heavy due to the cumulative effect, however it is my view that it is just and proper for each crime of Rape to be treated on its own right because the Namibian Constitution protects each person's basic human rights including the right to privacy and dignity on individual and not on collective basis. It is desirable that each victim should receive justice as an individual and within her own right. *S v Oxurub*.³

[15] I do consider the period the accused have been incarcerated before the case was finalised and I should take that into account, in the same breath accused has a string of previous convictions which clearly goes to show that he is not capable of being rehabilitated. He is a danger to society and must be removed for a considerable period of time.

[16] In the result, Mr Brendan Van Wyk I sentenced you as follows:

³ S v Oxurub CC 30-2010 (2015) NAHMD 171 delivered 28 July 2015.

Count three : 15 Years imprisonment.

Count four : 15 Years imprisonment.

Count five : 15 Years imprisonment.

The sentence in count five is ordered to run concurrently with the sentence on count four.

D N USIKU
Judge

APPEARANCES:

On behalf of the State: Mr Kumalo
Office of the Prosecutor General, Windhoek

On behalf of the Accused: Mr Dube
Office of the Legal Directorate, Windhoek