REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 28/2018

In the matter between:

THE STATE

and

ABRAHAM KHEINAMSEB	**ACCUSED 1**
MAATAVA GAMSEB	**ACCUSED 2**
RICHARDO SISKAE	**ACCUSED 3**

Neutral citation: *S v Kheinamseb and Others* (CC 28/2018) [2019] NAHCMD 552 (12 December 2019)

Coram: SIBEYA AJ
Heard: **05 December 2019**
Delivered: **12 December 2019**

Flynote: Criminal procedure – Sentence – Minimum prescribed sentences – Section 3(1)(a) of the Combating of Rape Act 8 of 2000 applied – Effect of time spent in custody – Application of section 3(3) of the Rape Act - Meaning of substantial and compelling circumstances and approach thereto – Rape prescribes removal of offenders from society.

Summary: Criminal procedure – Sentence – The three accused persons were each convicted of one count of rape of the complainant with accused one and two

under coercive circumstances by applying physical force. Court searched but could not find substantial and compelling circumstances therefore the minimum prescribed sentence provided for in section 3(1) of the Rape Act 8 of 2000 applied to accused one. Accused two convicted of rape but without coercive circumstances while accused three is under the age of eighteen years.

Held, that rape has reached frightening heights and society has turned to courts to uproot offenders from society.

Held further that, Substantial and compelling circumstances are factors which are substantial and real, worthy of warranting a departure from the prescribed minimum sentences.

Held further that, time spent in custody is a mitigating factor but there is no mathematical formula to its application and related weight to be attached differ from case to case.

Held further that, the minimum prescribed sentences do not apply strictly to persons who were under eighteen years of age at the time of the commission of the offence section 3(3) of the Rape Act.

ORDER

The accused is sentenced as follows:

1. Accused 1 (count 1- Rape) – 10 years' imprisonment;

2. Accused 2 (count 4 – Rape) – 10 years' imprisonment;

3. Accused 3 (count 7 - Rape) – 7 years' imprisonment of which 2 years are suspended for a period of five years on condition that the accused is not convicted of rape committed during the period of suspension.

SENTENCE

SIBEYA AJ:

[1] On 20 November 2019, this court convicted the three accused persons of one separate count of rape in contravention of section 2(1) (a) of the Combating of Rape Act 8 of 2000 (the Rape Act). This was after the accused persons who were each charged with three counts of rape, pleaded not guilty to all charges, after which the state and accused adduced evidence. All three accused persons persisted in their innocence throughout the trial, but this court found that the state proved its case beyond reasonable doubt on the charges convicted of.

[2] *Mr. Kumalo* appeared for the state while *Mr. Kamwi* appeared for the accused one, *Mr. Engelbrecht* appeared for accused two and *Mr. Lutibezi* appeared for accused three.

[3] In the premises of the conviction of the accused, this court is duty bound to pass appropriate sentences to the accused persons proportionate to the charges convicted of.

[4] It has become trite during sentencing to consider the triad factors of sentencing and this court is no exception, these are the crime, the offender and the interests of society[1]. As pointed out in *S v Khumalo*[2] there is a fourth element of mercy which requires consideration. It should however be remembered that mercy should not be misplaced pity. Punishment should therefore fit the criminal, the crime, be fair to society, and have some measure of mercy according to the facts and circumstances of the matter[3]. These factors should be considered together with

[1] S v Zinn 1969 (2) SA 537 (A).
[2] 1973 (3) SA 697 (A) 698.
[3] *S v Sparks and Another* 1972 (3) SA 396 (A) B at 410H.

the main purposes of punishment, being deterrent, preventative, reformative and retributive which are important to sentencing and this court therefore considers same[4].

[5] Courts are required at this stage to strike a reasonable balance between the competing factors of sentencing in order to deliver justice. Our law has evolved to the extent that during the balancing process it may sometimes be unavoidable to emphasise one factor at the expense of the others[5].

[6] This court now applies these factors to the current facts and circumstances, commencing with the personal circumstances of the offenders. None of the accused persons testified in mitigation but their personal circumstances were placed on record by their respective counsels.

Accused one

[7] Accused one is currently twenty-three years old and was nineteen years old at the time of the commission of the offence. He is an orphan who dropped out of school in grade 6 in 2012 following the passing of his parents, but he intends to return to school. He is a first offender who is unmarried with one child. He is unemployed but earns a living through assisting farmers with erecting fences where he makes about N$400.00 to N$500.00 per project. He was arrested on 28 July 2015, released on bail in January 2016, but defaulted by failing to appear in court on his court date, consequently he was re-arrested in October 2018 and has remained in custody ever since. Mr. Kamwi submitted that the period of about six months that accused one spent in custody before his release on bail and one year spent in custody pending trial after he failed to appear in court should count as strong mitigating factors worthy of reducing the sentence which the court would have ordinarily imposed.

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[4] *S v Tcoeib* 1991 NR 263.
[5] *S v Van Wyk* 1993 NR 426 (SC).

Accused two

[8] Accused two is thirty-three years old and was twenty-nine years old in the year 2015. He is unmarried and has two children who are in the care of their mother. At the time of the commission of the offence he was employed as a general worker and earned N$500.00 per month of which he supported his children with N$300.00 monthly. His father passed on in 1995 while his mother who is aged 70 years old is still alive. He dropped out of school in grade 7. Subsequent to his arrest he was released on bail, he then failed to return to court, consequentially he was re-arrested in February 2016 and has since been in custody to date. Mr. Engelbrecht submitted that accused two is a first offender, that the offence was not premeditated and that the complainant did not sustain injuries and did not spend time in hospital. He submitted that these are worthy factors which should reduce the sentence to be imposed on accused two.

Accused three

[9] Accused three is twenty years old and was sixteen years old at the time of the commission of the offence. He is unmarried, has no children and is unemployed. He dropped out of school in grade 4 and intend to return to school. Once released he wants to help his parents. He is a first offender who is remorseful and he apologised for committing the offence of rape. Mr. Lutibezi reminded the court that the prescribed minimum sentences in the Rape Act do not apply to accused three as he was under the age of eighteen years at the time of the commission of the offence. Section 3(3) of the Rape Act provides that:

> 'The minimum sentences prescribed in subsection (1) shall not be applicable in respect of a convicted person who was under the age of eighteen years at the time of the commission of the rape and the court may in such circumstances impose any appropriate sentence.'

[10] With regard to the interests of society, it should be remembered that the offence of rape is very serious and prevalent in this country. The number of such rape cases on our court roll is alarming and shows no signs of subsiding. The

community thus turns to our courts to protect them from the devastating effects of such serious offences to remove offenders of serious violent crimes from society. The Court is further called upon to impose severe punishments to the accused persons so as to deter them and similarly would be offenders from committing similar offences.

[11] Mr. Kumalo emphasised the seriousness of the crime of rape and the harm that its causes to complainants. *In casu*, the offence is more serious in view of the fact that the complainant was raped by three men in one night while applying physical for to her and the seriousness of the offence can thus not be underrated. Rape is prevalent in our country to the extent that it has reached frightening heights and courts, being the last line of defence, should play the role of assuring the community that offenders of violent crimes will be severely punished and the rule of law will be maintained lest society lose faith in the criminal justice system, which status our country cannot afford to have.

[12] It is unimaginable that three people can all lust after one complainant sexually, in the close proximity of time and space, one after the other and proceed to commit sexual acts with her in full appreciation of their deeds. It is only sick minds that enjoys pleasure in committing sexual acts in such circumstances. The submission of Mr. Engelbrecht that because the complainant was not hospitalised, that should favour the accused in sentencing looses sight of the seriousness and violent nature of rape. The complainant in this matter testified that her abdomen was in pain as a result of the rape.

[13] In considering the appropriate sentence it is crucial to commence with the penalty provision. Section 3(1) (a) (i) and (ii) of the Rape Act provides that:

‘(i) 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 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 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 not less than ten years'

[14] Coercive circumstances provided for in section 2(2)[6] includes: '(a) the application of physical force to the complainant or to a person other than the complainant'.

[15] It is therefore apparent from the Rape Act, that it provides for prescribed minimum sentences which should be imposed, unless if substantial and compelling circumstances within the meaning of section 3(2) of the Rape Act are found to be present.

[16] Hannah J in *S v Lopez*[7]discussed substantial and compelling circumstances and cited a passage with approval from *S v Malgas*[8] where it was stated that:

'The first matter to be addressed is the meaning to be given to the words 'substantial and compelling reasons'

"'a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the Legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily

[6] The Rape Act.
[7] 2003 (NR) 162 (HC) 172.
[8]2001 (2) SA 1222 (SCA).

attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.'

Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in Flannery v Halifax Estate Agencies Ltd by the Court of Appeal, "a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based - than if it is not". Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the Legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets "substantial" and "compelling" cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey is that the ultimate cumulative impact of those circumstances must be such as to justify a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considered.''

[17] This court associates itself with the above passage from S v Magas. In the analysis of this matter in order to determine whether substantial and compelling circumstances exists, it is important to weigh the cumulative effect of the factors relevant to such determination. These factors must be such that they are 'substantial', in the real sense and not based on flimsy grounds.

[18] All counsels for the accused persons invited this court to consider the time spent in custody as a strong mitigating factor[9]. Mr. Kumalo counter-submitted that all

[9] *S v Kauzuu* 2006(1) NR 225 (HC).

accused persons were at some stage released on bail and the fact that they found themselves back in custody out of their own making should not count in their favour.

[19] It is apparent that the accused persons defaulted by not returning to court on their court dates, hence they were re-arrested. The accused persons therefore find themselves in custody consequential to their actions and should take responsibility thereof. This court should not be misunderstood to mean that such time spent in custody should be ignored. To the contrary, time spent in custody awaiting trial without the accused enjoying his liberty counts in the accused's favour during sentencing. The issue for determination will however be the amount of weight to be attached to such time spent in custody factor. The said factor carries less weight when it is self-created by the accused as *in casu*.

[20] Being mindful that there is no mathematical formula to reducing the period of time spent in custody from the intended sentence to be imposed, this court finds that time spent in custody in this matter is outweighed by the seriousness of the offences and the interest of society to such degree that it should carry less weight. Time spent in custody is therefore considered together with all other relevant factors to sentencing in the exercise of the court's discretion.

[21] Save for accused three who extended his apology for his actions and showed remorse, his co-accused offered no apologies for their actions. It is aggravating to note that accused one and two did not show nor express remorse for the serious crime committed to a defenceless woman. It is further aggravating that the accused persons totally ignored the emotional and physical well-being of the complainant and what effect their actions would have on her.

[22] The mitigating factors of the accused persons are far outweighed by the seriousness of the offence committed and the interest of the society.

[23] Retribution and deterrence requires emphasis in this matter. In *S v Seas*[10] this court while discussing cases where emphasis may be made on the retributive and deterrent purposes of punishment stated the following:

> 'Retribution as a purpose of punishment is a concept that is premised on the understanding that once the balance of justice in the community is disturbed, then the offender must be punished because that punishment is a way of restoring justice within that community. It is only when the offender has paid his or her dues and has reformed that they would be welcomed back to take up their rightful place in society.'

[24] Mr. Kamwi submitted that accused one was nineteen years old at the time of the commission of the offence and therefore that should be a worthy mitigating factor. This submission does not appreciate the fact that the Rape Act only excludes offenders who were under the age of eighteen years at the time of the commission of the offence from the umbrella of the prescribed minimum sentences. If a person is nineteen years old, he is nineteen years, and remains nineteen years old at the time whether he wishes, prays or cries to be classified under the age of eighteen years old or even if the whole world wishes that he was eighteen years old he still carries his nineteen years old deoxyribonucleic acid (DNA). Accused one similarly placed to accused two finds themselves within the circumference of the prescribed minimum sentences of the Act although under different provisions apply.

[25] The personal circumstances of accused one and two (who was the eldest of the three accused persons) are outweighed by the nature and circumstances of the offence and the interests of society. It therefore becomes inevitable that accused one and two deserves long terms of imprisonment. Following consideration of the personal circumstances of the accused inclusive of mitigating factors and time spent

[10] (CC 17/2017) [2018] NAHCMD 245 (17 August 2018) para 21 – 22.

in custody, and weighing same with the nature, seriousness and circumstances of offences, particularly the offence of rape, this court finds that, despite a diligent search, there are no substantial and compelling circumstances present in this matter presented by accused one or accused two.

[26] Accused three on the other hand is saved by his youthfulness. His expression of remorse carries heavy weight in his favour and this court finds no reason to doubt such expression. The state also agreed that accused three's expression of remorse should carry weight. What aggravates the sentence of accused three is the fact that he is a cousin to the complainant and therefore committed the offence of rape in a domestic set up read with the provisions of the Combating of Domestic Violence Act. He was only 16 years old at the time of the commission of the offence and since the prescribed minimum sentences do not apply to him, this court in the exercise of its discretion will impose a sentence which it deems fit in the circumstances.

[27] Accused one and three were convicted of rape while applying physical force to the complainant while such application of physical force is lacking in respect of the conviction of accused two.

[28] It should be remembered that the Rape Act[11]in the circumstances where physical force to the complainant was applied, as *in casu*, provides for a minimum sentence of ten years imprisonment. This is the minimum sentence applicable to the position of accused one. In respect of the circumstances where there are no coercive circumstances as in the respect of accused two, the Rape Act[12] provides a minimum sentence of imprisonment for a period not less than five years.

[29] Although in respect of accused two, this court did not find the presence of coercive circumstances, this court finds that other aggravating factors which includes the fact that he was the eldest of the accused persons, he raped the complainant

[11] Section 3(1) (a)(ii).
[12] Section 3(1) (a)(i).

first, he did not show remorse neither did he express any makes him deserved of a lengthy custodial sentence.

[30] The Rape Act further prohibits the suspension of any part of the minimum prescribed sentence, but allows for the suspension of any part of sentence that may be imposed above the prescribed sentence.[13]

[31] Taking all the aforesaid factors, reasoning and conclusions into account, I am of the considerable view that the sentences set out below meets the justice of this case.

[32] In the result the accused persons are sentenced as follows:

1. Accused 1 (count 1- Rape) – 10 years' imprisonment;

2. Accused 2 (count 4 – Rape) – 10 years' imprisonment;

3. Accused 3 (count 7 - Rape) – 7 years' imprisonment of which 2 years are suspended for a period of five years on condition that the accused is not convicted of rape committed during the period of suspension.

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O S SIBEYA

ACTING JUDGE

[13] Section 3(4).

APPEARANCES

STATE:	P S Khumalo Of the Office of the Prosecutor-General, Windhoek.
ACCUSED 1:	K Kamwi

	Instructed by K Kamwi Law Chambers, Windhoek.
ACCUSED 2:	M I Engelbrecht Instructed by Engelbrecht Attorneys, Windhoek.
ACCUSED 3:	V Lutibezi Instructed by Kwala & Co Incorporated, Windhoek.