

REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF  
WINDHOEK  
SENTENCE



NAMIBIA MAIN DIVISION,

Case No: CC 14/2019

THE STATE

versus

KINGSLEY BALZER  
FRITZ NOABEB  
NORMAN WITBEEN

FIRST ACCUSED  
SECOND ACCUSED  
HIRD ACCUSED

**Neutral citation**     *S v Balzer and 2 Others* (CC 14/2019) [2021] NAHCMD 111 (17 March 2021)

**Coram:**        SHIVUTE, J

**Heard:**        25 January 2021

**Delivered:**   17 March 2021

**Fly note:**    Criminal Procedure – Sentence – Minimum prescribed sentences – Accused persons under the age of 18 years at time of commission of offence – Section 3(1)(a) of the Combating of Rape Act 8 of 2000 not applicable.

Criminal procedure – Sentence – Remorse – Accused 1 not testifying in mitigation – Accused 1 asking for forgiveness – regretting what he did through his lawyer – Accused 2 and 3 testifying in mitigation – Both stating they are sorry and asking for forgiveness – At the same time accused 2 blaming complainant for what they did – Denying intention to rape – Accused 3 denying unlawfulness – Court finding – Stating of remorse not sufficient – Accused 1 not taking court into his confidence by testifying – Accused 2 and 3 not fully accepting responsibility for their actions – No genuine remorse shown.

Criminal Procedure – Sentence – Counsel arguing complainant not suffering physical injuries – Absence of physical injuries should not lead to a reduction of what would otherwise be an appropriate sentence.

Criminal procedure – Sentence – Rape – Counsel asking for 5 years' imprisonment wholly suspended – coupled with community service – Community service not appropriate in more serious offences such as rape – where violence involved – Wholly suspended sentence not appropriate under circumstances either – Such sentence not reflecting seriousness of offence.

Criminal procedure – Sentence – Cumulative effect – Accused 2 and 3 convicted of more than one count – Crimes part of the same course of conduct – Cumulative effect of sentence may result in harsh sentence – Sentences in respect of rape to be partially run concurrently with others.

**Summary:** Accused 1 was convicted of one count of rape, whilst accused 2 and 3 were convicted of two counts of rape. Additionally, accused 3 has also been convicted of theft. The accused persons were under the age of 18 years at the time of the commission of offences. Thus, section 3(1) (a) of the Combating of Rape Act 8 of 2000 is not of application.

Criminal Procedure – Sentence – Remorse – Accused 1 did not testify in mitigation. Instead, through his counsel he asked for forgiveness and said he regrets what he did.

Accused 2 and 3 both testified in mitigation and said they were sorry for what they did and asked for forgiveness. However, at the same time accused 2 blamed the complainant for what happened and further stated that he had no intention to rape the complainant. Accused 3 had also stated that he did not know that what he was doing was wrong. Accused 1 did not take the court into his confidence to testify and show how remorseful he was. Accused 2 and 3 did not fully accept responsibility for their actions. The court is of the opinion that no genuine remorse was shown.

Criminal Procedure – Sentence – Absence of physical injuries as a result of rape. Counsel for the accused persons argued that a lesser sentence should be imposed because the complainant did not suffer physical injuries. Absence of physical injuries should not lead to a reduction of what would otherwise be an appropriate sentence.

Criminal Procedure – Sentence – Rape – Counsel for accused 3 argued that accused 3 should be given 5 years' imprisonment wholly suspended coupled with community service. The wholly suspended sentence is not appropriate under the circumstances as it does not reflect the seriousness of the offence. Furthermore, accused persons convicted of serious and violent offences such as rape should not be beneficiaries of community service.

Criminal Procedure – Sentence – Cumulative effect. Although accused 2 and 3 are convicted of more than one count of rape, such crimes are part of the same course of conduct. To avoid cumulative effect of sentence that may result in a harsh sentence, the court will order sentences in respect of rape to be partially run concurrently with others.

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## SENTENCE

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Accused 1:

Count 4: Rape contravening s 2(1) (a) of Act 8 of 2000 – 7 years' imprisonment.

Accused 2:

Count 7: Rape contravening s 2(1) (a) of Act 8 of 2000 – 7 years' imprisonment.

Count 13: Rape contravening s 2(1) (a) of Act 8 of 2000 – 7 years' imprisonment, 4 years of which are to be served concurrently with the sentence on count 7:

Accused 3:

Count 1: Rape contravening s 2(1) (a) of Act 8 of 2000 – 7 years' imprisonment.

Count 10: Rape contravening s 2(1) (a) of Act 8 of 2000 – 7 years' imprisonment, 4 years of which are to be served concurrently with the sentence on count 1.

Count 17:

Theft – 6 months' imprisonment to be served concurrently with the sentence in count 1.

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### **JUDGMENT ON SENTENCE**

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SHIVUTE J:

[1] Accused 1 was convicted of one count of rape. Whilst accused 2 and 3 were convicted of two counts of rape each, contravening s 2(1) (a) of the Combating of Rape Act 8 of 2000. In addition to that, accused 3 has also been convicted of theft.

[2] Having convicted the accused persons, it has now become necessary for this court to pass sentence. In doing so, the court will bear in mind the well-known factors considered in *S v Rabie* 1975 (4) SA 855 (A) at 862 G where it was stated as follows:

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

[3] In attempting to apply these principles, the court deems it fit to first consider the personal circumstances of the accused persons. The accused persons are all young offenders. At the moment they are about 20 and 21 years old. When they committed this heinous offence, accused 1 and 2 were about 16 years old whilst accused 3 was about 17 years old. They did not advance far in education. The level of education is Grade 5 in respect of accused 1 and accused 3. Accused 2 progressed to Grade 7. None of the accused is married or has children. Accused 2 and 3 worked as farm labourers before they committed these offences. They are all first offenders.

[4] Accused 1 did not testify in mitigation. Instead, his legal representative addressed the court from the Bar. Whilst accused 2 and 3 testified under oath. Accused 1 through his counsel, asked for forgiveness and said he regretted what he did. Accused 2 and 3 also testified that they were sorry and asked for forgiveness. However, although accused 2 and 3 said they were sorry for what they did, accused 2 blamed the complainant for what they did and he stated that he had no intention to rape the complainant. Accused 3 said he was not aware that what he did was wrong.

[5] Accused 2 further testified that before he was incarcerated, he was responsible for maintaining his siblings, because his father was serving a term of imprisonment and his mother was abusing alcohol. Accused 3 testified that he was living with his sister.

[6] It was argued on behalf of the accused persons that since they are first offenders who committed the offence whilst they were under the age of 18 years, the court should exercise mercy on them. Counsel for accused 2 and 3 argued that the complainant did not suffer injuries. It was further argued that the accused persons were remorseful. Counsel for accused 3 argued that the consumption of alcohol by his client had affected his judgment. Counsel for accused 1 and 2 suggested that the court should impose a term of imprisonment, part of which should be suspended. Counsel for accused 3

suggested that accused 3 should be sentenced to 5 years' imprisonment wholly suspended and that he should be ordered to perform community service.

[7] On the other hand, counsel for the State argued that although the accused persons are first offenders, the court should not lose sight of the seriousness of the offence and that the complainant was raped five times. Furthermore, counsel argued that the accused persons were armed with a knife and a panga at the time the offences were committed. Concerning the wholly suspended sentence, counsel for the State argued that this would amount to a mockery of justice as it would not reflect the seriousness of the offences committed. All counsel referred me to several authorities that I have considered.

[8] Although the accused persons are youthful offenders who have no previous convictions, the offence of rape they committed is a serious one. However, when they committed the offence they were under the age of 18 years. Therefore, the mandatory minimum sentences prescribed in section 3(1) of the Rape Act are not applicable to them.

[9] Furthermore, although the complainant did not suffer physical injuries, her rights to privacy and dignity have been violated. Therefore, the absence of physical injury as a result of the rape should not lead to a reduction of what would otherwise be an appropriate sentence.

[10] The sentence to be imposed should have a deterrent effect that will afford proper protection to the law-abiding members of our society from the invasion of their privacy and dignity by gangsters like the accused persons. Women and other vulnerable people of our society should be afforded their freedom of movement without any fear or disturbance. Although counsel for accused 3 requested a wholly suspended sentence coupled with community service, I am of the view that community service is not appropriate in more serious offences, especially offences that involve violence like rape

and murder. A wholly suspended sentence will also not be appropriate under the circumstances as it would not reflect the seriousness of the offence.

In re *R v Karg* 1961 (1) SA 231 A at 236 B Schreiner JA remarked as follows:

'It is not wrong that the natural indignation of interested persons and community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.'

[11] The fact that the complainant was raped by three people is an aggravating factor, whilst youthfulness and the consideration that they are first time offenders are factors in favour of the accused persons. Although the accused persons said they regretted what they did, the court does not consider their assertions in this regard as a genuine remorse because, accused 1 did not take the court into his confidence and testify under oath to show his remorse. Again, although accused 2 and 3 testified under oath, they did not fully accept responsibility of their actions. Accused 2 said he had no intention to rape the complainant and accused 3 asserted that he was not aware that what he did was wrong.

[12] The accused persons requested the court to exercise mercy on them. Remorse is one of the important factors that the court should consider. It is, however, not enough for an accused to say he is remorseful. He must accept his guilt and responsibility for his actions. Punishment must be meted with mercy where it is deserved. As was stated in *S v Rabie supra* at 866A – B:

'A judicial officer should not approach punishment in a spirit of anger because, being human, will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of the society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and pressure of society.'

[13] I believe that mercy in this case can be exercised if the court imposes a just sentence that fits the crime, the criminal and the interest of society to be considered

together with the main purpose of punishment namely; deterrent; preventative; reformatory and retributive. Except for accused 1, accused 2 and 3 are convicted of more than one count. However, although accused 2 and 3 were convicted of more than one count, these crimes were part of the same course of conduct. Therefore, I must bear in mind that cumulative effect of the sentence on both or all counts may result in a harsh sentence. In order to avoid this, I will order the sentences in respect of rape to be partially served concurrently with others.

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

Accused 1:

Count 4: Rape contravening s 2(1) (a) of Act 8 of 2000 – 7 years' imprisonment.

Accused 2:

Count 7: Rape contravening s 2(1) (a) of Act 8 of 2000 – 7 years' imprisonment.

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Count 17:

Theft – 6 months' imprisonment to be served concurrently with the sentence in count 1.



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NN Shivute  
Judge

## APPEARANCES:

THE STATE: Mr Itula  
Office of the Prosecutor-General.

FIRST ACCUSED: Mr Kauari  
Tjituri Legal Practitioner

SECOND ACCUSED: Mr Engelbrecht  
Engelbrecht Attorneys

THIRD ACCUSED: Mr Muchali  
Jermaine Muchali Attorneys