

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: CC 17/2019

In the matter between:

THE STATE

Versus

CHRIS VAN WYK

ACCUSED 1

DESMOND !OWAS-OAB

ACCUSED 2

Neutral citation: *State v Van Wyk* (CC 17/2019) [2021] NAHCMD 253 (26 May 2021)

Coram: CLAASEN, J

Heard: 18 May 2021

Delivered: 26 May 2021

Flynote: Criminal Procedure – Sentence – Accused convicted of Rape, in contravention of s 2(1)(a) of Act 8 of 2000 – Court found no substantial and compelling circumstances.

Summary: Accused was found in *flagrante delicto* on top of naked complainant lying stretched out on bare ground, whilst three other men held her captive. The three men immediately fled once the police arrived on the scene. Accused attempted to flee too, but the complainant held on to him and his pants on his knees made it difficult to get way. Accused's tablet as well as complainant's cut panty, brassiere and other clothes found in the sand. Complainant's face and body showed signs of physical assault.

Held, Accused's personal circumstances of being a first offender who served one and a half year in pre-trial custody pale in comparison to the factors in aggravation and do not amount to substantial and compelling circumstances.

Held, that the fact that the other three men got away that night and the State had further dilemmas as the complainant passed away before trial and another witness become mentally incapacitated, do not undo the undisputed evidence that the complainant was held in captivity on the ground by three other men whilst the accused was engaged in the act of sexual intercourse. Section 3(1)(a)(iii)(ee) of the Act applies.

Held, further that the accused did not show an iota of remorse and the circumstances wherein offense committed were gruesome. The complainant was pushed and pulled, controlled by a group of four men, whilst hearing a promise of sexual exploitation and killing her thereafter, as she had seen them. A short while later, stretched out, on the ground, in captivity, she was reduced to an object to fulfil the lascivious urges of the group of men. That left her with no shred of clothes, no shred of dignity and no choice nor the freedom to walk away.

Held, in these circumstances, a sentence in excess of the mandatory minimum of 15 years' imprisonment is justified.

ORDER

Count 2: Rape, under coercive circumstances, in contravention of s 2(1)(a) of Act 8 of 2000 - 18 years' imprisonment.

Exhibit '1' and exhibit '2', the panty and brassiere are to be returned to the Investigating Officer to be destroyed.

Exhibit '3', the Tablet is to be returned to its lawful owner.

SENTENCE

CLAASEN J:

[1] This is a case about a good Samaritan. The Samaritan in Namibia is Mr Toivo Ndjalo. He is employed as a sewerage plumber at the Municipality of Swakopmund. On the night of 1 November 2015 his intention to do the right thing, fuelled him to fanatically run to the police station to report a crime in the making. He saw a lady being overpowered by a group of four men at the open space behind 'Mondesa Youth Opportunities'. He overheard their evil intentions of sexual exploitation and thereafter killing her.

[2] Upon a rapid return to the scene, the picture that greeted him and the two Police Officers, confirmed that the complainant's nightmare was in full swing. She was naked and stretched out on her back amongst sand and stones. The accused, whose penis was exposed, was engaged in the act of sexual intercourse. The other three men held the lady captive by her arms and in position for the accused. The three men fled as soon as the police vehicle's lights illuminated the scene. The accused could not get

away. It was not for a lack of trying. The complainant managed to get a hold of him. In addition, it was explained that his pants on the knees hampered him in making a rapid and successful getaway.

[3] The complainant, Ms Trudie Cloete was not at court to tell the tale. For some or other reason the matter took years to be brought to trial and she passed away, due to unrelated causes, before the trial commenced. Her cut panty and brassiere, found in the sand that night, did however made it to court to echoe the narrative of the oral and documentary evidence. If it was not for the moral compass of Mr Ndjalo, and the rapid response of the two Police Officers being Constable Kwedhi and Constable Petrus, at the time, the aftermath may have been worse for the complainant than the revolting act that was in progress.

[4] This is the occurrence for which the accused was convicted and will be sentenced today. In order to arrive at an appropriate sentence, the court will consider the time tested factors of the crime, the offense, the interest of society¹ as well as a measure of mercy².

[5] Both counsel for the accused, Mr Sioymundji and counsel for the State, Mr Lisulo made submissions on sentencing, without tendering evidence under oath.

[6] The accused, hails from Swakopmund and is 27 years of age. At the time of the commission of the offense he was a mere 21 years old. Both his parents are alive and are pensioners at this stage. He has no previous convictions. He is single, with no children. He attended secondary school. Prior to being arrested he worked in the construction industry. His pre-trial incarceration period was 1 year and 6 months. Those were the extent of the personal circumstances placed before the court.

[7] Counsel for the accused proposed to the court a sentence of 10 years' imprisonment. He also requested that half of that term be suspended, but did not

¹ *S v Zinn* 1969 (2) SA 537(A).

² *S v Khumalo* 1973 (3) SA 697 (A).

motivate on what basis it could be justified.

[8] As for the crime, Counsel for the State emphasised that it is a very serious offence, that the complainant sustained physical injuries and that the court should be mindful of the societal interest, particularly the plight of women who are not spared at the hands of the barbaric behaviour of rapists. Therefore the court should give the mandatory minimum sentence or more.

[9] The parties were at loggerheads as to the sentencing bracket of the case. Mr Siyomundji respectfully expressed his discontent about the coercive circumstances category, in view of the absence of testimony from the complainant. According to him, the applicable mandatory minimum sentence is that of 10 years' imprisonment term as per s 3(1)(a)(ii) of the Combating of Rape Act 8 of 2000, (the Act).

[10] Mr Lisulo's view was that the mandatory minimum sentence falls within the range of s 3(1)(a)(iii) of the Act which is a custodial sentence of 15 years' imprisonment. The particular provisions on which he relied was that of s 3(1)(a)(iii)(aa) as well as s 3(1)(a)(iii)(ee) of the Act.

[11] Coercive circumstances was dealt with in the judgment³ given on 16 April 2021. The long and short of it was that the complainant, when found, had injuries, which were attested to by the eye witnesses and were visible in exhibit 'D' and exhibit 'E'.

[12] In addition, the evidence of the eye witnesses Mr Ndjalo, Constabe Kwedhi as well as Constable Petrus, established that there were four men and a naked lady in the sand on the scene. One of the men, the accused, was caught in the sexual act, whilst the other three men were holding the lady captive at that specific point in time. Section 3(1)(a)(iii)(ee) of the Act reads as follows:

'the convicted person is one of a group of two or more persons participating in the commission of the rape;

³ Para 64 and 65 of trial judgment given 16 April 2021

[13] At the risk of repeating the evidence, none of the men were doing nothing on the scene. They were not standing there with folded arms singing 'Kumbaya My Lord'. The accused was literally caught in the act, whilst the other three men, were seated and held the complainant captive. She was detained in their grip, lying on sand and stone, which act of captivity facilitated the despicable act. Liberation occurred only once these three men realised that the Namibian Police is in their midst.

[14] That the other three men got away that night and some could not be identified or sufficiently tied to the case because the complainant passed away and another prosecution witness became mentally incapacitated, are neither here nor there. It does not undo the undisputed evidence that the accused was doing his thing whilst the other three men were holding the complainant captive. That being the case, s 3(1)(a)(iii)(ee) of the Act finds application.

[15] There is nothing that can be said to minimize or alleviate the severity of the offence of rape. In this case Ms Cloete was naked and stretched out as if an animal on an altar. Except that it was not in biblical times and it was not a holy altar on which an animal was sacrificed for a virtuous purpose. Ms Cloete's right to liberty was brutally invaded by the group of four men that Mr Ndjalo saw physically controlling her, at the beginning of the incident. Pushing and pulling her, as if she is their marionette whilst promising her what's to come. That was not enough for them. The ordeal progressed to the next level of barbarism. A short while later, she was on the ground, reduced to an object to fulfil the lascivious urges of the group of men, leaving her with no shred of clothes, no shred of dignity, no choice and no freedom to walk away.

[16] It is aggravating that there is not an iota of remorse from the accused's side. It is not known whether that was a mere oversight or the insistent belief that a free pass ought to have been given just because the complainant 'conveniently' died before the trial could commence. Be that as it may, the court is left with no remorse.

[17] Undoubtedly the court can only give a lesser sentence than the mandatory minimum, if a case was made out for substantial and compelling circumstances.⁴ Counsel for the State took the view that the 18 months pre-trial incarceration on its own does not qualify as substantial and compelling. In support of his argument he relied on the matter of *S v JB*.⁵ The other information in mitigation was that the accused served one and a half year in prison and was a first offender. In my view, the cumulative effect of the factors in mitigation, pales in comparison to those in aggravation of sentence and do no amount to substantial and compelling circumstances.

[18] Mr Van Wyk was a relatively youthful person of 21 years at the time of the incident. It is ironic that the horrific deed took place in an open space behind 'Mondesa Youth Opportunities', a non-profit organization that offers educational intervention and amongst others instil values in the youth to become good citizens.

[19] Finally, it an excruciatingly painful reality for women in this country that the offense is prevalent. Though males can be on the receiving end too, in the majority of cases it is women. It is our daughters, wives, mothers and grandmothers. It can happen anywhere, just like Counsel for the State submitted. In this case it happened to a petite 30 year old mother of four children, who was walking across an open area.

[20] What is equally perplexing is that perpetrators, behave as if they are not from mothers too, who did not teach them to do such things. In this matter we heard that the accused's mother is 62 years and his father is 63 years old. Undoubtedly these are the parents who now have to bear the pain of conviction and support the accused on this difficult but inevitable path of a lengthy custodial sentence.

[21] What gives this court hope is the knowledge that there are still people with the calibre of Mr Toivo Ndjalo, who did not waver to assist a damsel in distress. It was because he was guided by a moral compass that is still intact. That is something the youth can aspire to, as it will lead one to do the right thing under all circumstances.

⁴ Section 3(2) Act 8 of 2000.

⁵ *S v JB* (SA 18/2013) [2015] NASC (13 November 2015).

[22] For these reasons the court is of the view that a sentence in excess of the mandatory minimum of 15 years' imprisonment is justified, but will consider that the accused has spent a period in custody before being granted bail.

[23] In the result the sentence is as follows:

Count 2: Rape, under coercive circumstances, in contravention of s 2(1)(a) of Act 8 of 2000 - 18 years' imprisonment.

Exhibit '1' and exhibit '2', the panty and brassiere are to be returned to the investigating officer to be destroyed.

Exhibit '3', the Tablet is to be returned to its lawful owner.

C Claasen
Judge

APPEARANCES

FOR THE ACCUSED

Mr Siyomunji
Siyomunji Law Chambers

FOR THE STATE

Mr Lisulo
Of the Office of the Prosecutor-General,
Windhoek