

REPUBLIC OF NAMIBIA

HIGH COURT  
WINDHOEK  
SENTENCE



OF NAMIBIA MAIN DIVISION,

Case No: CC 2/2021

**THE STATE**

versus

**JEREMIA VAN WYK**

**ACCUSED**

**Neutral citation:** *S v Van Wyk* (CC 2/2021) [2022] NAHCMD 334 (5 July 2022)

**Coram:** SHIVUTE J

**Heard:** 16 - 17 June 2022

**Delivered:** 5 July 2022

**Flynote:** Criminal Procedure – Sentence – Rape contravening s 2(1)(a) Act 8 of 2000 – Abduction – Factors to be considered – Personal circumstances of offender – Seriousness of offences – Interest of society – Aggravating circumstances by far overshadowed personal circumstances of the accused.

**Summary:** The accused was convicted of rape contravening section 2(1)(a) Act 8 of 2000 and abduction. He abducted a five-year-old child and sexually assaulted her. The offences were premeditated and they were committed in respect of a vulnerable and defenceless victim. The accused is not a first offender. Although his previous convictions were committed more than 20 years ago, they are clear indications that he has no respect for the law. The accused committed extremely serious offences.

Punishment should fit the offender, reflect the seriousness of the offence and be fair to society. When balancing the interests, the aggravating circumstances by far overshadowed the personal circumstances of the accused.

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### **ORDER**

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1. 1<sup>st</sup> Count: Rape contravening s 2 (1) (a) of the Combating of Rape Act 8 of 2000: 20 years' imprisonment.
  2. 2<sup>nd</sup> Count: Abduction: 7 years' imprisonment, 3 years of which are to run concurrently with the sentence on the first count.
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### **SENTENCE**

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SHIVUTE J:

[1] The accused was convicted of rape contravening section 2(1)(a) read with sections 1, 2(2), 2 (3), 3,4,5,6,7 and 18 of the Combating of Rape Act 8 of 2000 (the Act) and abduction.

[2] At this stage, it is my obligation upon the accused to consider what condign sentences should be meted out. The accused did not testify in mitigation. However, counsel for the State called Ms Kolokwe who is employed by City Police, Gender Based Violence Victim Support Unit. She testified that she was involved in the investigation of this matter. Whilst she was on duty she was informed that there was a missing child who was picked up from school by a stranger. Upon their investigation they found the victim in a bar in the company of the accused. The victim appeared to be shocked. She was not able to talk. When they tried to lift her up, she was resisting.

[3] When the child was taken to the Gender Based Violence office, she was still in shock and was screaming and running away. The child was examined by the doctor in the presence of the witness and she observed that she was injured at her private parts. The witness also visited the family after the incident and referred them for counselling. The child is still traumatised by the incident. As a result, she sometimes hits her head against the wall or destroys things in the house. This incident has also traumatised the whole family and they do not wish to come face-to-face with the accused. It is further Ms Kolokwe's testimony that cases of sexual assault against minors are on the increase, minors are suffering and they need to be protected.

[4] The accused's personal circumstances were placed before court from the Bar by his counsel. The accused is 53 years old. He is not married but has a daughter who is 19 years old. Before he was incarcerated, he did odd jobs where he earned about N\$300 per month. He had been in custody for two years and ten months. It was submitted, that the accused had taken full responsibility for his actions. At the time of the incident, he had consumed alcohol and crack-cocaine as well as other dependence producing substances. The accused did not have the opportunity to apologise personally to the victim's parents. However, he extended his apology through the sister of the victim's mother. The accused is not a first offender.

[5] On the other hand, counsel for the State argued that the applicable penalty provision, namely section 3(1)(a)(iii) *(bb)(A)(B)* of the Act prescribes a minimum penalty of 15 years' imprisonment. This is an indication that the offence of rape is being regarded as grave by the Legislature and stringent sentences are encouraged and advocated for. Abduction on the other hand, is also a serious offence, as case law shows that terms of direct imprisonment are imposed in this regard. Counsel further argued that there are no substantial and compelling circumstances existing in this matter.

[6] Counsel urged the court to consider the aggravating factors that the victim was a child of five years at the time of the commission of these offences. She was unable to

defend herself and was at the total mercy of the accused. The victim had suffered injuries on her private parts. Furthermore, the accused has a list of previous convictions. The accused has demonstrated that he cannot be rehabilitated as he finds himself continuously in conflict with the law. Therefore, he is a danger to others and should be removed from society for a long time. The offence of sodomy that he was convicted of twice is an offence of a sexual nature, hence bearing similarities to the present offence of rape. Counsel proposed that the accused should be sentenced to 30 years' imprisonment in respect of the rape charge and 10 years' imprisonment in respect of the abduction count. Counsel referred this Court to several authorities regarding sentencing, which I have had the benefit of considering.

[7] I am required to consider the accused's personal circumstances and the circumstances in which the offences were committed as well as the interest of society when imposing sentence on the accused. I have considered that the accused committed serious offences against a vulnerable child. Although the accused pleaded guilty to the charges, he took the risk of playing an elaborate hoax on this Court by admitting that he had sexual intercourse with the minor child by inserting his finger into her private part instead of admitting that the offence was committed by means of penile insertion.

[8] The fact that foreign bodies were left around the minor's female genitalia, did not even deter the accused to tell a lie that he inserted his finger. The accused's misplaced effort to mislead the court was an exercise in futility as DNA evidence does not lie.

[9] The accused pleaded guilty not because he is remorseful, but because he had no other option as there was evidence of a damning kind. I am of the opinion, that due weight should not be attached to his guilty plea. The accused committed premeditated offences. He planned to take the victim from school in order to sexually abuse her and executed his plans. The victim suffered unbearable pain and was left traumatised. There can be no doubt that the accused has destroyed the life of the innocent child.

[10] He has been in conflict with the law since his youth. He has previous convictions stemming from the 1980s to 2002. He has been convicted of various offences ranging from the use of a motor vehicle without the owner's consent, housebreaking with intent to steal and theft, theft, sodomy, escaping from lawful custody, robbery with aggravating circumstances and ultimately murder just to mention a few. The accused has more than 20 previous convictions. He was sentenced to 14 years' imprisonment in 2002 for murder. However, this did not deter him from committing further offences. Although these previous convictions are more than 20 years old, the accused is not on the same footing as a first offender. His previous convictions are clear indications that the accused has no respect for the law and is a danger to society.

[11] Looking at the personal circumstances of the accused, the only factors in his favour are that he is now 53 years old and that he has been in custody for more than two years. Although the accused spent more than two years in custody pending the finalisation of this trial, as was pointed out by the Supreme Court in *S v Karirao* (SA 70 of 2011 [2013] NASC (15 July 2013) para 23:

'Such period is not arithmetically discounted and subtracted from the overall sum of imprisonment imposed. This is a factor which is considered together with other factors such as the culpability of the accused and his or her moral blameworthiness, to arrive at an appropriate sentence in all the circumstances of a particular case.'

[12] Undoubtedly, the accused committed extremely serious offences of rape and abduction. These offences are more prevalent. Punishment should fit the offender, reflect the seriousness of the offence and be fair to society. A clear message must also be send out to all would be offenders that this court will not shirk in its responsibility to protect women, children and other vulnerable people against those who commit offences such as these. The aggravating circumstances present in this case, by far overshadow the mitigating factors placed before this Court.

[13] In the result, the following order is made:

1. 1<sup>st</sup> Count: Rape contravening s 2 (1)(a) of the Combating of Rape Act 8 of 2000: 20 years' imprisonment.
2. 2<sup>nd</sup> Count: Abduction: 7 years' imprisonment, 3 years of which are to run concurrently with the sentence on the first count.

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N N Shivute  
Judge

APPEARANCES

THE STATE:

F. Shikerete  
Of Office of the Prosecutor-General, Windhoek.

ACCUSED:

J.Andreas (of Andreas Hamunyela Legal Practitioners)  
Instructed by: The Directorate of Legal Aid, Windhoek.