REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 15/2020

In the matter between:

THE STATE

and

JACKSON KATJOMBE **ACCUSED**

Neutral citation: *S v Katjombe* (CC 15/2020) [2023] NAHCMD 514 (18 August 2023)

Coram: JANUARY J
Heard: **21 July 2023**
Delivered: **18 August 2023**

Flynote: Criminal procedure – Sentence – Three counts of rape and two counts of common assault – Committed under coercive circumstances –

Sentencing principles confirmed and applied – Serious offences – Limited weight to be accorded to mitigating factors – Sincerity lacking – Mandatory minimum sentences prescribed by the Combating of Rape Act 8 of 2000 – Absence of substantial and compelling circumstances not justifying the court to deviate from prescribed minimum sentences.

Summary: The accused person was convicted on three counts of rape and two counts of common assault. The evidence adduced indicated that the rape acts were committed under coercive circumstances. The complainants, in this matter, are all vulnerable in some way or another. The first complainant, WK, is wheelchair bound. She did not attend school and is unfamiliar with dates, days and months. This complainant has a developmental gab compared to her age and seemed to be mentally challenged with low intellect. JK, the second complainant, although displaying no significant abnormalities, has a low IQ compared to her age. QN, the third complainant, was between eight and nine years old at the time that the incident occurred. She too has a low IQ compared to her peers.

The offences were committed when the complainants were alone, with nobody to defend them, in the absence of their ability to defend themselves. The legislation in this regard considers the offence of rape in a very serious light, evidenced by the penalty clause in s 3 of the Combating of Rape Act 8 of 2000 ('the Act').

Held: that where the court is faced with multiple counts involving serious offences likely to attract lengthy terms of imprisonment, the sentencing court is obliged to consider the cumulative effect of the sentences to be served.

Held: that s 3 (2) of the Act provides that, unless the court is satisfied that substantial and compelling circumstances exist, justifying the imposition of a lesser sentence, the prescribed minimum sentences ought to stand. For the court to find that substantial and compelling circumstances are present, they must be such as to cumulatively justify a departure from the standardized response chosen by the Legislature.

Held: that the accused person`s mitigating factors, if considered in isolation, do not qualify as substantial and compelling circumstances so as to justify the imposition of a lesser sentence.

Held: further that having considered the circumstances of the accused, the circumstances under which the offences were committed, the interest of society and the objectives of punishment, that an appropriate sentence on counts four and five is six months imprisonment on each count. In relation to the counts of rape, a sentence of imprisonment is inescapable. Considering the period that the accused spent in custody and the cumulative effect thereof, part of the sentence should be suspended and part thereof to be served concurrently.

ORDER

Count 1 – Rape in relation to WK: 15 years` imprisonment.

Count 2 – Rape in relation to JK: 15 years` imprisonment. In terms of s 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that five years thereof are to be served concurrently with the sentence on count one.

Count 3 – Rape in relation to QN: 15 years` imprisonment. In terms of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that five years thereof are to be served concurrently with the sentence on count one.

Count 4 – Assault (common) in relation to WK: six months` imprisonment, wholly suspended for a period of five years on condition that the accused is not convicted of assault committed during the period of suspension.

Count 5 – Assault (common) in relation to JK: six months` imprisonment, wholly suspended for a period of five years on condition that the accused is not convicted of assault committed during the period of suspension.

The accused should thus serve an effective period of 35 years' imprisonment.

SENTENCE

JANUARY J:

Introduction

[1] On 16 June 2023, I convicted the accused on three counts of rape in contravention of s 2(1)*(a)* read with ss 1, 2(2), 3, 4, 5 ,6, 7 and 18 of the Combating of Rape Act 8 of 2000 ('the Act') and two counts of common assault. This court found that the rape acts were committed under coercive circumstances. It now becomes the duty of this court to impose a sentence it considers appropriate in light of the offences the accused has been convicted of.

[2] It is trite that, at sentencing, a triad of factors must be considered. This includes the seriousness of the offences for which the accused has been convicted of, his personal circumstances and the interest of society. In addition, the sentence must also be blended with an element of mercy.[1] As stated in *S v Van Wyk*[2]*,* the difficulty often arises from the challenging task of trying to harmonise and balance these principles and to apply them to the present facts. Equal weight or value need not be given to the different factors and, depending on the particular facts of the case, situations may arise where certain factors are emphasised at the expense of others. This is called the principle of individualisation where punishment is determined in relation to the individual before court, the facts and the circumstances under which the crime was committed. At the same time the court must consider the interest of society. In the end, the court endeavours to find and impose a well-balanced sentence.[3]

[1] *S v Pretorius* (CC 2/2018) [2022] NAHCMD 114 (15 March 2022).
[2] *S v Van Wyk* 1993 NR 426 (SC).
[3] *S v Madisia* (CC 08/2022) [2023] NAHCMD 312 (13 June 2023).

Personal circumstances

[3] The accused elected not to give evidence in mitigation of sentence. His personal circumstances were placed on record by his counsel, Mr Kaurivi.

[4] The accused is a first offender. He is 37 years of age, turning 38 in August 2023. He has three children, aged 15, 12 and 5 years, respectively. The two older children share the same mother, with whom they reside. The last born has a different mother, with whom he resides. The accused maintained the children prior to his incarceration. His grandmother now maintains all three children, in his absence.

[5] Before the accused was arrested, he was involved in a motor vehicle accident, in which he sustained bone fractures, necessitating the insertion of steel pins in one of his arms and in his hip. The accused suffers frequent pain as a result. The accused further suffered injury to one of his eyes which diminished his eye sight.

[6] Mr Kaurivi placed emphasis on the element of mercy, referring the court to the matters of *S v Rabie*[4] and *S v Nidel*[5], respectively. Mr Kaurivi held that the court should approach the sentencing of the accused with an element of mercy and not anger. He further submitted that the punishment that the court metes out must fit the crime, it must fit the convict and it must be blended with a measure of mercy.

[7] In contrast, Mr Iitula, counsel for the State, submitted that minimal weight should be afforded to the accused`s mitigating factors because he chose not to testify under oath. Mr Iitula submitted further that as a consequence of this election, the accused`s evidence carries less probative value. Mr Iitula further submitted that there was no medical expert before court to testify to the medical history of the accused. From the submissions made from the bar by Mr Kaurivi, it is difficult to gauge the extent of the pain purportedly suffered by the accused, as well as his purported injuries. It is Mr Iitula`s contention that, no submissions were made as to the special needs the accused has, which cannot be positively met by the correctional facility. In

[4] *S v Rabie* 1975 (4) SA 855.
[5] *S v Neidel and Others* (3) (21 of 2006) [2011] NAHC 347 (21 November 2011).

response to the issue of mercy alluded to by Mr Kaurivi, Mr Iitula argued that the court, in considering the element of mercy, must have regard to whether or not the accused person has shown remorse for his actions. Mr Iitula referred this court to the matter of *S v Van der Westhuizen*[6] where it was held that;

> `In order for remorse to be a valid consideration, penitence must be sincere and unless the accused takes the court fully into his confidence, the genuineness of contrition alleged to exist cannot be determined, or taken as a mitigating factor. The accused in the present instance did not testify in mitigation and opted for his legal representative to speak on his behalf. How was the court in these circumstances able to determine the genuineness of his remorse? He had made no effort in the past to apologise to anyone and to do so half-heartedly through his counsel, is simply insufficient. In view of the foregoing, not too much weight should be accorded to the accused's alleged remorse. The gravamen of contrition is that a person who is remorseful is likely not to reoffend.'

[8] It follows that, because the accused opted not to testify, it is difficult for the court to assess whether he is genuinely remorseful for his actions.

Discussion

[9] It is clear from the record of proceedings that the accused was not consistent in his defence throughout the trial and often evaded the questions posed to him in cross-examination and through questioning by the court in a plight to mislead the court. It is thus not apparent from the proceedings what motivated the accused to commit these offences. Moreover, while all rape cases are serious in nature, rape against vulnerable women and children tend to be more serious.

[10] The complainants, in this matter, are all vulnerable in some way or another. The first complainant, WK, is wheelchair bound. She did not attend school and is unfamiliar with dates, days and months. This complainant has a developmental gab compared to her age and seemed to be mentally challenged with low intellect. JK, the second complainant, although displaying no significant abnormalities, has a low IQ compared to her age. QN, the third

[6] *S v Van der Westhuizen* (CC 06-2015) [2015] NAHCMD 260 (5 November 2015).

complainant, was between eight and nine years old at the time the incident occurred. She too has a low IQ compared to her peers.

[11] It is evident from the record that these offences were committed when the complainants were alone, with nobody to defend them, in the absence of their ability to defend themselves.

[12] The legislation in this regard considers the offence of rape in a very serious light, evidenced by the penalty clause in s 3 of the Act. The Act prescribes a minimum sentence of not less than ten years in instances where the accused is a first offender and the rape was committed under coercive circumstances. These coercive circumstances include the application of physical force, threats (whether verbal or through conduct) of physical force and circumstances where the complainant is unlawfully detained.[7] In circumstances where a complainant is under the age of 13, the Act prescribes a period of imprisonment of not less than 15 years. The Act further prescribes a minimum sentence of 15 years imprisonment, where a complainant has suffered grievous bodily or mental harm as a result of the rape.[8]

[13] In relation to the penalty clause, Mr Kaurivi argued that the circumstances under which the rape was committed determine the sentence. He maintained that the accused is a first offender, incarcerated for about five years whilst awaiting trial and the sentence should thus be considered in light thereof. Mr Kaurivi referred to ss 2 and 3 of the Act. It was argued on behalf of the accused that, if rape is committed under any of the coercive circumstances outlined in s 2 (2) *(a)*, *(b)* or *(e)*, a term of imprisonment of not less than ten years ought to apply.

[14] The relevant provisions of s 2 (2) stipulates:

'(2) For the purposes of subsection (1) "coercive circumstances" includes, but is not limited to-

(a) the application of physical force to the complainant or to a person other than the complainant;

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[7] Combating of Rape Act 8 of 2000.
[8] Ibid.

(b) threats (whether verbally or through conduct) of the application of physical force to the complainant or to a person other than the complainant;

…

(e) circumstances where the complainant is unlawfully detained…'

[15] Mr Kaurivi proceeded to argue that, because the court found that physical force was used in respect of the rape of the first complainant, WK, s 3 (1) *(a)* (ii) of the Act finds application and the penalty is thus a term of imprisonment no less than ten years. Mr Kaurivi submitted further that it is evident from the record that physical force was similarly used in respect of the rape of JK. It follows that a term of imprisonment no less than ten years is also applicable. With reference to the third complainant, QN (8 years old), the provisions of s 3 (1) *(a)* (iii) (bb) (A) applies, in that a period of imprisonment of not less than 15 years is prescribed in instances where the victim is under the age of 13 years.

[16] Mr Kaurivi submitted in light of the foregoing, that there exists a provision in the Act, justifying the court to deviate from the prescribed penalties, and referred to the personal circumstances of the accused as well as the period of pre-trial incarceration. Mr Kaurivi prayed that the accused be sentenced, in respect of count one to ten years imprisonment, in respect of count two to ten years imprisonment and in respect of count three to 15 years imprisonment. Mr Kaurivi recommended six months imprisonment respectively, on counts four and five. In conclusion, it was held that the court should take into account the personal circumstances of the accused, and blend the sentence with an element of mercy. Mr Kaurivi recommended that the sentence suggested in count one, count two, count four and count five run concurrently with the sentence in count three, thus recommending the accused serve an effective term of imprisonment of 15 years for the offences he has been convicted of.

[17] Mr Iitula, argued to the contrary that the circumstances surrounding this matter, in respect of all three complainants, cannot be considered to fall within the category of s 3 (1) *(a)* (ii), in which a minimum period of ten years

imprisonment is prescribed. Mr Iitula made reference to s 3 (1) *(a)* (iii) (aa) of the Act, which states that 'where the complainant has suffered grievous bodily or mental harm as a result of the rape'. Mr Iitula highlighted the evidence adduced by the social worker, Ms Shipunda, who examined the complainants and testified in this court as to the psychological effects the rapes have had on the complainants, respectively. She testified that the victims were affected to such an extent that a recommendation was made for the complainants to see a psychiatrist. Based thereon, Mr Iitula submitted that all three complainants suffered mental injury and as such the provisions under s 3 (1) *(a)* (iii) (aa) of the Act ought to apply. The accused should thus be sentenced to a minimum of 15 years imprisonment on each count of rape. Mr Iitula submitted, in conclusion, that there does not exist any compelling circumstances to justify the court deviating from the minimum sentences prescribed by the Act. He recommended an effective term of imprisonment of 35 years, with some sentences in respect of counts four and five to run concurrently with those in counts one, two and three.

[18] A fundamental issue to consider or determine is whether or not the provisions of the Act, specifically as they relate to the prescribed minimum mandatory sentences, permits sentences to run concurrently with any other sentence imposed.

[19] Section 3(4) of the Combating of Rape Act provides that:

> 'if a minimum sentence prescribed in subsection (1) is applicable in respect of a convicted person, the convicted person shall notwithstanding anything to the contrary in any law contained, not be dealt with under section 297(4) of the Criminal procedure Act 1977, Act 51 of 1977). Provided that if the sentence imposed upon the convicted person exceeds such minimum sentence, the convicted person may be so dealt with in regard to that part of the sentence that is in excess of such minimum sentence.'

[20] Section 297(4) of the Criminal Procedure Act 51 of 1977 ('the CPA') provides for the court to suspend the sentence or part thereof for a period not exceeding five years. There is no provision that prohibits the minimum

sentences imposed to run concurrently. Section 280(2) of the CPA provides the court with the authority to order sentences to run concurrently.

[21] The above provisions should be read in conjunction with what the Supreme Court held in *Zedikas Gaingob and 3 others v S*[9] that:

> 'the phenomenon of what academic writers have termed informal life sentences where the imposition of inordinately long terms of imprisonment of offenders until they die in prison, erasing all possible hope of ever being released during their life time is alien to a civilised legal system and contrary to an offender's right to human dignity protected under Art 8 of the Constitution and that the absence of a realistic hope of release for those sentenced to inordinately long terms of imprisonment would in accordance with the approach of this court in *Tcoeib* and other precedents offend against the right to human dignity and protection from cruel, inhumane and degrading punishment'.

[22] The effect of the Gaingob judgment is that a convict cannot be given an inordinately long sentence which will eventually erase all possible hope of ever being released in his lifetime.

[23] Where the court is faced with multiple counts involving serious offences likely to attract lengthy terms of imprisonment, the sentencing court is obliged to consider the cumulative effect of the sentences to be served. Where, therefore, the cumulative effect is likely to be disproportionate to the blameworthiness in relation to the offences committed, or will be so excessive as to evoke a sense of shock, the individual sentences can significantly be enhanced by ordering the sentences to run concurrently.

[24] Section 3 (2) of the Act provides that, unless the court is satisfied that substantial and compelling circumstances exist, justifying the imposition of a lesser sentence, the prescribed minimum sentences ought to stand. It has been held that for the court to find that substantial and compelling circumstances are present, they must be such as to cumulatively justify a departure from the standardized response chosen by the Legislature.[10]

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[9] *Zedikas Gaingob and 3 others v S* (SA 7/2008, SA 8/2008) [2018] NASC 4 (06 February 2018).

[10] *S v Malgas* 2021 (2) SA 1222 (SCA) adopted by this court in *S v Lopez* 2003 NR 162 (HC).

[25] The Supreme Court in *S v Haufiku*[11] discussed the issue of substantial and compelling circumstances as follows:

> 'Substantial and compelling circumstances constitute facts and circumstances concerning the crime, its impact on society, in particular on the victim, and the personal circumstances of the perpetrator which, viewed cumulatively and in their totality, make the imposition of the mandatory minimum sentence disproportionate and unjust. In assessing whether that test has been met, a sentencing court should place in the scale all the factors traditionally taken into account in mitigation or aggravation of sentence but bearing in mind that the legislature's chosen standardised response to the crime of rape should not be departed from for flimsy reasons such as sympathy for the perpetrator. It must be borne in mind that, apart from it being an obnoxious offence deserving severe punishment in its own right, the legislature has identified certain types of conduct under which rape is committed (coercive circumstances) as deserving of standardised severity. These include where 'the complainant has suffered grievous bodily or mental harm as a result of the rape' or where 'the convicted person uses a firearm or any other weapon for the purpose of or in connection with the commission of the rape'.

[26] It is found that the accused`s mitigating factors placed before this court by his counsel, carries little weight. The accused has shown no remorse for his actions. He gave a bare denial in relation to the rapes of QN and WK, and insisted that he had a consensual sexual relationship with JK, despite not putting same to the latter whilst she was on the stand. The accused`s mitigating factors, if considered in isolation, do not qualify as substantial and compelling circumstances so as to justify the imposition of a lesser sentence.

[27] There is no doubt that the offences for which the accused has been convicted of are serious and prevalent. The circumstances surrounding the commission of these offences justify the imposition of the prescribed minimum sentences in terms of s 3 of the Act.

[28] I now turn to deal with the issue of the penalty clause and which provision of the Act ought to apply in relation to the circumstances of the matter. Mr Kaurivi contends that the rapes of WK and JK ought to fall in the category of coercive circumstances, justifying a period of imprisonment of not

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[11] *S v Haufiku* (SA 6/2021) [2023] NASC 25 (21 July 2023).

less than ten years, whereas a period of 15 years imprisonment applies in respect of QN, given that she was under the age of 13 years, at the time of the incident. In opposition, Mr Iitula submitted that all three complainants suffered mental injury, as testified by the social worker and as such, a minimum period of 15 years imprisonment is prescribed in terms of the Act.

[29] Mr Kaurivi stated that no evidence was led on whether the complainants suffered mental injury or the degree of mental injury purportedly suffered by the complainants. He submitted further that the social worker, who testified to the mental status of the complainants, conceded that she was not qualified to make a determination as to the mental suffrage of the complainants. Be that as it may, this court finds that there was undoubtedly some degree of emotional harm suffered by the complainants as a result of the rapes.

[30] This court fully associates itself with the sentiments expressed by the Supreme Court in *S v Haufiku*[12], when it held that;

> 'The State not having led evidence on the 'lasting physical and psychological impact' of the acts of rape on the victim ought not to have enjoyed the priority it did. I am not prepared to accept that because evidence is not led to that effect, the experience of rape does not produce lasting psychological impact on a woman. How could it not? Empirical research findings by the Legal Assistance Center (LAC) which has done pioneering work in this area demonstrates that social stigma attaches to rape.
>
> [17] According to the LAC4:
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> "In every focus group discussion participants raised the topic associated with rape. This stigma brands the victim as tainted and suggests that the experience of rape, though beyond her control, is one that is deeply shameful. . . .
>
> While the shame that rape brings on a family in large part derives from the community's response to that rape, sometimes this shame comes from feelings of guilt within the family as well."
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> [18] Therefore, even in the absence of specific evidence, the baseline assumption must be that non-consensual sexual intercourse with a woman is the most

[12] *S v Haufiku* (SA 6/2021) [2023] NASC 25 (21 July 2023).

humiliating experience she can ever be subjected to. I doubt that a woman can ever forget the day that she had been subjected to the indignity of rape!

[19] The High Court's conclusion that (at the very least) the State had not proved lasting psychological impact on the victim cannot be correct.'

[31] The court is thus in agreement with the contention by Mr Iitula that 15 years is a suitable sentence in respect of all three counts of rape in terms of s 3 (1) *(a)* (iii) (aa).

[32] Having considered the personal circumstances of the accused, the circumstances under which the offences were committed, the interest of society and the objectives of punishment, an appropriate sentence on counts four and five would be six months` imprisonment on each count. In relation to the counts of rape, a sentence of effective imprisonment is inescapable. Considering the period that the accused spent in custody, the guidelines in the *Gaingob* judgment and the cumulative effect of anticipated imprisonment, part of the sentences should be ordered to run concurrently and some suspended. The suspended sentences should serve as a personal deterrence to the accused person upon his release.

[33] In the result, the following sentences are imposed:

Count 1 – Rape in relation to WK: 15 years` imprisonment.

Count 2 – Rape in relation to JK: 15 years` imprisonment. In terms of s 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that five years thereof are to be served concurrently with the sentence on count one.

Count 3 – Rape in relation to QN: 15 years` imprisonment. In terms of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that five years thereof are to be served concurrently with the sentence on count one.

Count 4 – Assault (common) in relation to WK: six months` imprisonment, wholly suspended for a period of five years on condition

that the accused is not convicted of assault committed during the period of suspension.

Count 5 – Assault (common) in relation to JK: six months` imprisonment, wholly suspended for a period of five years on condition that the accused is not convicted of assault committed during the period of suspension.

[34] The accused should thus serve an effective period of 35 years' imprisonment.

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HC JANUARY

JUDGE

APPEARANCES:

STATE:	T T Iitula Of the Office of the Prosecutor-General, Windhoek

ACCUSED:	T K Kaurivi Of T K Kaurivi Legal Practitioners Instructed by the Directorate Legal Aid, Windhoek