REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI APPEAL JUDGMENT

Case no: CA 08/2012

In the matter between:

BENISIER MEKELO NDAKOLO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ndakolo v The State* (CA 08/2012) [2013] NAHCNLD 57 (05 December 2013)

Coram; MILLER, AJ et CHEDA, J

Heard: **05 December 2013 Delivered:** **05 December 2013**

Flynote: Sentence - Appellant convicted of rape of a nine year old boy. Sentence of 17 years imprisonment imposed. On appeal held that the retributive and deferent aspects of sentence to be afforded more weight than the personal circumstances of the appellant. Sentence confirmed.

1. The appeal is dismissed.

JUDGMENT

MILLER, AJ (CHEDA, J concurring)

[1] The appellant was convicted by a regional magistrate on a charge of rape read with the Combating of Rape Act, Act 8 of 2000 and sentenced to 17 years imprisonment. The appellant was 19 years old when the crime was committed. The victim of the rape was a

nine year old boy.

[2] The charge and the subsequent conviction and sentence stem from certain events which happened on 18 may 2006 near a place called Okatale and which is situate within the magisterial district of Eenhana.

[3] On that day the complainant and a friend of his went to a shop to deliver flour. On their way back they were confronted by the appellant who accused them of taking sugar cane from his house.

The appellant then told the complainant that he (the complainant), must either submit to a beating or to a sexual act. The response of the complainant was that he would prefer a beating if those were the only options. The appellant then told the complainant to bend forward. The appellant then lowered the trousers the complainant was wearing, unzipped his own trousers and proceed to have sexual intercourse with the complainant per anum. During the course of this ordeal the appellant also hit the complainant with a whip, the blows being directed to the complainant's back. The complainant stated that he found the experience painful

[4] .It is not known whether the complainant suffered any physical injury and, if so, what the extent of those were. No medical evidence was presented at the trial before the regional magistrate.

[5] The facts I have mentioned were not disputed and thesr is, correctly in my view, no appeal against the conviction. The appeal before us is directed at the sentence imposed by the regional magistrate. Three grounds of appeal were raised in the Notice of Appeal. They are:

1. The sentence imposed is disturbingly inappropriate;
2. the regional magistrate misdirected himself by not considering and properly applying his mind to all the relevant factors and;
3. the regional magistrate erred in placing too much emphasis on the seriousness of the crime at the expense of the personal circumstances of the appellant.

[6] The first and third grounds raised in the Notice of Appeal in essence seek to attack the sentence imposed on the basis that it is disturbingly inappropriate as a result of the regional magistrate having misdirected himself in the weight he attached the seriousness of the crime.

[7] In my view the second ground of appeal is entirely without merit. The learned regional magistrate in the course of his judgment on sentence took into account and considered all the relevant factors, these being the nature of the crime, the personal circumstances of the appellant and the interests of society. It consequently remains for us only to consider whether the sentence imposed is disturbingly inappropriate.

[8] I bear in mind also that *in casu,* the regional magistrate was obliged under the provisions of the Combating of Rape Act, to impose a minimum sentence of fifteen year imprisonment unless there were substantial and compelling circumstances sufficient to warrant the imposition of a lesser sentence. The regional magistrate concluded that there were no such circumstances. There is no appeal against that finding. I, in any event, believe that the regional magistrate's finding was justified.

[9] The question ultimately is whether the sentence imposed, which is in excess of the

prescribed minimum sentence is disturbingly inappropriate. It is quite permissible and more often than not inevitable that in considering and affording appropriate weight to the conflicting considerations relevant to sentence, more weight will be attached to one or more considerations and lesser weight to others.
S v. Van Wyk 1993 NR 246 (SC).

[10] It is a sad and notorious fact that women and children living in this country have become increasingly subject to violence and abuse either gratuitously or for the most unworthy reasons. I fully agree with the following dictum emanating from the judgment in S v Iilonga (CC17/2012) [2013] NAHCNLD 06 (25 February 2013)

> "why should women and children in this country feel insecure when moving around in public at any time of day; apprehended by feelings of anxiety, fear or that something bad could happen to them?; thereby diminishing the quality and enjoyment of their lives. It must be emphasised that under the Constitution the rights of children are not less valued or of less importance. On the contrary, they have a legitimate right to protection from maltreatment, neglect, abuse or degradation and there is a reciprocal duty to afford them such protection. It has therefore been said that such a duty falls not only on law enforcement agencies, but also on all right thinking people and, ultimately the court, being the upper guardian of all children."

[11] It is a realistic fact that the imposition of substantial custodial sentences is not the ultimate panacea for this scourge. That does not detract from the fact that the courts should play their role as part of the collective effort to eradicate this violence from society.

[12] More often than not, our courts when considering an appropriate sentence in cases of this kind, ought to afford more weight to the punitive, retributive and deterrent aspects of sentence. The personal circumstances of the accused, although relevant and worthy of consideration, must yield to the other competing considerations. That was in essence the approach adopted by the regional magistrate which approach I cannot fault. For these reasons I conclude that the sentence imposed was not disturbingly inappropriate.

[13] In the result the appeal is dismissed.

PJ Miller

Acting Judge

M Cheda

Judge