REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC 17/2012

In the matter between:

THE STATE

and

MWAALA IILONGA **ACCUSED**

Neutral citation: *The State v Iilonga* (CC 17/2012) [2013] NAHCNLD 06 (25 February 2013)

Coram: LIEBENBERG J
Heard: 19 February 2013
Delivered: 25 February 2013

Flynote: **Sentence** – Accused convicted on plea of guilty on a charge of rape in contravention of the provisions of s 2 (1)(*a*) of the Combating of Rape Act, 8 of 2000.

Youthful offenders – *Dicta* enunciated in *S v Ericksen* that youthfulness is a mitigating factor endorsed – However, youthfulness only one of several other factors relevant to sentencing – Sentencing court not to indiscriminately exercise its discretion by simply accepting in all cases as a mitigating factor that youths are always immature, lack insight, discernment and experience – Regard must also be had to the circumstances of a particular case (*Director of Public Prosecutions, Kwazulu-Natal v P*) followed – Court obliged to look at all facts and circumstances *before* reaching a conclusion.

Unsophisticated accused – Mere *ipse dixit* from the Bar that accused is an unsophisticated person because he has no or little formal education does not *per se* make of him an unsophisticated person – Neither the fact that he hails from a rural setting – In order to be a valid consideration, and as such a mitigating factor, it should be established that (i) the accused's background causes him/her to be an unsophisticated person; (ii) that this fact indeed impacted on his/her abilities or actions during the commission of the crime; and (iii) if so established, the weight to be accorded thereto – Without these facts being duly established, there is no legal basis the court would be entitled to treat the accused differently.

Psychological harm – Victim 8 year old – Severe injuries inflicted to genitalia as a result of the sexual intercourse – Evidence of permanent psychological harm lacking – Unrealistic to suppose that there will be no psychological harm – Does not mean that sentence should be approached on the footing that there was no psychological harm.

Substantial and compelling circumstances – Circumstances considered individually might be substantial – However, to find that those circumstances are compelling it must be considered together with all the circumstances present – Extenuating circumstances and aggravating factors to be considered together in the evaluation.

Summary: The accused was convicted on his plea of guilty for having raped the complainant aged 8 years. He is 21 years old, a first offender and progressed at school up to grade 5 before dropping out. Complainant was coming from school on her way home when forcibly overpowered and raped by the accused. Serious injuries were inflicted to the genitalia which required medical intervention. Court found that despite the presence of substantial circumstances these, when considered together with all the circumstances and aggravating factors, are not compelling. The court thus not entitled to impose a lesser sentence. On the contrary, the facts of the case dictate that a sentence above the prescribed minimum sentence be imposed. Accused sentenced to 20 years' imprisonment, partly suspended.

ORDER

The court imposes the following sentence:

20 years' imprisonment of which 3 years is suspended for a period of 5 years, on condition that the accused is not convicted of rape or attempted rape, committed during the period of suspension.

JUDGMENT ON SENTENCE

LIEBENBERG J:

[1] The accused, consequential to a plea of guilty, was convicted on 19 February 2013 on a charge of rape, in contravention of the provisions of s 2 (1)(*a*) of the Combating of Rape Act, 8 of 2000 (hereinafter "the Act").

[2] Ms *Amupolo* from the Directorate: Legal Aid, represents the accused in these proceedings, and pursuant to the accused's plea of guilty, prepared a written plea explanation in terms of s 112 (2) of Act 51 of 1977. In the statement the accused admits having committed a sexual act on the 22nd of July 2011, at Ampole village, in the district of Outapi, with K, by penetrating her vagina with his penis under coercive circumstances ie that he applied physical force to her person while she was eight years of age, and he being 21 years old; thus, an age difference of more than three years. In amplification of his plea he stated that on the said date he came from the cuca shops when he met with the complainant, walking with a friend. He does not say what caused the friend to run away; only that he thereafter decided to have sexual intercourse with the complainant. After pushing her down to the ground, he forcibly removed her panties and had sexual intercourse with her for an undetermined period of time. They thereafter parted ways.

[3] The evidence led in mitigation was that of the accused and his elderly mother, Ms Johanna Samuel.

[4] The personal circumstances of the accused amount to the following:

He is currently 22 years of age and has been living with his parents in the village, until his arrest in July 2011. He has remained in custody ever since, a period of approximately one year and seven months. During this period he developed asthma and believes this was brought about by the poor conditions under which he was detained. According to the accused he attended school up to grade 5, which he passed, but was forced to leave school as his parents refused to cover the school fees. Ever since, he remained at home as he was unemployed. It however emerged during his mother's evidence that there was actually a different reason why the accused had left school, namely, that he made himself guilty of truancy and refused to attend school; despite several attempts from her side to persuade him otherwise. When asked to express himself about the offence he committed, he said that he could not deny it and

if given the opportunity to apologise to the complainant's family, he would do so. Despite having pleaded guilty, admitting the unlawfulness of his conduct, the accused in cross-examination made a complete turnabout, now saying that he was under the influence of alcohol to such an extent that he did not know what he was doing. When asked to explain the contradicting versions, he simply answered by saying that he did not 'hear (the question) properly' and that he indeed knew what he was doing; thus appreciating the wrongfulness of his act. The accused has not brushed with the law before and will be treated as a first offender.

[6] Ms Samuel testified about the conditions at home and that the accused was one of 13 children. He was born on 12 July 1990, thus 21 years old when committing the crime. She described him as being an obedient child and offered her apologies to the court for her son's misdeeds. Although not clear from her evidence as to how it came to her attention, she said that shortly after the incident she visited the scene and observed blood (spots) on the ground; she thereafter contacted the police.

[7] It was further submitted in mitigation, on the accused's behalf, that, given his young age, he was immature and uneducated; due to his detention, he was unable to apologise to the complainant's family; and lastly, that the accused took the court into his confidence by showing remorse for his wrongdoing. It was also pointed out that no weapon was used in the commission of the crime and, when regard is had to all the circumstances of the case, the court should find, in the light of what has been said in *S v Limbare*[1], that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. The mandatory sentence applicable in circumstances as the present is imprisonment for a period of not less than 15 years.[2]

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[1] 2006 (2) NR 505 (HC).
[2] Section 3 (1)(*a*)(bb) of Act 8 of 2000.

[8] The accused at the time of committing the offence was 21 years of age and, although still young, I do not consider him for purposes of sentence to fall in the same category than juvenile offenders would. As was stated in *S v Erickson*[3], it is trite that youthfulness of an offender would usually be a mitigating factor; that young offenders often "lack(s) maturity, insight, discernment and experience and, therefore, act(s) in a foolish manner more readily than a mature person". It was for that reason, the court said, that extra care is needed in determining a suitable sentence for a young offender; more so, where the chances of reform is great and "the result of an indiscriminate exercise of the court's discretion is potentially irreparable". I respectfully endorse these views. However, it remains but *one* of several other factors the court needs to consider in order to arrive at an appropriate sentence; due regard must equally be had to both extenuating circumstances *and* aggravating factors present.

[9] By the same token, in my view, a sentencing court would be wrong in its approach by indiscriminately exercising its discretion by simply *accepting* and without due regard being had to the particular circumstances of the case, that youthful offenders, *in all cases*, are immature, lack insight, discernment and experience. The sentencing court, when dealing with youthful offenders, would still be required to look at *all* the facts and circumstances of a particular case, *before* it would be entitled to come to such a conclusion. This is evident from the *dicta* enunciated in *Director of Public Prosecutions, Kwazulu-Natal v P*[4] where the accused was 12 years old at the time of orchestrating the murder of her grandmother. The court at 249i- 250a said:

'The accused, in my view, and in spite of her age and background, acted like an "ordinary" criminal and should have been treated as such. She had no mental

[3] 2007 (1) NR 164 (HC) at 166 par 5.
[4] 2006 (1) SACR 243 (SCA).

abnormalities and, something the Judge had noted, was able to pass herself off and in many respects acted like someone of about 18 years of age. … All the guesswork about her mental and physical age in contradistinction to her actual age pales into insignificance.' (My emphasis)

[10] The accused in the present matter hails from a rural setting where he and his siblings lived with their parents and he, by his own choice, received formal education only up to grade 5 before he dropped out. It is against this background that defence counsel contends that the accused is immature and uneducated: thus explaining his irresponsible conduct when committing the crime. I do not agree. The contention as far as it concerns the psychological development of the accused is speculative, as there is no evidence before the court from which this may be inferred. It cannot, in my view, simply be assumed that because the accused grew up in a rural environment and received limited formal education that, therefore, he is immature, explaining his conduct on the day he committed the rape. I can do no better than to repeat what I occasioned to say in *The State v Mandume Matheus Kamudulunge*[5] at p 6 par. 10:

'Defence counsel's contention that the accused's lack of formal education should be considered a mitigating factor, is, on the present facts, without justification; for there is nothing before Court showing that the accused is an unsophisticated person; neither that it might have impacted on his state of mind when committing the offences and thus lessens his moral blameworthiness. Lack of formal education does not *per se* classify a person to be unsophisticated, for in this country there are many people who, without *any* formal education, live a decent life and has distinguished themselves from others as leaders. … Neither do I see the connection between the accused's limited formal education and the manner in which he planned the commission of the offences and the execution thereof, for it does not speak of any lack of sophistication. Consequently, I do not consider the accused's lack or limited formal education to be a mitigating factor – more so, where the accused was unwilling to inform the Court of the reasons why he dropped out of school.'

[5]Unreported Case No CC 20/2010 delivered on 31 October 2011.

[11] Defence counsel's *ipse dixit* from the Bar that the accused is an unsophisticated person because he has no or little formal education does not *per se* make of him an unsophisticated person; neither the fact that he hails from a rural background. I am of the opinion that in order for it to be a valid consideration and as such a mitigating factor, it should at least be established that (i) the accused's background causes him/her to be an unsophisticated person; (ii) that this fact indeed impacted on his/her abilities or actions during the commission of the crime; and (iii) if so established, the weight to be accorded thereto. If these facts have not duly been established, I am unable to see on what legal basis the court would be entitled to treat the accused any differently when sentencing.

[12] The accused in this instance was 21 years of age when he committed the crime and testified that he on that day came from a nearby cuca shop where he consumed some alcohol. He did not disclose any detail as to how it came that he acted in the manner he did. Neither am I willing to speculate on his psychological development in the absence of any evidence to that end; nor can the accused expect the court to do so if no attempt was made to present evidence showing otherwise.

[13] This notwithstanding, the court will keep in mind that the accused is relatively young and in view thereof, there is a possibility of rehabilitation.

[14] Turning to the aspect of remorse and the accused having taken the court into his confidence, I am not entirely convinced that this is indeed the case, for the accused was clearly trying to shift the blame for having left school at an early age to his parents; secondly, he clearly tried to exculpate himself by saying that he did not appreciate the wrongfulness of his act, due to intoxication. He, in view thereof, did not strike me as an honest witness or a person who took the court into his confidence. He has until now not offered any apology to the victim's family and, if his mother could do so in open court, I fail to see why he could not have done the same. In order for remorse to be

a valid consideration at the stage of sentencing, it has to be sincere[6] whilst it has also been said in *S v K*[7] at 3 par. 3 that:

> 'Although a plea of guilty can be indicative of contrition on the part of an accused, it should not be taken for granted to be the case; as in many cases the evidence against an accused is so overwhelming that it leaves the accused with no option other than to plead guilty. In that case, there is no reason why the accused should 'benefit' from the situation and have his plea of guilty noted as a mitigating factor (*S v Landau* 2000 (2) SACR 673 (W) at 678a – c).'

[15] In the present case Mr *Shileka* submitted that the writing was on the wall for the accused and there was no other option for him but to plead guilty. It seems to me that it is indeed the case. I am thus unable to come to the conclusion that the accused has demonstrated any remorse for his wrongdoing to the victim and her family.

[16] A factor which usually weighs heavily with the court in favour of the accused is when he/she is a first offender. Although it does not *per se* guarantee that the accused would not receive a custodial sentence – particularly when convicted of a serious crime (as in this instance) – it is an important mitigating factor that deserves to be given sufficient weight. Another is the fact that the accused has been in custody for over one-and-a-half years, pending the finalisation of the trial.

[17] The offence of rape is undoubtedly serious, especially where it involves a child 8 years of age who, in the company of a friend and on their way home from school, was accosted by the accused in broad daylight and forcibly raped in the open. It is clear from the medical evidence adduced that the

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[6] *S v Seegers*, 1970 (2) SA 506 (A) at 511G-H.
[7] 2011 (1) NR 1 (HC).

complainant's body as regards her genitalia, at the time of the incident, was physically (still) underdeveloped as she sustained several injuries of the genitalia in the process. It is common cause that the complainant was first taken to Tsandi district hospital on the same day where she was medically examined by a certain Dr Emmanuel. He noted his findings in a report (J-88) which was received in evidence under s 212 (4)(*a*) of Act 51 of 1977.

[18] Those findings, as noted in the report, and of importance to these proceedings, are the following: The complainant was in shock and her mental state is described as 'painful and (in) distress'; her clothes were stained with (her own) blood. The injuries were noted to be a second degree tear of the perineum; lacerations of the labia majora and minora, and vestibule. The hymen was not intact and she bled from her vagina. The complainant was subsequently transferred to Oshakati Intermediary hospital where she was examined by Dr Gideon, a medical practitioner.

[19] Due to the complainant's young age she was taken to theatre where an examination was conducted under anaesthesia. Dr Gideon testified that there were several tears of the vagina which she described as "the whole part was torn on the inside, showing multiple tears" as well as a big tear of the perineum; all of which had to be sutured.

[20] From the above it is obvious that serious injuries were inflicted to the complainant's genitalia during the sexual act committed with her. The extent of her bleeding from her genitalia was such that the accused's mother even noticed blood on the ground at the scene. The excruciating pain that the complainant must have experienced during this horrific ordeal is unthinkable; understandably resulting in her being in a state of shock and painful distress when seen by the doctor. Counsel for the defence ventured to say that, in the absence of reliable evidence showing that complainant was psychologically

scarred by the crime committed against her, the court should not find otherwise. I do not agree for the following reasons.

[21] I consider complainant to have been at a vulnerable stage of her life when she was raped. Bearing in mind that she was severely injured and in shock when examined by the doctor at Tsandi, it would be unrealistic to suggest that no psychological harm was done to her simply because there are no evidence to that effect. I therefore firmly associate myself with the words of Mpati JA in *S v Mahomotsa*[8] where the following is stated at 441i-j:

'Where as here, the complainants were young girls, it is quite unrealistic to suppose that there will be no psychological harm. To quantify its likely duration and degree of intensity, of course, is not possible in the absence of appropriate evidence, but that does not mean that one should approach the question of sentence on the footing that there was no psychological harm.' (My emphasis)

[22] The two victims in *Mahomotsa* were both 15 years of age. Complainant in the present case was merely 8 years old and as such more vulnerable. In my view, the psychological impact of the horrific ordeal she experienced is more likely to have a long-term effect on her than for it to be forgotten in the near future – not to mention the memory of the physical pain she had to endure during the assault. It is thus a factor to be taken into consideration when considering what suitable sentence to impose.

[23] The complainant, as mentioned, was at a vulnerable age and it was easy for the accused to abuse her. This is usually the case where criminals think they can get away with it – and all too often do. The accused afterwards saw the complainant was injured and was bleeding, but still had the audacity

[8] 2002 (2) SACR 435 (SCA).

to warn her not to tell anyone about what had happened, lest he would assault her. Understandably she immediately made a report when she reached home. Complainant was an innocent young girl making her way home from school in the company of a friend. She, like tens of thousands of other school going children in this country do so daily; and there is no reason why a single one of them should feel unsafe whilst on their way. They equally have a right to walk and play on the streets peacefully outside their homes in a free country, without having to fear falling victim to unscrupulous criminals like the accused. 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 (*De Reuk v Director of Public Prosecutions, WLD*).[9]

[24] I consider the above to be aggravating circumstances weighing heavily against the accused.

[25] I believe that the circumstances of this case are such that it evokes widespread outrage in communities throughout Namibia and, unless there are truly convincing reasons for a different response, crimes like the present is required to elicit a severe and consistent response from the courts, lest we risk encouraging the breakdown of law and order and communities taking the law into their own hands. It is trite that the natural indignation of interested persons, and of the community at large, should receive some recognition in

[9] 2003 (1) SACR 448 (WLD) at 457b-d.

sentencing by the courts (*R v Karg*).[10] The court is sensible to the prevalence of serious crime and the widespread terror and misery caused to innocent persons involved; and therefore, must send out a clear message that such conduct will not be tolerated, and that punishment will become progressively heavier.

[26] Turning now to the objectives of punishment. It was contended that, given the young age of the accused, the prospects of rehabilitation are good; a factor to be taken into account when sentencing. I agree, however, it does not mean to say that, therefore, a custodial sentence should not be imposed. Where the circumstances are such where the interests of the offender are outweighed by the rights and legitimate expectations of society, and the crime committed is of serious nature, then, reformation would necessarily have to take place in an institution where the accused is detained and kept in check. In these cases the emphasis usually falls on prevention, deterrence and retribution as objectives of punishment. I am convinced that this is one such case.

[27] In its determination as to whether or not there are substantial and compelling circumstances present, justifying the imposition of a lesser sentence than what is prescribed in the Act, I take cognisance of what has been stated in *S v Limbare (supra)* and adopt the same approach. After due consideration of all the extenuating circumstances, as well as the aggravating factors present, I have come to the conclusion that the mitigating circumstances such as the accused's relatively young age; he being a first offender; the plea of guilty tendered; and the period of time already spent in custody, when considered in *isolation,* would indeed be substantial; but, when considered together with *all the circumstances* (as the court is required to do), including the aggravating factors, it significantly loses weight, to the extent that it cannot be said to be 'substantial and compelling', justifying the imposition of a lesser sentence as provided for in the Act.

[10] 1961 (1) SA 231 (A) at 236B.

[28] I accordingly find that no substantial and compelling circumstances exist in this matter. On the contrary, in the circumstances of this case, I am in agreement with State counsel that this is rather a matter where a sentence of imprisonment in excess of the mandatory minimum sentence, partly suspended, would be justified.

[29] Consequently, the court imposes the following sentence:

20 years' imprisonment of which 3 years is suspended for a period of 5 years, on condition that the accused is not convicted of rape or attempted rape, committed during the period of suspension.

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JC LIEBENBERG

JUDGE

APPEARANCES

STATE	R Shileka Of the Office of the Prosecutor-General, Oshakati.
ACCUSED	M Amupolo Instructed by the Directorate: Legal Aid, Oshakati.