



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC 08/2011

In the matter between:

**JACOB SIMON**

**APPLICANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Simon v The State* (CC 08/2011) [2014] NAHCNLD 14 (27 February 2014)

**Coram:** LIEBENBERG J

**Heard:** 20 February 2014

**Delivered:** 27 February 2014

**Flynote:** **Criminal procedure** – Appeal – Application for leave to appeal in terms of s 316(1)(b) – Court found no reasonable prospects of success on appeal to exist.

Condonation – Notice of appeal filed out of time – In view of no reasonable prospects of success on appeal – Application refused.

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**ORDER**

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There are no prospects of success on appeal and the application for condonation of late filing of the Notice of Appeal is accordingly refused.

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**JUDGMENT*****Application for Leave to Appeal***

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LIEBENBERG J.

[1] Applicant was convicted on pleas of guilty on charges of rape in contravention of s 2 (1)(a) of the Combating of Rape Act, 8 of 2000 (count 1) and murder (count 2). On the first count he was sentenced to 18 years' imprisonment and on the second to 35 years' imprisonment. Ten years of the sentence imposed on count 1 was ordered to run concurrently with the sentence of 35 years, applicant thus having to serve 43 years' imprisonment.

[2] Ms *Mugaviri* appears on behalf of the applicant while Mr *Wamambo* represents the respondent. Counsel filed comprehensive submissions for which the court expresses its gratitude.

[3] Applicant on the advice of his counsel, in my view correctly, withdrew his original application for leave to appeal and on 06 February 2014 filed a fresh application, clearly setting out the grounds relied upon for the appeal. In addition he seeks condonation for the late noting of the appeal.

[4] Respondent opposes both applications on the basis of there being no prospects of success on appeal. I now turn to consider whether that is indeed the case.

[5] The grounds relied upon for purposes of the application are: The sentences imposed on both counts are too harsh and induces a sense of shock; the court misdirected itself by giving insufficient weight to the personal circumstances of the applicant being a first offender, that he assisted with the investigation and has pleaded guilty. Furthermore, that insufficient weight was given to contrition on the part of the applicant as stated in his plea explanation and that the court erred in law by finding that no substantial and compelling circumstances existed in respect of count 1.

[6] In support of the contention that both sentences induce a sense of shock counsel referred me to various judgments relating to sentences imposed in similar cases. As regards count 1 counsel concedes that rape is a very serious and prevalent offence in Namibia for which the courts, depending on the circumstances of the case, have imposed in the past the prescribed minimum sentences. But, sentences in excess of the mandatory minimum had also been imposed where appropriate

[7] Applicant did not testify in mitigation and his personal circumstances were put before court from the Bar. Part of applicant's profile is that he is a first offender of relatively young age (22 years) when he committed the offences and that he apologised to the family of the victim and society in general. Unfortunately the applicant did not take the court into his confidence and testify about the remorse he now claims to have and in absence thereof, it was found that little weight could be given to penitence alleged to exist (para 9).

[8] As can be gleaned from the judgement on sentence the personal circumstances of the applicant were summarised and considered at paras 8 – 10. The court was mindful of applicant being a first offender and his young age. Mitigating factors were summarised, discussed and considered in the judgement (para 10).

[9] The determination whether or not substantial and compelling circumstances were present in view of relevant case law was thoroughly dealt

with in the judgement and in the end the court came to the conclusion that the circumstances present were not such that it was substantial, compelling the court to impose a lesser sentence (para 14). The court was of the view that given the circumstances under which the rape was committed, a sentence in excess of the prescribed minimum was justified. The victim was a girl aged 17 years doing her chores around the house when the applicant came upon her and decided to rape her. She tried to run away but he gave chase and managed to grab her by the hair, forcing her to the ground. He used a panga he had with him to cut her panty from her body wherafter he had sexual intercourse. After he had finished he decided to kill her when she said she would report him to the police. The panga was used in the commission of both offences, a factor considered to be aggravating.

[10] Though the circumstances under which the rape was committed are not exceptional, the blatant manner in which the applicant went about to satisfy his sexual desires cannot simply be ignored. When the victim showed no interest in him and even tried to run away, he caught her and forced her into submission. He clearly used the panga he had with him to achieve his aim and is silent as to why he was in possession of a panga at the time. The court expressed its concern about the vulnerability of young children and with what ease their constitutional rights are trampled on. If the deceased knew the applicant's conduct was wrong and punishable by law, so did applicant, but he was not deterred in any way. He explained that when the deceased said she would report him he became scared and decided to kill her; but what did he expect? Were she just to accept her fate whilst he showed no respect to her fundamental rights? As stated in the judgement, only because the deceased stood up for what she believed was right, it cost her dearly as she paid with her life (para 16).

[11] In respect of count 1, having reconsidered all the circumstances favourable to the applicant as well as those factors weighing against him, I remain firm in the conclusion reached that there are no substantial and compelling circumstances present justifying the imposition of a lesser sentence.

[12] It should be borne in mind that the mandatory sentence of imprisonment not less than 15 years finds application to the present facts, but this is merely a *minimum* sentence and not the norm. Circumstances may arise where an injustice would be done even when the minimum sentence is imposed; conversely, there may also be instances where the circumstances of the case are such that the mandatory sentence is inadequate and when imprisonment in excess thereof is justified. In my view, this is one such case. The gravity of the offence including the circumstances under which it was committed, considered together with the interests of society, demand a sentence in excess of the prescribed minimum and I consider a sentence of 18 years' imprisonment appropriate.

[13] As for count 2, the attack on the deceased was merciless and can be described as vicious and fierce, the effect clearly evident from photos taken showing the severity of 17 blows directed at the body and head of the deceased. Four of these fractured the skull causing brain injuries, leaving gaping wounds to the head. The deceased died a horrendous death for no reason. Regard was had to the testimony of the deceased's mother who said there was no need for applicant to kill her child because of the rape. However, applicant felt differently and was willing to take a life only to avoid being apprehended. The court earlier remarked that applicant was unable to explain his irrational behaviour and must therefore be considered a danger to society (para 19).

[14] In view of the spate of brutal murders currently committed against women in this country, where the victims are beheaded with pangas or ruthlessly killed with knives and other dangerous weapons, the remarks earlier made by the court seems even more apposite. The following appears at para 17:

'This Court too often is called upon to decide cases in which pangas are used to mutilate and kill others and although it is not uncommon to see people walking the streets carrying pangas hanging from their sides, it seems to me that law enforcing

officers should take a different view of the situation and disarm those persons who are not in possession of these lethal weapons for legitimate reasons. Simply too many people in this country lose their lives or are mutilated with pangas in the hands of criminals who would not hesitate to use it against a fellow human being.'

[15] Crimes like the present disturb the peace and harmony in society and unless the offender is given a sentence which satisfies the requirements of justice, a sentence which not only reflects the disapproval of the court, but also that of society, some might lose faith in the justice system and decide to take the law into their own hands. When dealing with the objectives of punishment it was concluded that the seriousness of the crimes committed, and the interests of society, outweigh the interests of applicant by far and that lengthy custodial sentences were called for. The cumulative effect of these sentences was ameliorated by an order that it must partly run concurrently.

[16] Though criticism may justifiably be levelled against the judgement on sentence for not reflecting in any detail that the applicant pleaded guilty, it is a factor that was taken into consideration but which was not given considerable weight. It is usually considered to be a mitigating factor and rightly so, however, the court should be wary of giving too much weight thereto when this is not justified by the circumstances of the case. On the present facts it should be borne in mind that the sole reason why the applicant decided to kill his victim was to evade justice. Though it was contended that applicant intended pleading guilty from the outset, there is no evidence before the court that he had done so in the face of the State having a weak case. In the circumstances I find the remarks made in *S v Landau*<sup>1</sup> apposite:

'Courts often see as significant the fact that an accused chooses to 'plead guilty'. This is sometimes regarded as an expression on the part of the accused of genuine co-operation, remorse, and a desire not to 'waste the time of the court' in defending the indefensible. In certain instances a plea of guilty may indeed be a factor which can and should be taken into account in favour of an accused in mitigation of sentence. However, where it is clear to an accused that the 'writing is on the wall' and that he has no viable defence, the mere fact that he then pleads guilty in

<sup>1</sup>2000 (2) SACR 673 (WLD) at 678a-c>

the hope of being able to gain some advantage from that conduct should not receive much weight in mitigation of sentence unless accompanied by genuine and demonstrable expression of remorse, which was absent in casu.'

[17] In conclusion, I have compared the present sentences with those cases put before me by counsel and I am not persuaded that it is shockingly inappropriate for being too harsh and that a Court of appeal would come to a different conclusion.

[18] In the result, there are no prospects of success on appeal and the application for condonation of late filing of the Notice of Appeal is accordingly refused.

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JC LIEBENBERG  
JUDGE

APPEARANCES

APPELLANT

G Mugaviri  
Of Mugaviri Attorneys,  
Oshakati,

RESPONDENT

N M Wamambo  
Of the Office of the Prosecutor-General,  
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