

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

SENTENCE

Case No.: CC 12/2013

THE STATE

and

MARTIN JOHANNES ELAGO

ACCUSED

Neutral citation: *State v Elago (CC 12/2013)* [2016] NAHCNLD 89 (1 November 2016)

Coram: TOMMASI J

Heard: 26 January 2016, 29 February 2016, 19 May 2016, 1 May 2016, 8 August 2016 and 22 August 2016

Delivered: 1 November 2016

Flynote: Criminal Procedure — Sentence — Juvenile offender — Committed a series of offences of the same nature — Custodial sentence imposed despite the youthfulness

Summary: The accused was convicted of 3 counts of rape in contravention of the Combating of Rape Act and 1 count of attempted rape. He was 15 years old at the time of the first rape and shortly after his 16th birthday raped another victim twice on one day. Twelve days after he was released in the care of his guardian he attempted

to rape another complainant. His victims were 12, 9 and 8 years old respectively. The court held that despite his personal and mitigating youthfulness, the accused posed a risk to society and that he ought to be deterred from committing similar crimes. The sentence however is structured in such a manner as not to break the accused but to rehabilitate the accused.

ORDER

1. Count 1 –contravening section 2(1)(a) read with sections 1, 2(2), 3, 5 and 6 of the Combating of Rape Act, 2000, (Act 8 of 2000):
The accused is sentenced to 5 years' imprisonment
2. Count 2 - contravening section 2(1)(a) read with sections 1, 2(2), 3, 5 and 6 of the Combating of Rape Act, 2000, (Act 8 of 2000):
The accused is sentenced to 5 years' imprisonment.
3. Count 3 - contravening section 2(1)(a) read with sections 1, 2(2), 3, 5 and 6 of the Combating of Rape Act, 2000, (Act 8 of 2000)
The accused is sentenced to 5 years imprisonment.
It is ordered that 3 years of the 5 years' imprisonment imposed in respect of count 3 run concurrently with the sentence imposed in respect of count 2.
4. Count 4 - attempted rape- The accused is sentenced to 3 years imprisonment wholly suspended for five years on condition that the accused is not convicted of rape (whether it be common law or in contravention of the Combating of Rape Act, 8 of 2000) or attempted rape, committed during the period of suspension.

SENTENCE

TOMMASI J:

[1] The accused herein was convicted of 3 counts having contravening section 2(1)(a) read with sections 1, 2(2), 3, 5 and 6 of the Combating of Rape Act, 2000, (Act 8 of 2000) and 1 count of attempted Rape and the court is now tasked to impose an appropriate sentence.

The offences

[2] On 16 March 2010 the complainant came home from school. The accused grabbed her, hit her twice on her back with fists and let her lay down on her back. He then had sexual intercourse with her. He threatened to kill her if she should tell anybody. The complainant was a little over 12 years old at the time and the accused was 15 years old at the time. It appears from the record that the accused was not arrested for this offence until 15 August 2010 despite the fact that it is evident from the CR Number that it was reported to the police during March 2010.

[3] The accused turned 16 years old on 6 June 2010 and two days thereafter on 8 June 2010 he once again approached a nine year old girl on her way from school and raped her twice. Her hymen was ruptured and bleeding to the extent that she was still bleeding when she arrived home.

[4] The accused was identified the same day and arrested. He appeared in court on 9 June 2010 and he was held in custody until 13 October 2010. During this period whilst he was in custody he was arraigned before the same court for the first incident which took place in March 2010. He was released into the care of his guardian on 28 September 2010 in respect of the latter case and on 13 October 2010 on the second case. It is clear from these records that the magistrate was not alerted to the fact that the accused was detained on two similar counts.

[5] On 25 October 2010 i.e. shortly after he was released in the care of his guardian he committed the third offence of attempted rape. The complainant was an 8 year old walking home from school with her friends. The accepted evidence revealed that the accused had assaulted the 8 year old complainant when she resisted.

[6] The accused was arrested on 28 October 2010 on this count and held in custody until 22 December 2010 when he was once again released into the care of his guardian.

[7] It appears from the above that the accused used the same modus operandi each time i.e. he would wait the very young victims to come from school and then sexually assault them. The accused committed not only one offence but a series of sexual assaults on young defenceless victims. The offences committed are serious in nature and the fact that he committed it repetitively is an aggravating factor.

The offender

[8] The accused was himself a minor at the time of the commission of the offence and the court obtained a pre-sentence report from the directorate of Child welfare. This report gives an in-depth background of the accused. The accused was raised by his maternal grandmother and both his parents were largely absent in his life. He was however well taken care of by his two siblings. His mother passed away when he was 12 years old and his father passed away during 2010, the year during which the accused started offending. The accused however indicated that he was not affected by the death of his father as he hardly knew him.

[9] The accused appeared to have been a well behaved but slow learner who dropped out of school in grade four for no apparent reason. He continues to be well behaved in custody and shows willingness to do chores. Save for suffering from hypertension, he enjoys good health. The accused admitted to having taken intoxicating liquor before he committed the offence but did not raise this during his testimony in this court.

[10] The accused testified that he is 22 years old and that he does not have any children. He expressed remorse. He explained that he was afraid of the court and that this was the reason he pleaded not guilty. He testified that he has been in

custody since 2012. He testified that his grandmother who raised him died last year. It transpired that the accused has been in custody relating to another charge of rape since August 2012 which is still pending. For purposes of determining an appropriate sentence this court will not take into consideration the time spent in custody since this related to the legitimate incarceration pending another case.

Interest of society

[11] The community was terrorized by the accused's behaviour which ranged for a period of time. The victims were vulnerable young girls who were unable to defend themselves against the onslaught of the accused who was older and physically stronger than them. His conduct made it unsafe in broad daylight for the children in that community to walk from school. Enough has been said about how this offence is abhorred by society. In fact, this is indeed the reason why harsh minimum sentences are prescribed by legislature. Every accused must know that the courts will deal with perpetrators of this offence harshly.

[12] Amongst the personal circumstances of the accused, his youthfulness is the strongest factor mitigating in his favour. This was recognised by the legislature and section 3(3) of the Combating of Rape Act provides that the minimum sentences shall not be applicable in respect of a convicted person who was under the age of eighteen years at the time of the commission of the rape and the court may in such circumstances impose any appropriate sentence. The courts are also aware of the fact 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" (see *S v Erickson*,

[13] The above factor however does not stand alone. It must be viewed in the context of the crime committed, the repetitive nature thereof and the exploitation of the vulnerable young victims who must carry the emotional scars for their whole lives. I want to agree with the sentiments expressed by Liebenberg J that an accused cannot hide behind youthfulness; and that there are cases in which incarceration of children is required. [*S v K 2011 (1) NR 1 (HC)*] this is such a case.

[14] The accused carefully planned the commission of the offences by waiting for the children to come from school. He repeated this conduct knowing what he was doing was wrong. As a juvenile offender he was treated with mercy and released into

the custody of his guardian. He understood that his conduct would have legal ramifications but he persisted. This makes him a dangerous person unless restrained. The court cannot ignore the danger he poses to society merely because he is a juvenile defender. The accused must understand that for each one of his actions there are consequences so that he may think twice before repeating same. The message to all youthful offenders the message should also be clear: If you commit serious crimes you shall, like adults, receive custodial sentences. The court however structured the sentence in such a manner so as not to break the accused but to rehabilitate him.

[15] Having taken into consideration personal and mitigating circumstances of the accused, the offences he committed, and the interest of society the court is of the view that the following sentence would be an appropriate sentence:

1. Count 1 –contravening section 2(1)(a) read with sections 1, 2(2), 3, 5 and 6 of the Combating of Rape Act, 2000, (Act 8 of 2000):
The accused is sentenced to 5 years' imprisonment
2. Count 2 - contravening section 2(1)(a) read with sections 1, 2(2), 3, 5 and 6 of the Combating of Rape Act, 2000, (Act 8 of 2000):
The accused is sentenced to 5 years' imprisonment.
3. Count 3 - contravening section 2(1)(a) read with sections 1, 2(2), 3, 5 and 6 of the Combating of Rape Act, 2000, (Act 8 of 2000)
The accused is sentenced to 5 years imprisonment.
It is ordered that 3 years of the 5 years' imprisonment imposed in respect of count 3 run concurrently with the sentence imposed in respect of count 2.
4. Count 4 - attempted rape- The accused is sentenced to 3 years imprisonment wholly suspended for five years on condition that the accused is not convicted of rape (whether it be common law or in contravention of the Combating of Rape Act, 8 of 2000) or attempted rape, committed during the period of suspension.

MA TOMMASI

Judge

APPEARANCES

THE STATE:

Adv R Shileka
Office of the Prosecutor-General

ACCUSED:

Mr S Aingura
Aingura Attorneys