REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 80/2009

In the matter between:

FIKAMENI DANIEL **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation*: Daniel v S* (CA 80- 2009) [2017] NAHCNLD 62 (06 July 2017)

Coram: TOMMASI, J and JANUARY, J

Heard: 20 June 2017

Delivered: 06 July 2017

Flynote: Criminal Procedure – Appeal – Sentence – Contravening section 2(1)(a) of Act, Act 08 of 2000-Rape – Magistrate applying wrong section in act – Minimum sentence – Misdirection – No substantial and compelling circumstances – Sentence set aside – Correct sentence imposed afresh.

Summary: The appellant was convicted and sentenced for rape in accordance with the Combating of Rape Act, Act 8 of 2000 after he pleaded not guilty and a trial was held. The magistrate on submission of the prosecutor committed a misdirection to accept the submission of the prosecutor that the minimum sentence in the circumstances is 15 years' imprisonment applying the wrong section of the Act. The misdirection is corrected and the appellant is sentenced to 10 years' imprisonment.

ORDER

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1. The appeal succeeds;
2. The sentence of 16 years' and 10 months is set aside;
3. The accused is sentenced to 10 years' imprisonment.
4. The sentence is anti-dated to 13 July 2007.

APPEAL JUDGMENT

JANUARY J, (TOMMASI, J CONCURRING)

[1] The appellant in this matter was charged with contravening section 2(1)(a) of Act, Act 08 of 2000. He pleaded not guilty and after a trial was held he was convicted. This appeal is against sentence. The learned magistrate found no substantial and compelling reasons and sentenced the appellant on 13 July 2007 to '18 years' imprisonment, the one year and 2 months (1 Year 2 months by accused in custody awaiting sentence are to be subtracted). Effective: Sixteen years ten months (16 Years 10 months).'

[2] The appellant was unrepresented in the court *a quo.* He is represented in this court by Mr Aingura and the respondent by Mr Gaweseb.

[3] The record was mechanically recorded. The transcribed record in the meantime got lost and the record before this court is a reconstructed record with the notes of the magistrate. The charge sheet with the allegations and particulars of the act of the accused is not attached to the reconstructed record. Both counsel agreed to argue the matter on the record as is.

[4] The appellant filed a notice of appeal against both conviction and sentence on 21 August 2007 and 21 May 2011. Mr Aingura withdrew both these notices and filed a new notice of appeal with an application for condonation. Mr Gaweseb did not oppose the application for condonation and the matter was argued on sentence only. The appellant withdrew the appeal against conviction. Mr Gaweseb conceded that the appellant has prospects of success in that the magistrate misdirected himself by applying the wrong section of the Combating of Rape Act in being under the impression that the minimum sentence was 15 years imprisonment.

[5] The appellant was a first offender and was 24 years old at the time of sentence. The coercive circumstances proven was physical force by assaulting the complainant. The record indicates that the complainant was 17 years old. He spent 1 year and 10 months trial awaiting in custody. He is not married but has 9 children. He was employed before arrest.

[6] It is trite law that sentencing is pre-eminently within the discretion of the trial court. This court of appeal has limited power to interfere with the sentencing discretion of a court *a quo.* A court of appeal can only interfere;

- when there was a material irregularity; or
- a material misdirection on the facts or on the law; or
- where the sentence was startlingly inappropriate;
- or induced a sense of shock; or
- was such that a striking disparity exists between the sentence imposed by the trial Court and that which the Court of appeal would have imposed had it sat in first instance in that;

- irrelevant factors were considered and when the court *a quo* failed to consider relevant factors.[1]

[7] The relevant sections in the Combating of Rape Act, Act 08 of 2000 provides as follows:

> **'2 Rape**
>
> (1) Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances-
>
> (a) commits or continues to commit a sexual act with another person; or
>
> (b) …
>
> shall be guilty of the offence of rape.' and;
>
> (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;
>
> 3 Penalties
>
> (1) Any person who is convicted of rape under this Act shall, subject to the provisions of subsections (2), (3) and (4), be liable-
>
> (a) in the case of a first conviction-
>
> (i) where the rape is committed under circumstances other than the circumstances contemplated in subparagraphs (ii) and (iii), to imprisonment for a period of not less than five years;
>
> (ii) where the rape is committed under any of the coercive circumstances referred to in paragraph (a), (b) or (e) of subsection

[1] *S v Kasita* 2007 (1) NR 190 (HC); *S v Shapumba* 1999 NR 342 (SC) at 344 I to 345A; *S v Jason & another* 2008 NR 359 at 363 to 364G

(2) of section 2, to imprisonment for a period of not less than ten years;

(iii) …'

[8] As stated above it was only physical force by assaulting and dragging the complainant that is present in the matter. The magistrate clearly misdirected himself by applying section 3(1)(a)(iii) where the minimum sentence is 15 years' imprisonment whereas he should have applied section 3(1)(a)(ii) where the minimum sentence is 10 years' imprisonment. The magistrate did not find substantial and compelling circumstances. I agree with the learned magistrate.

[9] It is important to mention that the prosecutor submitted that where physical force is used, the minimum sentence is 15 years. The magistrate simply adhered to this submission. This is not the first case where a presiding officer commits a misdirection by following a mistake by a prosecutor. Magistrates are reminded that sentencing is in their discretion. They should exercise this discretion and apply their minds irrespective of submissions of prosecutors.

[10] Both counsel submitted that a sentence of 10 years' imprisonment will be a just sentence. The crime is serious and in my view there is merit to impose a sentence of more than the minimum sentence. This I state, mindful of the period the appellant spent in custody trial awaiting.

[11] In the circumstances the sentence stands to be set aside and this court may sentence afresh. I need to state in passing that the deduction of part of the sentence is wrong. The Criminal Procedure Act does not provide for it but provides in section 297 that the court may consider to suspend part of it on conditions and may consider the period in custody to arrive at a proper sentence.

[12] In the result:

1. The appeal succeeds;
2. The sentence of 16 years' and 10 months is set aside;
3. The accused is sentenced to 10 years' imprisonment.

4. The sentence is anti-dated to 13 July 2007.

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H C JANUARY

JUDGE

I Agree

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M A TOMMASI

JUDGE

Appearances:

For the Appellant:	Mr Aingura
	Of Aingura Attorneys
For the Respondent:	Adv Gaweseb
	Of Office of the Prosecutor-General