

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

SENTENCE

Case no: CC 16/2012

In the matter between:

THE STATE

v

SEM SHAFOISHUNA HAUFIKU

ACCUSED

Neutral citation: *S v Haufiku* (CC 16/2012) [2019] NAHCNLD 41 (12 April 2019)

Coram: TOMMASI J

Heard: 4 March 2019

Delivered: 12 April 2019

Flynote: Criminal Procedure – Sentence – Housebreaking with intent to steal and theft and housebreaking with intent to steal and robbery – Offence prevalent and norm is custodial sentence even for first offenders - two counts of rape – Section 3(1)(a)(iii)(ff) of the Combatting of Rape Act, 2000 (Act 8 of 2000) provides for a minimum sentence of imprisonment of 15 years unless there are substantial and compelling circumstances which exist to justify a lesser sentence – Accused 18 years old at the time of the commission of the offence – Offence serious and

accused cannot hide behind his youthfulness – Youthfulness nevertheless a factor mitigating the offences committed by the accused – Cumulative effect of the sentences taken into consideration and lengthy period in custody awaiting trial – Lesser sentence imposed.

ORDER

Count 1 – Housebreaking with intent to steal and theft – 2 years' imprisonment;

Count 2 – Contravening section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) rape – 10 years imprisonment;

Count 3 – Housebreaking with intent to rob and robbery – 5 years' imprisonment;

Count 4 - Contravening section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) rape – 10 years imprisonment;

It is ordered that the sentence imposed in count 4 runs concurrently with the sentence imposed in count 2.

SENTENCE

TOMMASI J;

[1] This court is to sentence the accused herein. He has been convicted of housebreaking with intent to steal and theft, 2 counts of rape as defined in the Combating of Rape Act, 8 of 2000 (count 2 and 4) and housebreaking with intent to rob and robbery. This court has already stated the facts in the judgment and will only restate the facts taken into account for purposes of sentence.

[2] It is the duty of the court to consider the offender i.e. his personal circumstances and those factors mitigating the offences he committed. The court however cannot lose sight of the nature of the offences he committed and the

legitimate interest of society. Punishment must fit the crimes he committed, satisfy the objectives of punishment and be fair to the accused. This is no easy task. The Combatting of Rape Act, 8 of 2000 prescribes mandatory minimum sentences for rape and the court has to determine whether there are substantial and compelling circumstances and, if such circumstances exist, this court has to record same.

[3] The accused did not testify in mitigation but the following facts were placed before the court by his legal practitioner, Ms Mugaviri. The accused was 18 years old at the time he committed the offences. His parents passed away during 2007. The accused never went to school. He became a cattle herder and she submitted that the responsibility of working at a young age weighed heavily on his shoulders. The accused's legal practitioner indicated that he has remorse for his actions.

[4] Ms Mugaviri submitted that the accused has been in custody for 2 years before he was released on bail and a further 4 years after his bail was cancelled. There is however no clear evidence before court of the period the accused spent in custody awaiting trial. It appears from the submissions by counsel for the accused that the accused was released on bail but it was cancelled due to his failure to appear in court. It was further submitted that the accused also simultaneously served imprisonment in respect of another offence which has no bearing on this case as no previous convictions were proven by the State. This court however is prepared to accept that the accused spent a considerable period in custody awaiting trial and takes cognizance of the inordinate delay (almost 8 years) in finalizing the trial.

[5] The accused committed all these offences in one evening. He broke and entered into the cuca shop of Suoma Shoombe and stole cash and alcohol. He thereafter went to the next cuca shop where he raped the complainant twice. He used a knife to force her into submission both in respect of the rape and to force her to open the cuca shop. Here he also stole some goods i.e. a beer, a nokia cellphone, one luncheon roll, dunhill cigarettes and a knife.

[6] The businesses in this jurisdiction is plagued by constant break-ins. Housebreaking with intent to steal is prevalent and it has become the norm for courts to impose custodial sentences for this offence even in cases of first offenders. It is further an aggravating factor that the accused had used a knife to achieve his criminal objectives. The youthfulness of the accused at the time he committed the

offence mitigates his offences but this court has made it clear that young offenders who commit heinous crimes like adults cannot escape severe punishment merely because they are youthful. The accused set out that evening with the intent to commit the offences of housebreaking with the intention to steal and he came prepared with a knife to do violence if he encounters resistance. These two offences of housebreaking therefore were pre-meditated.

[7] The prescribed minimum sentence in terms of s 3(1)(a)(iii)(ff) of the Combatting of Rape Act, is 15 years imprisonment if the convicted person used a firearm or any other weapon for the purpose of or in connection with the commission of the rape. The accused herein used a knife to subdue the complainant. The complainant was pregnant at the time. She testified that the sexual assault on her was painful. The complainant was sleeping when the accused entered the room and raped her. He thereafter again raped her for a second time. This must have been a horrific ordeal for her particularly knowing that she was pregnant. The State however led no evidence adduced to the effect that there was lasting physical or psychological trauma suffered by the complainant.

[8] The protection of women and children ranks as an important consideration by the courts. A clear and consistent message of this court has been that offenders who commit gender based violence will be dealt with severely. There should be no room for misunderstanding. The legislature for this reason imposed the mandatory minimum sentences and the courts should not lightly deviate from those sentences.

[9] There is no rational explanation which mitigates the accused's actions. I am however mindful of his youthfulness. The legislature also considered this an important factor and section 3(3) provides that the minimum sentences prescribed in subsection (1) 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. This provision is not applicable to the accused. The accused was 18 years and 4 months old when he committed the offence. The offences were furthermore committed the same evening and the court must guard against imposing a sentence which would be disproportionate to the blameworthiness of the accused. This together with the fact that he spent a considerable time in custody awaiting trial leads this court to

conclude that there exists substantial and compelling circumstances which justifies a lesser sentence.

[10] Mr Shileka, counsel for the State submitted that the accused showed no remorse for his conduct. I agree. Nothing in the conduct of the accused afterwards leads this court to conclude that he has remorse. There was no acknowledgment of wrongdoing and no sincere and heartfelt apology for his conduct. The impersonal averment of remorse tendered to this court by his legal practitioner can hardly be considered as sincere.

[11] This court has a duty to satisfy the legitimate expectations of society given the nature of the offences committed by the accused but it should also have regard for the personal circumstances and mitigating factors. In the circumstances of this case the latter must of necessity give way to other considerations such as the interest of society and the need for deterrent sentences.

[12] The following sentences would be appropriate in these circumstances:

Count 1 – Housebreaking with intent to steal and theft – 2 years’ imprisonment;

Count 2 – Contravening section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) rape – 10 years imprisonment;

Count 3 – Housebreaking with intent to rob and robbery – 5 years’ imprisonment;

Count 4 - Contravening section 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) rape – 10 years imprisonment;

It is ordered that the sentence imposed in count 4 runs concurrently with the sentence imposed in count 2.

M A TOMMASI
JUDGE

Appearances:

For the State:

Mr R Shileka
Office of the Prosecutor General- Oshakati

For the Accused:

Ms G Mugaviri
Of Mugaviri Attorneys, Oshakati
Instructed by Legal Aid