

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

SENTENCE

Case No: CC 10/2019

In the matter between:

THE STATE

and

MUAAMBELAU NDOVAI

ACCUSED

Neutral citation: *S v Ndovai* (CC 10/2019) [2020] NAHCNLD 135 (18 September 2020)

Coram: DIERGAARDT, AJ

Heard on: 16 September 2020

Delivered: 18 September 2020

Flynote: Criminal Procedure – Sentence – Factors to be taken into account at sentencing–Accused convicted of one count of Rape and two counts of Assault by threat–Offences committed in the context of a domestic relationship–Combating of Rape Act 8 of 2000–Absence of substantial and compelling circumstances.

Summary: Summary can be seen from the judgment.

ORDER

1. Count 1: Contravening Section 2(1) (a) read with sections 1, 2, 3, 4, 5, 6 and 7 of the Combating of Rape Act, 8 of 2000;(Rape under coercive circumstances) Rape read with the, provisions of the Combating of Domestic Violence Act, 4 of 2003;- 23 years imprisonment of which 3 years is suspended for five years in terms of section 297 of Act 51 of 19 77 on condition that the accused is not convicted of committing the offence of Rape during the period of suspension;
2. Count 2: Assault by threat read with the provisions of the combating of domestic violence Act, 4 of 2003 (I.R.O. Brenda Ndovai); - 2 years imprisonment;
3. Count 3: Assault by threat read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 (I.R.O. Ndapandula Tjithunga) - 1 year imprisonment;
4. It is ordered that the 3 years in respect of counts 2 and 3 shall run concurrently with the sentence imposed in count 1.

SENTENCE

DIERGAARDT AJ:

[1] The accused stands convicted of:

- a) One count of Rape read with the provisions of the Combating of Domestic Violence Act 4 of 2003,(Rape under coercive circumstances) ;
- b) Two counts of Assault by Threat.

[2] The facts of this case are as set out in the judgment delivered on 15 September 2020. The accused must now be sentenced in respect of the three counts on which he is convicted.

[3] In deciding the proper sentence, the court has to consider the traditional triad of the factors normally considered by the courts at sentencing, namely: the personal circumstances of the accused, the nature and gravity of the crime(s) committed and the interests of the society¹ At the same time the court must also have regard to the objectives of punishment namely: prevention, deterrence, rehabilitation and retribution in order to strike a balance amongst them.

[4] However, that does not mean equal weight must be given to each of those objectives, as circumstances of a case might dictate that one or more factors must be emphasized at the expense of the others.

[5] Having considered the objectives of punishment, the court will then have to decide which purpose or any combination of them is best served by the sentence to be imposed.

[6] While doing so regard is also to the requirements of the sentencing process to strike a balance among the competing factors, as well as to strike a balance between the principles of equality and consistency of treatment on the one hand and the personal circumstances of the accused, on the other. Coupled with the above, the court is also required to impose a punishment that is blended with a measure of mercy, the court, being guided by the circumstances of the case, in its application thereof.

¹-See: S v Zinn 1969 (2) SA 537 (A) at 540 G.

Nature and Circumstances in which the offence was committed

[7] The background, against which the aforesaid offences were committed, insofar as is relevant to the present proceedings, is as set out hereunder.

[8] The victim in counts 1 and 2 is the biological daughter of the accused who was 8 years old at the time of the incident. Between 7 and 8 February 2018 the accused was at home with the victim and her siblings. He sent the victim's siblings to fetch water. He kept her behind under the false pretense that she had to clean the house. After cleaning she went outside. Upon her arrival outside he grabbed her, took her into the house and had sexual intercourse with her by inserting his penis into her vagina.

Assault by Threat charges (counts 2 and 3)

[9] After the sexual act the accused threatened the child into silence by intimidating her with death. The child reported the incident to her mother a day thereafter. Upon confronting the accused he threatened to kill her mother and himself if the matter should reach the police. As a result of these threats the child was only taken for medical treatment a month after the incident.

Personal circumstances of the accused

[10] The accused did not testify under oath or call any witnesses in mitigation. The defense council for the accused, Mr Tjirera submitted from the bar. He submitted that the accused is 39 years old. He was 36 years old at the time of the incident. He is a first offender. He was married in terms of customary law with the mother his children, the complainant in count 3.

[11] The accused did odd jobs in Opuwo and he was the sole provider for his children and three of his nephews. He further submitted that the accused has been in custody, trial waiting since 2017. During his incarceration he developed swollen legs and he suffers from depression.

[12] Mr Tjirera conceded that the accused had been convicted of serious, horrible offences but asked the court to take into consideration that the rape incident was a result of a moment of madness. The accused now realizes his mistake.

[13] Mr Tjirera did not present any substantial and compelling circumstances to be taken into consideration but rather drew the courts attention to the applicable minimum sentence of 15 years imprisonment. He pleaded for at least 3 of the fifteen years to be suspended conditionally.

[14] He submitted that the accused was a good father and partner before the incident. He pleaded to the court to afford the accused the opportunity to reform his life. In conclusion he requested all three counts to be taken together for purposes of sentencing, alternatively for the sentences on counts 2 and 3 to run concurrently with count 1.

Aggravation

[15] The state called two witnesses to testify in aggravation, Brenda Ndovai and Ndapandula Tjithunga.

[16] Brenda confirmed that the accused is her biological father. She testified that she respected her father before the incident but after the incident she feels different. In her own words she stated that she did not expect her father to do things like that to her

[17] She expressed her feelings towards the accused to be bad and she is not at peace. She was asked by the court about her physical condition shortly after the incident and she informed the court that she was in pain from her waist and pointed to her legs. Three years after the incident she feels better but still has bad thoughts about the incident.

[18] Ndapandula Tjithunga testified that Brenda is a product of a romantic relationship between her and the accused. She informed the court that before the incident Brenda was swift and responsive when called upon to perform tasks. She noticed after the incident the child became slow and sometimes stare when requested to do something. She also mentioned that after the incident the child would start crying.

[19] She testified that the incident had a negative impact on her to the extent that her relationship with the accused was destroyed. The accused moved out of the house after some days. She informed the court that when she looks at the accused she feels very bad in her heart. She mentioned that she is still afraid of the accused.

[20] The state submitted that in addition to all factors to be taken into consideration the prevalence of the offence and the impact on the victim must also be taken into consideration. She submitted that the accused and the child were known to each other as a result of their domestic relationship. The state was of the opinion that the accused abused this position of trust when he created the opportunity to be alone with his daughter. In other words his actions were planned. The state further submitted that the rape took place where the victim ought to have been safe and secure. She emphasized that the victim not only suffered physically but the incident left a physiological scar which would take much longer to heal. Her prayer is for the court to consider a sentence in excess of the minimum sentence.

Conclusion

[21] In determining an appropriate sentence I have regard to the triad of sentence as mentioned in the beginning.

[22] I have no doubt in my mind that the accused is convicted on very serious and prevalent offences. Being mindful of the fact that each case is to be judged on its own merits, I take cognizance of the fact that the rape took place in the context of a domestic relationship which constitutes an aggravating factor in itself. The child is a female aged eight years old at the time of the incident.

[23] On the evidence presented during trial, I am convinced that the rape has been carefully planned and executed by the accused. He sent his other children away in order to satisfy his sexual needs on his own biological daughter. I am of the view that he failed in his duty to protect and care for this child being his own flesh and blood.

[24] The aggravating circumstances bring me to the impact of these offences on the victims. It is common cause that the accused knew the child was in need of medical attention when he left the hospital. He decided to ignore the child's condition causing her to suffer for a month. It is evident that the child suffered to such an extent that she was paining from her hips to her legs and she could not walk properly. She endured an untreated vaginal discharge.

[25] The accused did not stop at the rape but went further and threatened the child and her mother with death. This conduct was not only an attempt to conceal his wrong doing, but clearly indicates that he has no remorse for his wrong doing.

[26] I share the same sentiment with Damaseb JP, as expressed in *S v Laizer Kuhlewind* (CC 13/2010) [2011] NAHCMD (11 October 2011) in that: 'Rape attaches a stigma and brings opprobrium to victims. That reinforces the seriousness of the offence of rape and the need to protect the interests of society by imposing stiff penalties on the perpetrators of rape'.

[27] In *casu* the sexual assault on this child by her own father is more than barbaric. Although the state did not lead any expert evidence that the act caused lasting psychological trauma, the evidence of the physical and emotional state of the child moved me to accept that the child suffered mental trauma in the immediate aftermath of the sexual assault. I am convinced that the child sustained mental scars that will not easily heal

[28] The accused cries out for mercy pleading to the court to impose the minimum sentence as prescribed by the law but suspend a portion thereof. When it comes to the count of rape, the provisions of the Combating of Rape Act, come into play. A minimum sentence of 15 years imprisonment is prescribed in these circumstances, unless the court finds that there are substantial and compelling circumstances justifying the imposition of a lesser sentence. There is no prayer from the defence to deviate from the mandatory sentence. There is thus no plea to the court to take into consideration compelling substantial circumstances. To satisfy myself and be fair to the accused I turn to the case of *S v Malgas* (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001) where the test for compelling substantial circumstances was developed and illustrated as follows.

'The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as to cumulatively justify a departure from the standardized response that the Legislature has ordained.' And: "The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favorable to the offender,

maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.'

[29] I have thus taken into account all the personal circumstances of the accused including the time he has spent in custody while awaiting trial, his medical condition and his dependents left behind.

[30] I am of the view that there are no substantial and compelling circumstances warranting deviation from the minimum sentence prescribed by the Combating of Rape Act no 8 of 2000. On the contrary, the circumstances in which this offence was committed are aggravating, and a custodial sentence is unavoidable. It in fact warrants a sentence in excess of the prescribed mandatory minimum sentence, to deter the accused from repeating this type of offences, and to serve as a general deterrence to the would be offenders.

[31] In *R v Karg* 1961 (1) SA 231 A at 236 B Schreiner JA remarked as follows: 'It is not wrong that the natural indignation of interested persons and the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands'.

[32] Having taken into account all factors discussed above also bearing in mind the interest of the community, without over or under emphasizing any of the factors I find the seriousness of the offence outweighs the personal circumstances of the accused. I could not find any remorse whatsoever in the mitigation of the accused.

[33] In the result am satisfied that a lengthy term of direct imprisonment would be the only appropriate sentence in respect of the offences of which accused is convicted.

[34] I therefore sentence the accused as follows:

1. Count 1: Contravening Section 2(1) (a) read with sections 1, 2, 3, 4, 5, 6 and 7 of the Combating of Rape Act, 8 of 2000;(Rape under coercive circumstances) Rape read with the, provisions of the Combating of Domestic

Violence Act, 4 of 2003;- 23 years imprisonment of which 3 years suspended for five years in term of section 297 of Act 51 of 19 77 on condition that the accused is not convicted of committing the offence of Rape during the period of suspension;

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4. It is ordered that the 3 years in respect of counts 2 and 3 all run concurrently with the sentence imposed in count 1.

A Diergaardt
Acting judge

APPEARANCES:

For the State:

Ms. S Petrus

Of the Prosecutor General Office, Oshakati

For the Accused:

Mr. N Tjirera

Of the Directorate of Legal Aid, Opuwo