REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

LEAVE TO APPEAL JUDGMENT

Case Title: The State v Kutareua Tjirambi	**Case No:** HC-NLD-CRI-APP-SLA-2019/00087
Ruling on Application for leave to Appeal	**Division of Court:** Northern Local Division
Heard before: Kesslau J	**Delivered:** 11 August 2023
Neutral citation: *S v Tjirambi* (HC-NLD-CRI-APP-SLA-2019/00087 [2023] NAHCNLD 79 (11 August 2023)	
The order: 1. The application for leave to appeal against the sentence imposed on count 1 is granted.	
Reasons for order:	

Kesslau J

Introduction

[1] This is an application for leave to appeal by the state in terms of section 310(2)(*a*)

of the Criminal Procedure Act 51 of 1977, as amended (the CPA) against the sentence imposed in the Opuwo Regional Court after a conviction on a charge of the contravention of s 2 (1)(a) of the Combating of Rape Act 8 of 2000 (the Act): Rape.

[2] The sentence imposed by the court *a quo* was 8 years imprisonment wholly suspended for a period of 5 years on the usual condition. The accused was convicted and sentenced on additional charges of assault with the intent to do grievous bodily harm however this application for leave to appeal only concerns the count of rape.

<u>The application</u>

[3] The Respondent was duly served with the notice for leave to appeal within the prescribed period and he appeared in this court on 10 April 2020. The respondent indicated that he wish to apply for Legal Aid and the matter was thereafter remanded several times until a non-favourable outcome from the Directorate of Legal Aid was received on 16 April 2021. It appears that the respondent was not satisfied with the outcome and requested time to request the Directorate to reconsider. The matter was remanded again for that purpose, however on 22 November 2021 the respondent failed to attend court and a warrant for his arrest was issued. Since then the respondent could not be found.

[4] Considering the interest of the administration of justice and to bring finalization to this application the decision was made by this court to deal with the matter in chambers without a full hearing.[1] Furthermore the absence of the respondent leaves no other choice but to accept that the application is unopposed.

<u>The grounds for the application</u>

[5] The grounds contained in the notice are the following:

> '5.1 The learned magistrate erred in law and or fact in the following respects:
>
> 5.1.1 By under emphasizing the seriousness of the offence of contravening section 2(1)(a)

[1] *S v Mujiwa* 2007 (1) NR 34 (HC); *S v Swartbooi and Others* (CA 59-2008) [2012] NAHC 63 (14 March 2012).

of the Combating of Rape Act, 8 of 2000-Rape.

5.1.2 By over emphasizing the personal circumstances of the respondent while failing to consider and /or attach little weight to the lack of remorse by the respondent.

5.1.3 By imposing a sentence which induces a sense of shock if regards is had to the nature and circumstances of the offence, particularly the fact that the complainant was severely assaulted and was vulnerable.

5.1.4 By wholly suspending 8 years imprisonment, when the respondent acted like an adult and ordinary criminal during the process of raping the complainant.'

On prospect of success

[6] Section 3(1) of the Act makes provision for mandatory penalties on a conviction, however it does not apply to minors with s 3 (3) of the Act stating 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**.' (Emphasis added).

[7] The magistrate apart from indicating that the respondent was a minor at the time of the offense gave no other reasons for imposing a totally suspended sentence. The evidence that the offense might have been premeditated and injuries sustained by the young victim were not mentioned during sentencing. In considering similar matters involving minor accused, it appears that a term of imprisonment is the norm rather than the exception.[2]

Conclusion

[8] Considering the above, I am satisfied that the applicant has shown that there are reasonable prospects of success on appeal in that another court may come to a different conclusion than the trial court regarding an appropriate sentence.

[2] *S v Kheinamseb and Others* (CC 28/2018) [2019] NAHCMD 552 (12 December 2019)*; S v K* 2011 (1) NR 1; *S v H* 1995 NR 136*; S v Haufiku* (SA 6-2021) [2023] NASC (21 July 2023).

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<tr><td colspan="2">[9] In the result, it is ordered that:
The application for leave to appeal against the sentence imposed on count 1 is granted.</td></tr>
<tr><td>Judge:</td><td>Comments:</td></tr>
<tr><td>E.E. KESSLAU</td><td></td></tr>
<tr><td colspan="2">Counsel:</td></tr>
<tr><td>Applicant:</td><td>Respondent:</td></tr>
<tr><td>R Shileka
Of Office of Prosecutor-General, Oshakati</td><td>K Tjirambi
Okahwa Village, Opuwo</td></tr>
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