CASE NO.: SA 4/99

IN THE SUPREME COURT OF NAMIBIA In the

matter between

AMUTENYA SHAPUMBA APPELLANT

And

THE STATE RESPONDENT

CORAM: Strydom, C.J., Mtambanengwe, A.J.A, et O'Linn, A.J.A. HEARD ON: 1999/10/05 DELIVERED ON: 1999/11/17

APPEAL JUDGMENT

STRYDOM, C.J.: The Appellant appeared before a Judge of the High Court on a charge of rape. Notwithstanding his plea of not guilty he was convicted and sentenced to imprisonment of 1 5 years. Appellant applied for leave to appeal against his conviction and sentence but was unsuccessful. He thereafter filed a petition in terms of sec. 316(6) of Act No. 51 of 1977 and leave was granted to him to appeal against his sentence only. The Court wants to thank Mr. V. Olivier,

who appeared *amicus curiae* for the Appellant, for his assistance in this matter. Mr. Potgieter appeared for the State.

On behalf of the Appellant Mr. Olivier also launched an application for condonation for the late filing of the Heads of Argument of the Appellant. Mr. Potgieter indicated that he did not oppose the application and as we were satisfied with the explanation given for the late filing, condonation was granted.

The complainant testified that at about 11 o'clock on the morning of the 22nd January 1997 the Appellant and one Ipinge came to her house where she was busy cooking. As she was also assisting in a nearby cuca-shop they asked her to serve them with gingerbeer which she was willing to do once she had completed her other chores.

When complainant was on her way to open the cuca-shop, Ipinge told her that she was rude to them and that they were going to have intercourse with her. This was said presumably because she did not serve them immediately when she was approached. When she was about to unlock the shop, the Appellant took her arm and pulled her towards a room which was built onto the back of the house. Appellant twisted her arm and pushed her on

a bed which was inside this room. Although the Complainant tried to push the Appellant away he was too strong for her and succeeded to lift her skirt and inserted his penis into her vagina without taking off her panty. The complainant also screamed but nobody came to her rescue. She was shocked and became confused but she thought at one stage she also

saw someone else, a third person, inside the room. Complainant is of the opinion that the Appellant did not ejaculate"inside her: When the Appellant stood up from her and went out, she followed him. Outside she met one Shapaka, and she saw Ipinge and another woman standing some distance away. Complainant also launched an attack on the Appellant whom she tried to hit with an empty crate. She reported to one Hilma what had happened to her and was subsequently taken to the Police and also to the hospital where she was examined by a doctor.

After the Appellant was convicted of the crime of rape, the State proved that the Appellant was also convicted by the Regional Court of a similar offence on the 25th April 1997. It became clear, and this was also admitted by the Appellant, that the present crime was committed at a time when he was out on bail for the first alleged rape. In regard to this first crime the Appellant was sentenced by the Regional Court to 9 (nine) years imprisonment of which 2 (two) years were suspended for five years on certain conditions. This means that, together with the 1 5 years imposed by the High Court, the Appellant now faces an aggregate sentence of at least 22 years imprisonment.

The crime of rape, being an unlawful and forceful invasion of

the body and privacy of a woman, mostly with the purpose to satisfy the sexual urge of the offender, can, except in the most exceptional circumstance, not contain mitigating factors which could explain the commission of the crime and diminish the moral blameworthiness of the offender. Whereas there is very little that can mitigate the commission of the crime of rape there are certain specific factors which would further aggravate and

contribute towards the seriousness of the crime and the consequent punishment thereof. Examples of these are the rape of young children, the amount of force used before, during or after the commission of the crime, the use of weapons to overcome any resistance by means also of threats of violence, rape committed by more than one person on the victim, the fact whether the rapist is a repeat offender etc. These factors, or a combination thereof, resulted in heavy punishments imposed by the Courts. See in this regard S_y_P, 1991(1) SA 517 (AD); S_y_G, 1989(3) SA 695 (AD); SvR$_f$ 1996(2) CR 341 (TPD); S_y_M, 1993(1) CR 319 (SECLD); S y_V and Ano., 1991(2) CR 484(A); S v D$_r$ 1991(2) CR 543 (A) and S v F$_r$ 1990(1) SACR 238(A).

A reading of the above cases shows that the element of violence and its absence or presence during the commission of the crime of rape is a factor which plays a very significant role when it comes to the meting out of punishment. It goes without saying that this is the one factor which compounds the humiliation suffered by the victim and which, like nothing else, brings it to the mind of the victim that she is at the complete mercy of her attacker who, at his whim, may seriously injure or even kill her. It is the violence involved in the attack which often leaves the victim, not only with physical scars, but also psychological ones.

Mr. Olivier submitted that the Court a quo committed a misdirection which would entitle this Court to interfere with the sentence of 1 5 years imposed by the trial Court. Counsel submitted that the trial Court over-emphasised the seriousness of the second offence bearing in mind the cumulative effect of the two sentences. Counsel

argued that this should have been addressed by the Court a *quo* by either ordering that the two sentences run concurrently or by imposing a shorter term of imprisonment. The contention that the sentence was also in conflict with Article 8(2)(b) of the Constitution, namely that it amounted to cruel, inhuman or degrading punishment, was, in my view, correctly abandoned.

Counsel for the Appellant and Respondent were *ad Idem* as to the law applicable in appeals against sentence. In this regard it must be accepted that sentencing falls primarily within the discretion of the trial Court and that a Court of Appeal would only interfere with the exercise of such discretion "where it is clear that the discretion of the trial court was not exercised judicially or reasonably ..." Du Toit: Commentary on the Criminal Procedure Act at pa 31 - 28. What is regarded as an unreasonable or injudicious exercise of such discretion has been laid down in the form of guidelines by the Courts over many years. Thus a Court of Appeal would be entitled to interfere on appeal with a sentence imposed where the trial Court has materially misdirected itself on the facts or the law or committed an irregularity or where the sentence imposed is startlingly inappropriate or induces a sense of shock or is

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. (See S v Rabie 1975(4) SA 845 (A); S v Holder 1979(2) SA 70 (A); S v Vries 1996(2) SACR 638 (Nm) and S v Brand 1998(1) SACR 296 (CPD) and S v Kibido 1998(2) SACR 213 (SCA).)

The first issue is then to consider whether this Court, applying the aforementioned principles, could interfere with the sentence of 15 years imposed by the Court a *quo.* The most aggravating circumstance present is no doubt the fact that the Appellant committed this crime during the period that he was out on bail for a similar crime. This, together with the fact that the crime was committed at the place where the Complainant worked and resided, certainly called for strict measures and the sentence of 15 years imprisonment imposed by the learned Judge *a quo* no doubt emphasised the deterrent and preventative objectives of sentencing. In his judgment the judge a *quo* correctly stated that it was an aggravating circumstance that the Appellant committed the second rape at a time when he was out on bail for a similar offence together with the fact that the crime was committed in daylight at the home of the complainant. Consequently and bearing in mind the aggravating circumstances and other circumstances relevant to sentencing I am of the

opinion that the sentence of 1 5 years imprisonment is in all the circumstances not such that this Court could interfere with it. Although each case must be decided on its own facts the sentence of 1 5 years imprisonment is not out of line with other sentences imposed by the Courts in more or less similar circumstances. I am also not persuaded that the sentence, standing on its own, was vitiated by any material misdirections.

This is however, not the end of the matter. In SvM, *supra,* at p. 135 f - h the following was stated by Eksteen, J A:

> "Where more than one offence has been committed, a Court should naturally guard against the undesirability that the cumulative effect of all the sentences does not become unreasonably onerous for the accused.

> This result can be avoided by ordering that some of the sentences should run concurrently, either wholly or partially. So too where it is brought to the attention of the trial Judge that the accused was busy serving a sentence which was imposed by another Court, the cumulative affect of such sentences will have to be considered in order to ensure that the total period of imprisonment is reasonable and fair and that it would not be unreasonably onerous or depressing upon the accused." (My translation from Afrikaans.)

The principle set out above is a salutary one and one which has been applied over a long period by our Courts. See S v Whitehead 1970(4) SA 424 (A); S v Young 1977(1) SA 602 (A); R v Abdullah 1956(2) SA 295 (A) and S v Mtshali and Ano 1967(2) SA 509 (N).

In the present case the Court a quo was asked to order that the sentence of 15 years run concurrently with the one of 9 years previously imposed by the Regional Court. This request was rejected by the learned trial Judge who came to the conclusion that the two sentences should run consecutively. In my opinion the decision by the Court a *quo* to reject the submission to order that the two sentences should run concurrently must be seen against the aggravating circumstances to which I have already referred and can therefore not be faulted. Such an order would also have meant that the Appellant virtually goes unpunished for the first crime of rape committed by him which, in all the

circumstances was a serious offence, one which merited a sentence of 9 years imprisonment.

However, as was pointed out in S v M *supra* p. 135, in circumstances such as these it is not only the duty of the Court to consider whether to order that the whole sentence run together with other sentences but also to consider to order that part of

the sentence to be imposed should so run with another sentence or sentences where the cumulative effect would otherwise be too long. This latter possibility was not considered by the Court a *quo* and from the reasons of judgment it seems that the trial judge was content, once he had rejected the submission that the two sentences should run concurrently, to stop there and did not further consider the effect of an aggregate sentence of 22 years imprisonment, or even a possible 24 years imprisonment, and the possibility to order that part only, and not the whole of the sentence of 1 5 years, should run concurrently.

After considering all the circumstances of the case I have come to the conclusion that if I had sat in first instance in this case I would have ordered that part of the sentence of 15 years should run concurrently with the sentence of the Regional Court previously imposed. 1 have come to this conclusion mostly on two grounds.

There can firstly be no doubt that a period of at least 22 years imprisonment is long and would normally be imposed in circumstances which are of a very serious nature. With that 1 do not mean to say that rape of any kind is not a serious offence. I think there can be no doubt that, more

particularly in the High Court of Namibia, the length of sentences imposed for rape have more than doubled and even trebled over the past few years and the sentence of 15 years imposed by the Court a *quo* reflects that trend. However, as previously pointed out, the absence or presence of violence before or during or after a rape is a factor which plays an important role in the determination of the sentence.

In the present case no weapons were used by the Appellant to get the complainant to submit to him. According to the Complainant she was dragged or pulled into a room where she was pushed onto a bed. In this process the Appellant also twisted her arm behind her back. The Complainant suffered no injury and the doctor, who still saw her the same day that the attack occurred, testified that he could find no visible signs of rape or other injuries. Although the Complainant was shocked and confused after the crime was committed there is no evidence that this incident left her with any permanent psychological effect.

Secondly the fact that the Appellant was still a first offender at the age of 23 should at least cast some doubt on any possible conclusion that he may be sexually maladjusted and beyond rehabilitation. In regard to the latter issue it must be kept in mind that the second crime was committed before the Appellant was convicted and sentenced for the first crime and, although an aggravating circumstance, it is not possible to say what the effect of a long term of imprisonment would have on the Appellant. Bearing in mind what was said by Ipinge it seems that there are still men who think that women are there for the pleasure of men and can be dealt with as if they are no more than chattels.

Bearing in mind all the circumstances of this case it cannot be said that this is an extreme case which would merit the incarceration of the Appellant for at least 22 years. In my opinion the cumulative effect of the two sentences must be softened by an order that part of the second sentence should run concurrently with the sentence imposed previously by the Regional Court. Considering all the circumstances I would

order that a period of four (4) years of the sentence of fifteen (15) years imposed by the trial Judge should run concurrently with the first sentence. The difference of a period of four (4) years is to my mind sufficiently striking to enable this Court to interfere with the order of the Court a *quo.*

The effective period of imprisonment is still at least eighteen (18) years and will fulfil the purpose which the Court *a quo* had in mind. It would certainly bring it home to the Appellant and others that rape is a serious crime and that the Courts, in their protection of women, are as vigilant as is the case where any other serious crime is committed.

In the result the appeal against sentence succeeds to the following extent:

> "In regard to the sentence of 1 5 years imprisonment it is ordered that four (4) years of the said sentence run concurrently with the sentence of nine (9) years imprisonment, previously imposed by the Regional Court on 25th April 1997".

STRYDOM, C.J.

I agree.

MTAMBANENGWE, A.J.A.

I agree.

O'LINN, A. J. A
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COUNSEL ON BEHALF OF THE APPELLANT: Mr. V. Olivier *(Amicus Curiae)*

COUNSEL ON BEHALF OF THE RESPONDENT: Mr. A. Potgieter (Prosecutor-General)