REPORTABLE

CASE NO.: SA 18/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between

THE STATE **Appellant**

and

JB **Respondent**

Coram:	SHIVUTE CJ, STRYDOM AJA and MTAMBANENGWE AJA
Heard:	**1 November 2013**
Delivered:	**13 November 2015**

APPEAL JUDGMENT

SHIVUTE CJ (STRYDOM AJA and MTAMBANENGWE AJA concurring):

[1] In this appeal by the State against sentence with the leave of the trial court, the respondent was convicted in the High Court of assault read with the provisions of ss 1(1)(*a*)(i) and (ii), 2(1)(*b),* 3(1), 21, 25(1) and (3) of the Combating of Domestic Violence Act Act 4 of 2003 as well as the first schedule thereto. This was preferred as the first count in the indictment. He was also convicted on the second count, being of rape in contravention of section 2(1)(*a*) read with ss 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 and further read with ss 2(1)

(*a*)(i) and (ii), 2(1)(*b*), 3(1), 21(1), 25(1) and (3) as well as the first schedule to the Combating of Domestic Violence Act 4 of 2003.

[2] He was sentenced to one (1) year imprisonment in respect of the first count and to fourteen (14) years for the rape count. It was ordered that the sentence of 1 year imprisonment run concurrently with the sentence imposed on the second count.

[3] While the draft judgment was under consideration, I received a petition in the matter of *S v LK*, Case No P 1/2014, in which a question of whether it was competent for the State to appeal to the Supreme Court against sentence only imposed by the High Court arose. In light of initial divergence of opinion during the consideration of the petition in chambers, I decided to refer the petition for full arguments in open court. It was also considered apposite that the judges who sat with me in this appeal also constitute the panel that would hear and decide the petition. As we considered that the outcome of the petition may have a bearing on the present appeal, judgment in this appeal was stayed pending the outcome of the petition. The parties to the appeal were informed of the developments and counsel were invited to file heads of arguments on the questions raised by the court in the petition should they be so minded or advised.

[4] Judgment in the petition in *S v LK* is being handed down together with the judgment in this matter. It was held in *LK* that the State has the right to appeal outright against any sentence imposed by a judge of the High Court subject to it obtaining leave to appeal and that as such the State was entitled to petition the

Chief Justice for leave to appeal even though such leave concerned only the sentence imposed by the High Court. In light of this finding, the outcome of the petition now grants us the opportunity to dispose of the appeal. I accordingly propose to deal with the merits thereof.

[5] It is a trite principle that sentencing is pre-eminently a matter for discretion of the sentencing court and that a court of appeal may interfere with that court's exercise of discretion only if such discretion was not exercised judicially or where it is found that the sentence imposed is vitiated by an irregularity or misdirection or is disturbingly inappropriate. (*S v Shikunga* 1997 NR 156 (SC) at 173B-E; *S v Van Wyk* 1993 NR 426 (SC) at 447G-J.)

[6] The appellant advanced six grounds of appeal on the basis of which it contended that the trial court misdirected itself, alternatively erred in law and/or in fact in imposing the sentences. It contended that the presiding judge did this by:

> '(a) Finding that the fact that the respondent spent 11 months in custody pending his trial singularly constitutes substantial and compelling circumstances justifying a departure from the mandatory minimum sentence prescribed by the Combating of Rape Act;
>
> (b) Determining the existence of substantial and compelling circumstances based on the personal circumstances of the respondent to the exclusion of all other factors normally taken into account in sentencing;
>
> (a) Finding that there were substantial and compelling circumstances that warranted a departure from the prescribed mandatory minimum sentences when, from the court's own finding, the circumstances of the respondent

were far outweighed by the circumstances of the offences and the interest of society;

(b) Departing from the mandatory minimum sentences prescribed by the Combating of Rape Act for flimsy reasons;

(c) Ordering the sentence of 1 year imprisonment imposed in respect of the assault charge to run concurrently with the sentence imposed on the charge of rape; and

(d) Imposing a sentence that is shockingly lenient when the circumstances of the respondent are weighed against the circumstances of the offence as well as the interest of society.'

[7] Where a perpetrator has been convicted of having committed a sexual act with a complainant who is under the age of 18 years and the perpetrator is the complainant's parent as in this case, s 3(1*)(a)*(iii)(cc) of the Combating of Rape Act, 2000 prescribes a minimum sentence of 15 years imprisonment. A court may, however, impose a lesser sentence if it is satisfied that ‘substantial and compelling circumstances’ exist justifying a departure from the prescribed minimum sentence. The sentencing court should enter those circumstances on the record of the proceedings and may then impose such a lesser sentence. (Section 3(2).)

[8] The trial court found that there were substantial and compelling circumstances present justifying a departure from the prescribed minimum sentence and so it imposed as previously stated, a sentence of 14 years on the second count. The trial court identified what in its view amounted to such circumstances by stating as follows:

> 'It is trite that the period the accused spends in custody, especially if it is lengthy, is a factor which normally leads to a reduction in sentence. You spent 11 months in custody and I consider that to constitute substantial and compelling circumstances to justify a departure from the mandatory sentence.'

[9] Although the trial court appears to have taken into account the other factors and circumstances traditionally considered in sentencing, it apparently singled out the fact that the respondent had spent 11 months in custody awaiting the finalisation of his trial as the substantial and compelling circumstance justifying a departure from the imposition of the prescribed minimum sentence of 15 years. It is not surprising therefore that the first four of the appellant's grounds of appeal appear to have been directed at the above finding. Indeed, counsel for the appellant readily conceded that this finding by the trial court was the principal reason why the appeal was lodged.

[10] I may deal with the consideration of ground 5 of the appellant's grounds of appeal above at the outset. It has no merits at all since it is clear that the crime of assault was committed more or less at the same time as the offence of rape and the trial court was correct in ordering it to run together with the sentence on the rape count. Furthermore, the sentence on the second count does not appear to be 'shockingly lenient'. The difficulty is that it appears discordant with the provisions of s 3(2) of the Combating of Rape Act, 2000 and the question is whether that is justified on the facts. This aspect is dealt with below.

[11] As mentioned before, the minimum sentence prescribed in s 3(2) of the Combating of Rape Act, 2000 can be departed from only where the sentencing

court finds that substantial and compelling circumstances exist to justify such departure. What may amount to 'substantial and compelling circumstances' in a particular case has been discussed by the High Court in a number of cases including *S v Lopez* 2003 NR 162 (HC); *S v Gurirab* 2005 NR 510 (HC); and *S v Limbare* 2006 (2) NR 505 (HC). I am satisfied that the principles established in those decisions constitute good law. As such it is not necessary, on the facts of this appeal, to embark on a detailed discussion of the principles set out in those cases. It is necessary nevertheless to emphasise that in an attempt to make a value judgment as to whether there are substantial and compelling circumstances present in a given case, a court is required to take into account all the factors relevant to sentencing and that it should refrain from finding that a particular set of facts amount to ‘substantial and compelling circumstances’ just because in its view the prescribed minimum sentence appears to be harsh or because of some sympathy towards the accused or even an aversion to minimum sentences in general. Where there are no 'substantial and compelling circumstances' present, a court is under a statutory obligation to impose the prescribed minimum or a higher sentence where the facts of the case call for the imposition of such a higher sentence. As the adage goes, each case must be considered on its own facts.

[12] As already mentioned, in the present case the trial court determined that the fact that the respondent had spent 11 months awaiting the finalisation of his trial alone constituted 'substantial and compelling circumstances'. This cannot be accepted as correct. Although the period that an offender has spent in custody awaiting the finalisation of his or her trial, especially if lengthy, is a factor normally taken into account in sentencing, in the circumstances of this case such a period

cannot by itself constitute 'substantial and compelling circumstances'. The trial court also found that the respondent's personal circumstances were outweighed by the crimes he had been convicted of. In light of this finding, the trial court misdirected itself in finding at the same time that the one personal circumstance namely, the period of custody awaiting the finalisation of his trial amounted to substantial and compelling circumstances. Such misdirection on a material aspect on sentencing leaves this court at large to consider the sentence afresh and it is to this aspect that I propose to turn next.

[13] It is generally accepted that sentencing is the most difficult aspect in a criminal trial. It involves a delicate act of seeking a balance between three competing factors, namely the offender, the crime and the interest of society. As courts have repeatedly pointed out, it is unavoidable that in seeking to balance these competing factors, one or other of them may be emphasised at the expense of the others. It remains now to consider the crimes.

[14] The evidence led at the trial establishes that the respondent, the biological father of the complainant, arrived home late from an outing. He was seemingly under the influence of alcohol. An argument ensued between the respondent and the complainant's mother. The respondent took the complainant's mother into a room where the complainant was asleep. The complainant was awoken by the noise generated by the quarrel and upon the respondent noticing the complainant's presence in the room, he physically attacked her. She ran out of the room following her mother who had run out first. The complainant ended up at a neighbouring house with the respondent in pursuit. In spite of pleas from the

neighbour to leave the complainant alone, the respondent beat up the complainant and pushed her back to his house. He took her into a room and pushed her onto a bed, undressed her and proceeded to commit a sexual act on her. Neighbours who were attracted to the scene by, amongst others, the complainant's screams, witnessed the despicable act by peeping through a window or through holes in the corrugated iron sheets with which the room was constructed. The police were called to the scene and the respondent was arrested and taken into custody.

[15] The respondent's personal circumstances are that he was 47 years old at the time of the sentence. He was orphaned at the age of 14 and following the death of his parents was placed under the care of his brother. He attended school up to Grade 6 only after which he worked as a farm hand until the age of 20. He is married to the complainant's mother. At the time of his arrest the respondent was employed as a farm worker and was the sole bread winner in the family. As previously stated, he spent 11 months in custody before the conclusion of the trial and his sentencing. The respondent has a number of previous convictions that were more than 10 years old. The presiding judge was therefore correct in not taking them into account in the process of sentencing.

[16] I agree with the court below that the respondent's personal circumstances were by far outweighed by the seriousness of the crimes, particularly the offence of rape and the utterly brazen and appalling manner in which the crimes were committed. The assault on the complainant was gratuitous and unprovoked. Incidents of domestic violence against women and children are notoriously prevalent in our society and as such our courts are under a duty to ensure that

offenders convicted of such crimes are dealt with to the fullest extent of the law. The trial court was correct in its characterisation of the crime of rape as heinous, particularly because it was committed by a father against his own daughter. The complainant was understandably distraught when testifying. This state of affairs persisted even at the time she testified in aggravation of sentence. She broke down while testifying both in the main trial and aggravation of sentence. Asked, perhaps rhetorically, why she was so upset and broke down during her testimony, the victim replied:

> 'It hurts me a lot that my biological father could have done something like this to me.'

[17] I do not find that the cumulative impact of the factors and circumstances normally taken into account when sentencing offenders is such that it justifies the departure from the mandatory minimum sentence prescribed by the Act. In my view, therefore, there are no substantial and compelling circumstances present in this matter justifying a departure from the prescribed minimum sentence in respect of the count of rape. I consider that the prescribed minimum sentence would be an appropriate sentence in the circumstances of the case. I would accordingly impose the minimum sentence.

[18] I agree with the presiding judge that the sentence on count 1 should be ordered to run concurrently with the sentence imposed on the second count. Although the assault preceded the rape, there is no doubt that the two incidents are intertwined. They occurred more or less in the same space and time. As

earlier alluded to, it is not a misdirection to order the sentence on the first count to run concurrently with the sentence imposed on the second count.

[19] I would accordingly make the following order:

1. The sentence of one (1) year imprisonment imposed on the respondent in respect of count 1 is confirmed.

2. The sentence imposed on the respondent in respect of count 2 is set aside and for it is substituted the following sentence:

   'Fifteen (15) years imprisonment.'

3. The sentence of one (1) year imprisonment imposed on count 1 is to run concurrently with the sentence of fifteen (15) years imposed on count 2.

4. The sentence is antedated to 28 June 2012.

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SHIVUTE CJ

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STRYDOM AJA

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MTAMBANENGWE AJA

APPEARANCES

APPELLANT:	I M Nyoni
	For the State
RESPONDENT:	B B Isaacks
	Instructed by the Director of Legal Aid.