REPORTABLE

CASE NO.: SA 68/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE **Appellant**

and

VASCO KANGULU LIBONGANI **Respondent**

Coram: DAMASEB DCJ, MAINGA JA and HOFF AJA

Heard: **29 October 2014**

Delivered: **18 March 2015**

APPEAL JUDGMENT

MAINGA JA (DAMASEB DCJ and HOFF AJA concurring):

[1] The respondent stood trial in the Regional Court at Katima Mulilo on the charge of contravening s 2(1) of the Combating of Rape Act 8 of 2000 (the Act) read with s 94 of the Criminal Procedure Act 51 of 1977 (CPA); meaning although it was a single charge the respondent had had sexual intercourse with the complainant on divers or recurring occasions. A contravention of s 2(1) attracts a

minimum sentence of 15 years imprisonment which may be departed from on a finding of substantial and compelling circumstances. Respondent was convicted as charged and sentenced to 12 years imprisonment, the magistrate having found substantial and compelling circumstances.

[2] The appellant's appeal to the High Court against sentence was refused and leave to appeal to this Court was also refused.

[3] The present appeal is against sentence only. It is with the leave of this Court.

[4] The background of the charge based on the facts which are no longer in dispute may be stated as follows: The charge arose between July 2004 and August 2006. I assume that August 2006 is incorrect, it should read August 2004, as the respondent was arrested on 6 September 2004 and was in custody ever since. He could not have committed the offences in 2006 or 2005 or even the remainder of 2004 since his arrest in September 2004. Both the complainant and the respondent resided in the same village. They knew each other long before the incident and as a result, although the alleged sexual acts were perpetuated at night in a hut, it made the identity of the respondent a non-issue. The complainant was 10 years old then and the respondent 21 years old. The complainant and another minor child shared a hut within the parents' homestead as their bedroom. They also shared a grass mat as their bed. Between July 2004 and August 2004, for a week, the respondent visited the complainant daily at night and committed sexual

acts under coercive circumstances with the minor child. On the day that caused the arrest of the respondent, he had visited the complainant twice in the same night, committing the offences as alleged. On the second visit, for some reason or other during the acts the complainant cried or screamed. The scream attracted the attention of their parents who were sleeping in another hut some 10 meters away from the children's hut. The parents approached the hut where the complainant and the other child were, to investigate the cause of the scream. The complainant's late father entered the hut and found the respondent in the hut. He took hold of the respondent and they exited the hut. Outside the hut the respondent somehow managed to flee. The incident was reported to the police and the complainant was taken to the hospital. She was examined and the report revealed that the complainant's hymen had a lesion or was ruptured and there was a white discharge from her private parts which, amongst other things, was consistent with a sexual act.

[5] The nub of the appellant's case in this court and the High Court is that the sentence of 12 years imposed on the respondent is startlingly lenient and induces a sense of shock. Counsel for the appellant went on to submit that the learned judges erred when they held that the regional magistrate did not misdirect himself in sentencing the respondent when it was apparent that the learned magistrate gave insufficient weight to the deterrent and preventive factors, over emphasised the circumstances of the respondent, gave insufficient weight to the seriousness of the offence, paid insufficient regard to the coercive circumstances in this case, found substantial and compelling circumstances when such a finding was

unjustifiable under the circumstances, when he found that the respondent's health was so poor that he would very soon become a burden to the prison authorities when there was no medical evidence for the justification. Counsel further contended that the judges erred when they held that the sentence was not startlingly lenient when the respondent raped the complainant more than once in the sanctuary of her home, the complainant's tender age and the threats that were directed at her. It was further contended that the learned judges erred when they found that the respondent was charged with only one count of rape when it is apparent that the respondent was charged for contravening s 2(1) of the Act read together with s 94 of the CPA which meant that the respondent committed rape on divers occasions with the consequence that when he was convicted as charged he was not convicted of one count but for several counts.

[6] The circumstances in which an Appellate Court will interfere with a sentence imposed by a court of first instance are so well-known that their repetition here is unnecessary. They have been stated and restated in numerous judgments of this court and they were actually restated in the judgments of the High Court in this case dismissing the appeal and the application for leave to appeal. In my view, this case should have attracted a sentence far higher than the minimum sentence of 15 years.

[7] It is apparent from the regional magistrate's judgment that he convicted the respondent for having raped the complainant under coercive circumstances on divers occasions during the period July 2004 to August 2004. It is also apparent

from the charge sheet that the prosecutor intended to charge the respondent with divers acts of rape in a single count of rape.

[8] However, what is disturbing is the manner the charge sheet was framed, compounded by the failure of the regional magistrate to inform the unrepresented respondent that he was pleading to a series of acts of rape given the fact that the charge sheet only alleged a contravention of s 2(1) of the Act read with s 94 of the CPA. The unrepresented respondent had no clue as to the contents of s 94 and to have convicted him as charged was in my view unfair and violated his right to a fair trial. The right to a fair trial includes the right to be informed of the charge with sufficient detail to answer it. See Du Toit *et al: Commentary on the Criminal Procedure Act* 51 of 1977, 14-38 service 41, 2008*, S v Mpondo* 2007 (2) SACR 245 CPD at 251C*.*

[9] Section 94 of the Criminal Procedure Act provides:

> **'94 Charge may allege commission of offence on divers occasions**
> Where it is alleged that an accused on divers occasions during any period committed an offence in respect of any particular person, the accused may be charged in one charge with the commission of that offence on divers occasions during a stated period.'

[10] In *S v Alexander and Others* 1964(1) SA 249 CPD at 254A Van Heerden J had this to say:

> 'It has been authoritatively laid down by the Appellate Division in the case of *Rex v Heyne and Others, 1956 (3) SA 604 (AD)*, that when there is a series of acts done in pursuance of one criminal design the law recognises the practical necessity of allowing the State, with due regard to what is fair to the accused, to charge the series as a criminal course of conduct, i.e. as a single crime.' (My underlining.)

[11] In *R v Heyne and Others,* supra at 626 E-H – 627A Schreiner JA put it as follows:

> 'The question that immediately arises is whether the Crown is entitled to take a series of acts, performed over a period, as part of a single criminal scheme, and split it up, not into the individual acts each of which is a crime, but into a number of sub-series, distinguished only by their occurring during successive sub-periods of the total period – each sub-series then being treated as a separate count. Ordinarily a crime consists of an act or group of acts constituting a single transaction, the place and time of which can be described with some precision. Some crimes, such as crimes of omission, may be continuous in their nature. In the case of other crimes when there is a series of acts done in pursuance of one criminal design the law recognises practical necessity of allowing the Crown, with due regard to what is fair to the accused, to charge the series as a criminal course of conduct, that is, as a single crime. (*Rex v Smit and Another,* 1946 AD 862.) In the present case the Crown has, in the name of necessity or convenience, gone much further. In advancing its claim that prolonged criminal behaviour is a sequence of shorter, separately punishable spells of criminality, the Crown has argued that the question is simply one of providing the accused person with sufficient particulars to enable him to know what the case is that he has to meet. Each accused in the present case was told that he was being charged with taking part, for such period as he was associated with the work of one or other bottle store, in a scheme of illegal liquor selling and he was told, so far as it was known, the values of the liquor which it was alleged was illegally supplied during each of the months comprising that period.'

[12] The learned judge of appeal at 627C went on to say:

> 'The division of a single course of conduct into periods and the creation thereby of a number of separate crimes, based solely on the periods, has, so far as I am aware, no authority to support it. It seems to me to be essentially arbitrary. It is not related to any change in the mental or physical behavior of the accused person – anything that could be said to amount to a new act carried out by him.'

[13] The learned judge of appeal continued at 628B-C to say:

> 'The correct view, it seems to me, is that if the Crown relies upon a course of conduct, with such advantages from its point of view as there may be, the course of conduct must be regarded as one continuing crime, provable in various ways, including the proof of individual criminal acts making up the course of conduct. In the absence of statutory authority the Crown cannot obtain the advantages of charging a course of conduct and at the same time retain the advantage, if it can be so called, of being able to ask for punishment as if a number of offences had been charged. As the Crown case was framed there was one offence of contravening s 161(d) which was continuously committed by participation at any one or more of the three bottle stores. The first, fourth, fifth, sixth, eighth, tenth, eleventh and twelfth appellants should only have been found guilty of one contravention of the provision and the convictions of those who were found guilty of more than one such contravention must be altered accordingly.'

[14] In an earlier case *Rex v Smit and Another,* 1946 A.D 862 at 872 the learned judge had put it thus:

'In Gardiner and Lansdown's *South African Criminal Law (*4 ed vol 1. P. 243) reference is made to s 125(4) of Act 31 of 1917, which in respect of offences of a sexual or indecent character permits the charge to allege that the accused committed the offences on divers occasions during a specified period. The learned authors, after pointing out the possibility of contending upon the *expressio unius exclusion alterius* principle that such charges would not be competent in the case of other offences, reject the argument and conclude that such charges are permissible, although the procedure should be adopted with caution, lest the vagueness of the charge be unfair to the accused and prejudicial to him in his defence. I agree with this view. When a charge relates to behavior during a stated period the question may arise whether it charges a number of specific acts or a course of conduct (*Rex v Burwood,* 1941, AD 217 at p 225). Where a series of acts over a period is alleged any one or more may be proved without the Crown's being obliged to prove the whole series. And equally so, it seems to me, where a course of conduct over a period is charged, it is permissible to prove such conduct over a shorter period or during disconnected periods, even though what is proved may at the same time amount to specific instances of the conduct charged. The question reduces itself to one of fairness to the accused and in judging what is fair regard must be had to whether any request was made for particulars and to any reply that may have been made to such request.'

[15] More recently in *S v Mponda, supra, at 251F-H Binns-Ward AJ* put it thus*:*

'[15] The administration of justice is potentially prejudiced because the allegation of only a single count of rape in a charge sheet, where the evidence supports a multiplicity of counts, means that the properly convicted accused can be sentenced only as a single-count offender. As mentioned, this is cause for particular concern in matters where the Legislature has determined that offenders convicted on multiple counts should receive prescribed higher minimum sentences. It is liable to obstruct the achievement of legislative objects in the fight against crime and to bring the criminal-justice system into public disrepute.

> [16] A charge sheet must set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed as may be reasonably sufficient to inform the accused of the nature of the charge. See s 84 of the Criminal Procedure Act 51 of 1977 (the CPA). If, however, it is intended by the State to adduce evidence that the offence was committed on diverse occasions (each of which it is not practicable to individually specify) during a particular period, that much must be expressly alleged in terms of s 94 of the CPA.' (My underlining.)

[16] The charge sheet that the respondent answered to in the regional court read as follows:-

> 'That the accused is guilty of contravening section 2(1)(*a*) read with sections 1, 2(2), 2(3), 3, 4, 5, 6 and 7 of The Combating of Rape Act, 2000 (Act 8 of 2000) read with section 94 of Act 51 of 1977.
>
> In that between July 2004 and August 2006 and at or near Lisikili Village in the regional division of Namibia the accused, hereafter called the perpetrator, did wrongfully and intentionally under coercive circumstances commit or continue to commit a sexual act with Namangolwa Lilian Siyanga hereafter called the complainant, by
>
> (a) Inserting his penis into the vagina of the complainant: and/or
> (b) …
> (c) …
> (d) …
>
> (a) Applying physical force to the complainant and/or (a person other than the complainant): and/or
> (b) …
> (c) …

> (d) the complainant is 10 years old (under the age of fourteen) and the perpetrator is 21 years old (being more than three years older than the complainant).'

[17] It is clear from the charge sheet that it lacks particularity of a conviction of rape on divers occasions. A mere mention that s 2(1)(a) is read together with s 94 of the CPA is insufficient in my view. Section 94 speaks for itself, divers or recurring occasions have to be alleged in the charge sheet, in the alternative in the circumstances of this case, where the respondent was unrepresented the provisions of s 94 should have been fully explained to him so that he understood what he was answering to. In a letter addressed to the Prosecutor-General by the Public Prosecutor urging the Prosecutor-General to lodge an appeal, the Public Prosecutor amongst other things stated:

> 'It was also established that the accused raped her 8 times, although in sentencing the Court indicates "on more than two occasions at least".'

[18] There is no reason why the 8 recurring sexual acts could not be alleged in the charge sheet. In my view it would be only fair to the respondent to have done so. It is permissible to have alleged divers occasions in the charge sheet but a specific number of acts should be proved, otherwise divers occasions become vague and prejudicial to the accused, especially where the acts become relevant in sentencing. On the authorities above, the High Court was correct when it found that the respondent was found guilty of only one count of rape. Therefore, the argument by counsel for the appellant that the High Court erred when it found that

the respondent was charged with only one count of rape, when it is apparent that the respondent was charged for contravening s 2(1) read with s 94 of the CPA which meant that the respondent committed rape on recurring occasions, consequent that when he was convicted as charged he was not convicted of one count but for several counts, should fail.

[19] The question still remains whether the sentence of 12 years is startlingly lenient and induces a sense of shock. In my view the sentence was inappropriate. Rape is a very ugly offence, when a child is the victim as is the case here, even worse. I have no quarrel with the fact that the learned magistrate considered respondent's pretrial incarceration as a compelling and substantial circumstance but his consideration of the swollen feet of the respondent at the time. The prison authorities have facilities, which would enable him to receive such medical treatment for his condition. Respondent testified that he was not taken to the hospital for treatment. Why that is the case is not clear from the record. The swollen feet could only have excited pity but they could not have been considered as a substantial and compelling circumstance.

[20] I refrain to indulge myself into what constitutes substantial and compelling circumstances, much has been said on the subject that it does not merit repetition. See *S v Malgas* 2001(2) SA 1222 SCA*; S v Lopez* 2003 NR 162 (HC). Suffice to say substantial and compelling circumstances will vary with the circumstances of each case, and what may be sufficient on the facts of one case, may well be insufficient on those of another.

[21] In this case on reading the learned magistrate's judgment on sentence and his response to the appellant's grounds of appeal, except for the general remarks that rape is a serious offence, he failed to evaluate the seriousness of the crime in the light of aggravating circumstances (which he so aptly detailed in his judgment on conviction) and mitigating circumstances. The learned magistrate's evaluation of factors which constituted an appropriate sentence centred around the mitigating circumstances only, as opposed to the principles on substantial and compelling circumstances in *S v Malgas* and *S v Lopez*, *supra*, cases the learned magistrate was well familiar with. He found the pre-trial incarceration and respondent's illness as substantial and compelling circumstances and imposed the 12 years imprisonment. That in my view was a wrong approach and a misdirection.

[22] The learned magistrate in his judgment on sentence went on to say:

> 'I have no doubt that society at large will not be comfortable with a situation whereby somebody takes to law to have his case finalised, but upon its completion he is still sentenced to the minimum sentence. I believe society will say that is unjust. In case I am wrong, society might differ with me, but I hold that view for what it is worth. I remain convinced that society will not agree with such a route.'

[23] The sentiments above fail to appreciate the definitions of 'sexual act' in s 1 and 'rape' in s 2(1) of the Act. Cunnilingus for example, is a sexual act and would attract a minimum sentence of 15 years, so is any form of rape but where a rape is

committed with a degree of aggravation and viciousness it would call imperatively for the most extreme punishment; meaning more than the minimum sentence prescribed by the legislature.

[24] In this case not only was the complainant younger than the respondent by 11 years, she was raped in the comfort zone of her home, and threatened with a knife if she screamed or told anyone. Respondent had asked the complainant during cross-examination as follows: 'I would like you to tell this Honourable Court if you are the one whom I had sexual intercourse and thereafter you even excreted, you shitted? Between you and me who was bleeding?' The complainant I assume being embarrassed did not answer the first question but answered to the second question that she was the one that bled. Respondent could not have asked the questions unless that is what happened. If she defecated during the act or thereafter, which I believe she did given the questions of the respondent, it could only be as a result of pain. Respondent notwithstanding implicating himself in the commission of the offence never showed remorse, he denied the offence beyond his conviction. The magistrate having found that she was raped for more than once, twice in the one evening, he should have imposed a sentence in excess of the minimum sentence. Even in the non-consideration of the recurring sexual acts, for the sloppy drafting of the charge sheet, the seriousness of the crime required a sentence more than that imposed by the magistrate.

[25] Those who preside over similar matters should bear in mind that the legislature has set its face firmly against crime of this nature. See *S v Blaauw*

1999(2) SACR 295 WLD at 313g. The Act has among others its purpose to combat and to eradicate rape where possible. Rape is a very serious offence and should be punished severely. In *S v Chapman* 1997(2) SACR 3 (A) at 5b-e Chief Justice Mahomed described the offence in the following terms:

> 'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization.
>
> Women in this country are entitled to protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.
>
> The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade their rights.'

[26] I associate myself with the sentiments above, rape and the murder of women, wherever the crimes rear their ugly faces, should be visited with severe punishments. Our society is undoubtedly embarrassed by the killing and raping of women and children on a daily basis. The promulgation of the Combating of the Rape Act is a serious effort the legislature undertook in an attempt to arrest the scourge. The courts should join that fight, in some cases where possible, should show no mercy.

[27] Bearing in mind what I have set out above, the appeal should succeed.

[28] In the result I make the following order.

1. The appeal succeeds.

2. The sentence of 12 years imposed by the regional magistrate on 26 May 2006 is set aside and substituted therefor a sentence of 17 years imprisonment; which is antedated to 26 May 2006.

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MAINGA JA

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DAMASEB DCJ

_____
HOFF AJA

APPEARANCES

APPELLANT:	I M Nyoni
	For the State
RESPONDENT:	T Ipumbu
	Instructed by Directorate of Legal Aid.